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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. IV.

BONDS—BY—LAWS.

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DAVID ATWOOD,
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MADISON, WIS.

EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

CERTIFICATE OF APPROVAL.

[BONDS.]

LYNCHBURGH, VA., June 2, 1884.

I have examined the cases under the head of Bonds, submitted to me as digested by the general editor of "Federal Decisions," and as not deemed of sufficient importance to be printed in full, according to the plan of the work, and I am of the opinion that they have been well digested, and that good judgment has been exercised in excluding them, the points being covered by other cases printed in full.

JOHN W. DANIEL.*

* Author of Daniel on Negotiable Instruments, and Daniel on Attachments.

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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal	Alb. L. J.	McCahon.....	McCahon.
American Law Register... ..	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall	Marsh.
Bissell	Biss.	Martin	Martin (N. C.).
Black	Black.	Mason	Mason.
Blatchford.....	Blatch.	Montana Territory	Mont. T'y.
Blatchford's Prize Cases... ..	Bl. Pr. Cas.	Newberry.....	Newb.
Blatchford & Howland....	Bl. & How.	National Bankruptcy Regis-	
Bond	Bond.	ter	N. B. R.
Brewster	Brewster.	Olcott	Olc.
Brookenbrough.....	Marsh.	Opinions of Attorneys-Gen-	
Brown.....	Brown.	eral.....	Opp. Att'y Genl.
Call	Call (Va.).	Oregon	Oreg.
Central Law Journal.....	Cent. L. J.	Otto	Otto.
Chase's Decisions	Chase's Dec.	Overton	Overton (Tenn.).
Chicago Legal News	Ch. Leg. N.	Paine	Paine.
Clifford	Cliff.	Peters	Pet.
Colorado Territory.....	Colo. T'y.	Peters' Admiralty.....	Pet. Adm.
Connecticut Reports.....	Conn.	Peters' Circuit Court	Pet. C. C.
Cooke	Cooke (Tenn.).	Philadelphia Reports	Phil.
Court of Claims.....	Ct. Cl.	Pittsburgh Reports	Pittsb. R.
Crabbe	Crabbe.	Sawyer	Saw.
Cranch	Cr.	Smith	Smith (N. H.).
Cranch's Circuit Court....	Cr. C. C.	Sprague	Spr.
Curtis	Curt.	Story	Story
Dakota Territory	Dak. T'y.	Sumner	Sumn.
Dallas	Dal.	Taney	Taney.
Daveis.....	Dav.	Utah Territory	Utah T'y.
Day	Day (Conn.).	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall.
Dillon	Dill.	Wallace's Circuit Court ...	Wall. C. C.
Federal Reporter.....	Fed. R.	Wallace, Jr	Wall. Jr.
Fisher's Patent Cases.....	Fish. Pat. Cas.	Ware	Ware.
Flippin	Flip.	Washington.....	Wash.
Gallison	Gall.	Washington Territory.....	Wash. T'y.
Gilpin	Gilp.	Wheaton	Wheat.
Hempstead	Hemp.	Wheeler's Criminal Cases ..	Wheeler.
Hoffman.....	Hoff.	Woods	Woods.
Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

BONDS.

[See the cross-references at the end of this subject.]

A. OFFICIAL AND OTHER PENAL BONDS.

B. MUNICIPAL AND OTHER CORPORATE SECURITIES.

I. MISCELLANEOUS BONDS, §§ 1-173.

II. VOLUNTARY BONDS, §§ 174-222.

III. OFFICIAL BONDS, §§ 223-376.

1. *Execution*, §§ 223-239.
2. *Breach*, §§ 240-303.
3. *Marshal's Bond*, §§ 304-327.
4. *Accounts and Set-offs*, §§ 328-376.

IV. LIABILITY OF SURETIES, §§ 377-663.

1. *In General*, §§ 377-477.
2. *Amount of Recovery*, §§ 478-501.
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6. *Death of Surety*, §§ 536-560.
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V. RELEASE OF SURETIES, §§ 664-795.

1. *In General*, §§ 664-700.
2. *Alterations and Erasures*, §§ 701-753.
3. *Delay*, §§ 754-795.

A. OFFICIAL AND OTHER PENAL BONDS.

I. MISCELLANEOUS BONDS.

SUMMARY — *Law of the place; seal necessary*, §§ 1, 2. — *Obligee, who is an obligor, may be sued*, § 3; *delivery in such case*, § 4. — *Mutilation by obligor*, § 5. — *Designation of place of payment*, § 6. — *Bond of indemnity; enjoining judgment*, § 7. — *Rights of assignee*, § 8. — *Amount of recovery*, § 9. — *Statute directory as to time of taking bond*, § 10. — *For too large a sum*, § 11. — *Alteration by consent*, § 12. — *Scire facias; conclusiveness of judgment*, §§ 13-16.

§ 1. The general proposition, that the validity of a contract depends on the law of the country in which it is executed, is undeniable, unless it is to be performed elsewhere; the forms of execution are also governed by the local law of the contract, on which it depends whether a seal is necessary to give it efficacy or not. But when an instrument is executed in one country, with reference to the laws or judicial proceedings of another, it must be executed with the formalities prescribed in that country in which it is to take effect, for the purposes declared by the law. *Harman v. Harman*, §§ 17, 18.

§ 2. So where the laws of the country in which the bond is to take effect require it to be under seal, an instrument not under seal will not be recognized as a bond. *Ibid.*

§ 3. It seems that the obligees in a joint and several bond may sue one of the obligors at law, although one of the obligees is also an obligor. At any rate there is no difficulty where the suit is brought by an assignee of the bond under a statute which vests the assignee or indorsee with the same rights, etc., as might have been possessed by the assignor or indorser. *Bradford v. Williams*, §§ 19-21.

§ 4. The objection that there could be no delivery of the bond where one of the obligors is an obligee cannot be raised as against an assignee. *Ibid.*

§ 5. The destruction of the seal and signature by the obligor will not invalidate the bond. *Cutts v. United States*, §§ 22-25.

§ 6. The designation of the place of payment in a bond imports a stipulation that the holder will have it at the place when due, to receive payment, and that the obligor will produce there the funds to pay it. If the obligor is at the designated place at the maturity of the bond, with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest for delay. When the instrument is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment. *Ward v. Smith*, §§ 26-28.

§ 7. A judgment on bonds will be perpetually enjoined where the bonds were executed as an indemnity against notes on which the beneficiary was responsible as indorser, but which were paid, after the judgment was rendered, by the maker of the notes and of the bonds. *Scott v. Shreeve*, §§ 29-34.

§ 8. The assignee of bonds made to indemnify an indorser against liability on notes takes them subject to all the equities which existed while they were in the hands of their original grantee. *Ibid.*

§ 9. In an action on a bond with a collateral condition nothing can be recovered but what the obligee is entitled to on breach of the condition. The condition of the bond indemnifying plaintiff and his partner against any "compulsory payment" exacted or to be exacted from them is not broken by their voluntary payment of money into court. *Massey v. Schott*, §§ 35, 36.

§ 10. Where a statute provided that no clearance should be granted until the owner of the vessel should give a bond to the United States, it was held that the provision was directory, and that a bond executed after a clearance was granted was valid. *Speake v. United States*, §§ 37-39.

§ 11. Where a bond is given under a statute, and no fraud or circumvention is shown, the obligor will not be heard to say that the sum or valuation inserted was too large. *Ibid.* See § 119.

§ 12. Where an alteration in a bond is made by consent of all the parties it does not avoid the bond, and the fact of assent may be proved by parol. *Ibid.* See § 76.

§ 13. A bond was conditioned to pay the creditors of the obligee, and save the obligee harmless, etc. Judgment was entered for the penalty of the bond, and afterwards a *scire facias* was issued for the benefit of the creditors. *Held*, that the defendant could not plead as a set-off against the obligee notes acquired since the entry of the judgment on the bond. *Bergen v. Williams*, §§ 40-42.

§ 14. And where the bond was conditioned to pay debts due and those to become due, the surety was not permitted to plead to the *scire facias* that the obligee did not owe at the time the bond was given; and it was held, also, that the plea of *nul debet* was not admissible, as the judgment on the bond closed the controversy, and was indisputable so long as it remained in force. *Ibid.*

§ 15. Where judgment is recovered on a bond, such judgment is evidence against the surety on a *scire facias*. The surety, however, may show collusion and fraud, or a mistake in the amount of the judgment, or that the demand has been paid. *Berger v. Williams*, § 43.

§ 16. On a proceeding by *scire facias*, a breach alleged in the terms of the condition of the bond is sufficient. *Ibid.*

[NOTES.—See §§ 44-173.]

HARMAN v. HARMAN.

(Circuit Court for Pennsylvania: 1 Baldwin, 129-131. 1890.)

STATEMENT OF FACTS.—In this case complainants resided in France, and there executed before a notary a power of attorney authorizing their agents in the United States to execute for them the refunding bonds required by a decree of this court. Their power of attorney was not under the seals of the obligors, and the validity of bonds executed thereunder is drawn in question.

§ 17. *An instrument executed in one country with express reference to the laws and judicial process of another country must conform to the laws of the latter.*

Opinion by BALDWIN, J.

We have no doubt that the power of attorney is executed in the form, and with all the solemnities required by the law of France, where the parties are

domiciled; nor that any writing made under its authority would be binding upon them here, as a contract, to the same extent as it would there. The general proposition that the validity of a contract depends on the law of the country in which it is executed is undeniable, unless it is to be performed elsewhere; the forms of execution are also governed by the local law of the contract, on which it depends whether a seal is necessary to give it efficacy or not. But when an instrument is executed in one country, with reference to the laws or judicial proceedings of another, it must be executed with the formalities prescribed in that country in which it is to take effect, for the purposes declared by the law. The plaintiffs come into this court to claim the personal property of a decedent, domiciled in this state at the time of his death; they must pursue their remedy by the law of the forum to which they resort, and comply with all things required to entitle them to distribution, one of which is that they shall give bond and security, in the orphan's court, to the administrator to refund in certain cases.

§ 18. *Bonds executed here under a power of attorney (not under seal) executed in France are invalid as refunding bonds under the act of 1794.*

This court, in a suit in equity between a foreigner and a citizen, praying for an order of distribution of the estate of a decedent, is bound by the same law which regulates the proceedings of the orphan's court of the state; it has accordingly ordered that bonds shall be given pursuant thereto. The only question now before us is whether the papers presented are the bonds of the plaintiffs, according to the true intent and meaning of the fifteenth section of the act of 1794. We cannot doubt that the intention of the legislature was that the security of creditors and the administrator should be by an instrument, which should have all the effect and attributes of a bond or specialty by the laws of the state, binding the principals and sureties alike. If the papers now before us are not bonds, the obligation they create may be barred by the act of limitation, and in case of the death of any of the parties who have executed them, the administrator would come in only as a simple contract creditor for the sum which he had been compelled to pay to a creditor who may have sued after the order for distribution. This would be so contrary to the spirit, as well as words of the law, and so unjust to the administrator, that we cannot hesitate on the subject. The law of this state recognizes no instrument of writing to be a bond, without the seal of the party who executes it. The case of *Taylor v. Glaser* was a strong one; there were counterparts of an agreement; one was under seal; the other had none, and was held not to be a specialty. 2 Serg. & R., 504. The seal is not a mere formality of execution, but a matter of substance which gives to the paper certain legal effects which cannot be attached to any unsealed paper. The power of attorney not being under seal, therefore, could give no authority to execute a bond in the name of the parties; the cases are full to the point, and the law must be taken to be settled.

BRADFORD v. WILLIAMS.

(4 Howard, 576-588. 1845.)

ERROR to the Court of Appeals of the Territory of Florida.

STATEMENT OF FACTS.—Suit by an assignee of a bond against one of the obligors. Another obligor was one of the obligees.

§ 19. *It seems that the obligees in a joint and several bond may sue one of the obligors at law, though one of the obligees is also an obligor.*

Opinion by MR. JUSTICE NELSON.

Whether the obligees of the bonds in question could have maintained an action at law against the defendant is a question we need not determine, though it is not easy to perceive the force of the objection urged against it, namely, that Craig, one of the co-obligors, is also an obligee. The bond is joint and several, and the suit against Judge, one of the obligors; and if it had been brought in the name of the obligees, Craig would not have been a party plaintiff and defendant, which creates the technical difficulty in maintaining the action at law. It would have been otherwise if the obligation had been joint and not several, for then the suit must have been brought jointly against all the obligors.

It has been held that if two are bound jointly and severally, and one of them makes the obligee his executor, the obligee may, notwithstanding, maintain an action against the other obligor. *Cock v. Cross*, 2 Lev., 73; 5 Bac. Abr., 816, tit. Oblig. D., 4. But conceding, for the sake of the argument, the objection to be well taken, that a suit at law would not lie in the name of the obligees, we have no difficulty in maintaining it, even in the aspect in which the case is presented, and has been argued, before us.

§ 20. *Under the Florida act, allowing an assignee to sue in his own name, it is no objection to his suit upon a bond that an obligor is also an obligee.*

By an act of the legislature of Florida it is provided: "That it shall not be necessary for any person who sues upon any bond, note, etc., to prove the execution of such bond, note, etc., unless the same shall be denied by the defendant under oath." And also: "That the assignment or indorsement of any of the forementioned instruments of writing shall vest the assignee or indorsee thereof with the same rights, powers and capacities as might have been possessed by the assignor or indorser. And the assignee or indorsee may bring a suit in his own name." Duval's Comp., p. 96, §§ 33, 34. The bonds have been duly assigned in this case, and the suit is in the name of Williams, the assignee, and it being thus authorized by the laws of Florida, all difficulty as to the remedy at law, arising out of the circumstance of the same party being plaintiff and defendant, is removed. The act just recited provides that the assignee shall be vested "with the same rights, powers and capacities as might have been possessed by the obligees," and inasmuch as the bonds were uncollectible, at law, in the hands of the obligees, it has been argued that, upon the words of the statute providing for the assignment and suit in the name of the assignee, they must be equally invalid and inoperative after the assignment, and in his hands. This argument, doubtless, would be well founded and conclusive against the plaintiff, if the objection to the bonds was such as went to vitiate and destroy the legal force and effect of their obligation, such as usury, illegality, or the like, which would constitute a valid defense to a suit, in any form in which it might be brought. So in respect to any other defense in discharge of the obligation, such as payment, release, and the like. For the assignee takes the bonds subject to every defense of the description mentioned; and can acquire no greater rights by virtue thereof than what belonged at the time to the obligees. This, we think, is what the statute intended, and is all its language fairly imports; and is, indeed, only declaratory of what would have been the legal effect without the particular phraseology of the section. But the only objection here made to the bonds in the hands of the obligees is, the want of

legal validity in a court of law, arising out of the difficulty as to the parties, one of them being common to both sides of the obligation; not that they are altogether void and uncollectible, for it is conceded they might have been enforced in a court of equity. They are ineffectual at law, from defect of remedy. Now, the assignment, and ability to sue in the name of the assignee, removed at once this difficulty, and left him free to pursue his remedy at law; and, as all parties concerned are to be taken as having assented to the assignment and delivery to the assignee, including Craig himself, and the suit in his name being sanctioned by the law, we are unable to perceive any well-grounded objection to the judgment.

§ 21. — *want of delivery cannot be raised as against the assignee.*

It has been suggested that there could have been no delivery of the bonds to the obligees, and hence none by them to the plaintiff, so as to bind the defendant. But the obvious answer is, that all the parties except Craig were competent to make a delivery, and as he joined in the assignment, it is not for him to set up the objection for the purpose of invalidating his own act. The inchoate or imperfect delivery as to him in the first instance, arising out of his double relation to the instruments, became complete by his joining in the assignment and delivery to the plaintiff. The common case of one partner drawing a bill upon his firm, payable to his own order, or of partners making a promissory note payable to the order of one of the firm, which becomes valid in the hands of a *bona fide* holder, and collectible at law, affords abundant authority for the principle of the decision in this case. *Smith v. Lusher*, 5 Cow., 688; *Smyth v. Strader*, decided this term, 4 How., 404. The statute of Florida has put bonds on the footing of bills of exchange and promissory notes, so far as respects negotiability and right to sue in the name of the assignee. The above principle is therefore strictly applicable to the case in hand. We are of opinion the judgment of the court below should be affirmed.

CUTTS v. UNITED STATES.

(Circuit Court for Massachusetts: 1 Gallison, 63-74. 1812.)

STATEMENT OF FACTS.—Debt on a duty bond. In support of the plea of *non est factum* the defendant produced the bonds, and it appeared that the obligor's name had been cut out of the bonds and the seals torn off. It was also proved that the defendant gave to one Clark, a collector of the port, a negotiable note for the balance due on the bonds, and evidence was offered tending to prove that the defendant had notice, at the time of giving the note and taking up the bonds, that Clark had been removed from office. There was a finding for the United States on the plea of *non est factum*, and judgment was rendered for the amount remaining unpaid.

§ 22. *A material alteration of a bond by the obligee avoids the instrument.*

Opinion by STORR, J.

The general rule certainly seems to be, that any *material* alteration of a bond after its execution, *by the obligee* (or even, as some authorities assert, by a stranger without his privity), will avoid the bond. *Pigot's Case*, 11 Coke, 27. Nay, it is said that an immaterial alteration *by the obligee* will avoid the bond. *Id.* But an established exception to this rule is when the alteration is made by the consent of the obligor himself, after execution, either in pursuance of a previous or a subsequent agreement. *Zouch v. Clay*, 2 Lev., 35; *S. C.*, 1 Vent., 185; *Markham v. Gonaston*, Moore, 547.

§ 23. *A deed is not avoided by the cancellation or destruction of the seal by the obligor.*

But it has been supposed that the like doctrine does not apply to the case of the cancellation or destruction of the seal of the deed, even when done by the fraud or connivance of the obligor himself, without the privity of the obligee, unless it happen after issue joined, as in the cases in *Dyer*, 59, and *Owen*, 8, and 5 *Coke*, 119. If, indeed, a doctrine so unjust be incontrovertibly established, we can only regret it; but we cannot easily be brought to such a result. In *Mathewson's Case*, 5 *Coke*, 23, the question was, whether the tearing off a seal of one of the co-contractors in a charter-party avoided the deed as to all? Upon the construction of the instrument, the court held that it was a *several* deed, and therefore good as to all the parties but him whose seal was torn off. In *Whelpdale's Case*, 5 *Coke*, 119, the question was whether, on *non est factum* pleaded in a suit against one obligor, if it appeared to be a *joint* obligation, the plaintiff was entitled to recover, and it was adjudged in the affirmative. It is true, in this case, there is a *dictum* that "in all cases where the bond was once his deed, and afterwards before the action brought becomes no deed, either by erasure or addition, or other alteration of the deed, or breaking of the seal," the defendant may safely plead *non est factum*, and for this is cited *Dyer*, 59. Now the only point decided in *Dyer* was that, on such a plea, a tearing off of the seal, after issue joined, would not avoid the deed. As little does *Pigot's Case*, 11 *Coke*, 26 *b*, support the position. It was a case of interlineation after execution of the deed, and the question was as to its materiality, and the judgment of the court was *for the plaintiff*. The case cited in *Vin. Fait.*, N., a. 2, pl. 17, from 3 H. 7, 5, upon examination, decides no more than that, if the seal of the *joint* obligor be torn off, the other may plead *non est factum*. The only remaining authorities which bear in favor of the doctrine, as far as I have been able to discover, are those stated by Rolle in his *Abridgment* (2 *Roll. Abr.*, *Fait.*, x. 1, 2, 3), and copied from him by *Viner* (*Fait.*, x. 1, 2, 3), and *Perkins*, s. 135, and the *dictum* in *Dyer*, 59 a, n. 12.

§ 24. *Cancellation of deeds.*

The positions in Rolle are, (1) That if the seal be taken from the deed, it is not any deed. (2) If there be no manner of print remaining by which it appears that it was ever sealed, this shall avoid the deed. (3) That if the seal be once severed from the deed, and afterwards fixed and sealed to it again, yet the deed is avoided thereby. For the first position he cites 11 Hen. 6, 27. There is nothing to the purpose in that case; but I presume it to be a misprint for 7 H. 6, 19 *b* (*S. C.*, *Bro. Fait.*, 27), which fully supports the third position of Rolle. For the second position he cites 14 H. 4, 30 *b*, which seems to admit the doctrine, but it was not adjudged. This case, however, is cited in *Brook, Fait.*, 22, and put with a *quære*. As to the *dictum* in *Dyer*, "that it is immaterial what destroyed the seal," it is sufficient that it was the opinion of two justices only, and was not decided by the court. In none of the foregoing authorities does it appear by whom the seal was defaced; and if done by accident, or by the obligee, or by a stranger, the doctrine may perhaps, on the ancient reasoning, be supported. There is not in them a *scintilla juris* to support the presumption that it was applied to an abrasion by the *obligor himself*.

Now, we shall find that the case of a destruction of the seal by the obligor himself is expressly excepted from the generality of the foregoing rule in a variety of authorities. In *Sheph. Touchstone*, p. 69 (a work of great authority), it is said that if the seal be broken off, "be the same by whatsoever or

whomsoever, *unless it be by him and his means that is bound by the deed*," the deed is become void. The same doctrine is stated in Shep. Epitome, Deed, 405 (a book approved by the late Mr. Justice Buller). 7 East, 312, *n*. The same seems supported in Beckrow's Case (Het., 138), and was recognized as law in a case cited in Moor v. Salter (3 Buls., 79), 13 Vin. Fait., x. 1, 8. I consider it also fortified by the second resolution in Pigot's Case (11 Coke, 27), where the word "obligee" is evidently a misprint for "*obligor*," as will appear from the report of the same case by Moore, 835. See, also, Bro., Oblig., 83, and Fitz., Debt, 84. In Bayley v. Garford, March, 125, 127, the court said there was no difference between the rasure and interlineation of a deed and the breaking off of the seal. And if so, then the cases as to interlineations directly apply to the case of breaking off of the seal. The case of Read v. Brookman, 3 Term R., 151, I cannot but consider as founded on the same doctrine. For it would be difficult to contend that a party might by pleading a loss of the whole deed by accident, as by fire, recover; and yet he could not recover if a part only were burnt, or that if burnt by accident he might recover, but not if burnt wilfully by the obligor himself. Nor is the argument correct that this case is not an authority because it was on a release which had already had its full effect. The cases cited in the note 3 Term R., 153 *a*, show that the same manner of pleading without a proferit is allowed as to all instruments when lost by time or accident, when destroyed by the party bound by them, or when wrongfully withheld in the possession of such party.

§ 25. *Obligor cannot take advantage of his own wrong.*

On the whole, I consider the principle of law well established, that the obligor shall never take advantage of his own wrong, and that his own deed fraudulently or innocently destroyed by himself, without payment, does not thereby lose its legal obligation. And the principle still more strongly applies to cases where there are sureties, because, in such a case, the remedy by special action against the original wrong-doer would oftentimes prove wholly inefficacious. Now, if this doctrine be true, the charge of the district judge was undoubtedly correct. By the removal of Clark from office all his official authority ceased, and as an agent of the United States he was *functus officio*. Sthreshley v. United States, 4 Oranch, 169. When, therefore, the plaintiff in error settled with Clark and took up the bonds, the cancellation was either done by himself or by Clark, with his consent. If at this time he knew of Clark's removal, he knew also that the settlement was without authority, and a wrong to the United States. It was an unjust attempt to get possession of papers, which Clark had no authority to deliver, nor the plaintiff in error a right to withhold. Equity, therefore, as well as law, in such a case requires that he should not reap the fruits of a contrivance to defeat the just claims of the United States. The district judge concurs in this opinion, and therefore let the judgment be affirmed. We give no opinion, in this case, what would be the effect of any alteration by a stranger. *Vide* 4 Term R., 320; 6 East, 309, 311.

WARD v. SMITH.

(7 Wallace, 447-453. 1868.)

STATEMENT OF FACTS.—William Ward, a resident of Virginia, purchased certain real estate of Smith, and for the consideration money gave three joint and several bonds, payable at the Farmers' Bank of Virginia, at Alexandria. One of the bonds was deposited in the bank for collection in 1861. On this bond a

credit was indorsed of over \$500, and it was admitted that an additional sum was subsequently paid. Smith went within the Confederate lines in May, 1861, and remained there during the war. The remaining bonds were never deposited in bank. Ward made deposits in the bank to Smith's credit of depreciated bills of various banks of Virginia to an amount more than sufficient to satisfy the first bond. The cashier indorsed the several sums as credits on the first bond, but on learning that Smith refused to sanction the arrangement he erased the indorsements. Smith sued for the whole amount due at the time the first bond was deposited in bank.

Opinion by MR. JUSTICE FIELD.

The defendants claim that they are entitled to have the amounts they deposited, at the Farmers' Bank in Alexandria, credited to them on the bonds in suit, and allowed as a set-off to the demand of the plaintiff. They make this claim upon these grounds: that by the provision in the bonds, making them payable at the Farmers' Bank, the parties contracted that the bonds should be deposited there for collection either before or at maturity; that the bank was thereby constituted, whether the instruments were or were not deposited with it, the agent of the plaintiff for their collection; and that as such agent it could receive in payment, equally with gold and silver, the notes of any banks, whether circulating at par or below par, and discharge the obligors. We do not state these grounds in the precise language of counsel, but we state them substantially.

§ 26. *Depositing at a bank for collection a security payable there, constitutes the bank the owner's agent to receive payment in legal currency only.*

It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds.

§ 27. *Payment in depreciated money; legal tender.*

But even as agent of the payee of the first bond the bank was not authorized to receive in its payment depreciated notes of the banks of Virginia. The fact that those notes constituted the principal currency in which the ordinary transactions of business were conducted in Alexandria, cannot alter the law. The

notes were not a legal tender for the debt, nor could they have been sold for the amount due in legal currency. The doctrine that bank bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not. In *Ontario Bank v. Lightbody*, 13 Wend., 105, it was held that the payment of a check in the bill of a bank which had previously suspended was not a satisfaction of the debt, though the suspension was unknown by either of the parties, and the bill was current at the time, the court observing that the bills of banks could only be considered and treated as money so long as they are redeemed by the bank in specie. That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge. *Story, Prom. Notes*, §§ 115, 389; *Graydon v. Patterson*, 13 Ia., 256; *Ward v. Evans*, 2 *Ld. Raym.*, 930; *Howard v. Chapman*, 4 *Carr. & P.*, 508.

§ 28. *Bonds drew interest during the late civil war where the agent to receive the money resided in the same jurisdiction with the debtor.*

The objection that the bonds did not draw interest pending the civil war is not tenable. The defendant Ward, who purchased the land, was the principal debtor, and he resided within the lines of the Union forces, and the bonds were there payable. It is not necessary to consider here whether the rule that interest is not recoverable on debts between alien enemies during war of their respective countries is applicable to debts between citizens of states in rebellion and citizens of states adhering to the national government in the late civil war. That rule can only apply when the money is to be paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receive the money, will violate the law by remitting it to his alien principal. "The rule," says Mr. Justice Washington, in *Conn v. Penn*, "can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offense is imputable to him, and not to the person paying him the money." 1 *Pet. C. C.*, 496; *Denniston v. Imbrie*, 3 *Wash.*, 396. Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor. It was so held in *Paul v. Christie*, 4 *Har. & McH.*, 161. Here the principal debtor resided, and the agent of the creditor for the collection of the first bond was situated within the federal lines and jurisdiction. No rule respecting intercourse with the enemy could apply as between Marbury, the cashier of the

bank at Alexandria, and Ward, the principal debtor residing at the same place. The principal debtor being within the Union lines could have protected himself against the running of interest on the other two bonds, by attending on their maturity at the bank, where they were made payable, with the funds necessary to pay them. If the creditor within the Confederate lines had not in that event an agent present to receive payment and surrender the bonds, he would have lost the right to claim subsequent interest.

Judgment affirmed.

SCOTT v. SHREEVE.

(12 Wheaton, 605-611. 1837.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up by appeal from the circuit court of the District of Columbia for the county of Alexandria. The object of the bill filed in the court below was to obtain relief against a judgment at law recovered against Shreeve, the appellee, upon certain bonds given by him to Elisha Janney, and which bonds had been assigned to the appellant Scott, as his trustee, for the benefit of his creditors. In the progress of the cause, it was deemed necessary by the court that the Bank of Potomac should be made a party defendant. A supplemental bill for that purpose was accordingly filed, and the bank made a party.

The first inquiry that seems naturally to arise is how the case stood as between Shreeve and Janney, the original parties to the bonds. The material facts upon which the complainant in the court below relied for relief are not denied by the answer of Scott. From the bill and answer and exhibits in the cause, accompanied by a written agreement between the solicitors of the parties, before the cause was set down for argument, the leading facts in the case appear to be, that some time in the year 1808 Shreeve failed in business, being indebted to the Bank of Potomac in the sum of \$6,300, upon a note discounted at the bank, and upon which Janney was the indorser; for whose security Shreeve transferred to him, and John Roberts, who was also his indorser upon other notes, certain property at a valuation, but which, upon settlement of accounts between them, fell short of Janney's responsibility to the bank upon his indorsement, \$1,980.88; for which, by agreement between the parties, Shreeve gave to Janney five bonds, payable in five annual instalments, and Janney was to pay the note to the bank, upon which he was the indorser. The note, however, was continued running in the bank in its original form, Janney appearing responsible as indorser only. This note was renewed from time to time until the 19th of May, 1809, when, by the payments which had been made by Janney out of the property assigned by Shreeve, it was reduced to the sum of \$3,306; and Janney himself having failed about this time, no further payments were made upon this note until the month of June, 1818, when Shreeve, after a long absence, returned to Alexandria, and was called upon by the bank for payment of his note, upon which he paid the sum of \$3,355.29, being the amount of principal and interest due upon the five bonds which he had given to Janney.

§ 29. *Judgment upon bonds given to indemnify an indorser upon notes which were paid by the obligor after the judgment was rendered will be perpetually enjoined.*

Upon this brief statement of the facts as between Shreeve and Janney, it will be seen that Shreeve was exposed to a double responsibility for the same

debt. He was liable on his note held by the bank (unless the bank may be considered as having assented to the arrangement, and accepted Janney as solely responsible on the note, which will be hereafter considered), and he was also liable to Janney on the bonds which he had given him. For the purpose of indemnifying Shreeve against his responsibility to the bank, Janney gave him the instrument bearing date the 1st of March, 1809, acknowledging that Shreeve had satisfied him by his bonds of the 28th of February, 1809, for all demands against him as security at bank, and for all other accounts; and that the note above referred to, although originally discounted for the use of Shreeve, was continued in his name, but for the convenience of him, Janney, and engaging to save Shreeve harmless from the said note, and in due time to take it up.

§ 30. *Bill in equity; insufficient defense at law.*

An objection is here made to sustaining this bill in equity, because there was a complete and adequate remedy at law. But this objection cannot be sustained. The bonds given by Shreeve to Janney were simply for the payment of money, and although the consideration for which they were given had failed by Janney's neglect to pay up the note in the Bank of Potomac according to his engagement, this could not have been set up at law as a defense in the suit upon the bonds; nor could he, in that suit, have set off the amount paid to the bank upon his note. The engagement of Janney, on assuming the payment of the note to the bank, was a contract of indemnity only, and rested in damages, and could never form the subject of a set-off at law; and although an action at law might be maintained against Janney upon this indemnity, it would be going too far, even if Janney was solvent, to say that a court of equity could not interpose and stay a recovery upon the bonds, but that the party must be turned round to his remedy at law upon his indemnity. But, in the present case, it would be gross injustice, and a certain denial of all remedy, to refuse relief on this ground, Janney having become insolvent. There was, then, no defense at law which Shreeve could have set up against these bonds, nor had he any other remedy at law to which he was bound to resort. Was there, then, any defense which he could have set up against a suit upon his note if he had permitted the bank to prosecute him? None is perceived by the court. He stood upon the note as maker, and was liable to the bank as such; and although by the agreement between him and Janney, the note was continued in that form for the convenience of Janney, yet the bank was no party to that arrangement, and could not be bound by it. Even admitting the knowledge of that agreement by the bank, it certainly could not have been set up as a defense to the note, unless it could be shown that there was an express or implied agreement to accept Janney as the debtor, and to discharge Shreeve.

§ 31. *Ordinarily a debtor is not bound to plead the statute of limitations, but he may do so in proper cases.*

It has been urged, however, on the part of the appellants, that the statute of limitations had run against the note, and that Shreeve might and ought to have availed himself of it.

If the statute of limitations had run against this note, and might have been pleaded, we should be very unwilling to say that Shreeve was bound to plead it. It is a defense which a party may often avail himself of with great justice and propriety. But whether he will or not must be left to his own election. It is, however, unnecessary to inquire into the duty or obligation of Shreeve to have pleaded the statute under the circumstances of the case, because we do not

think it could have been set up as a defense to the action. The letter of license given by the bank to Shreeve bears date on the 12th of January, 1809, and was for the term of seven years, which, of course, expired in January, 1816. It certainly cannot be pretended that the statute ran during the continuance of this letter of license. Payment of the note was demanded by the bank, and made by Shreeve, in June, 1818, about two years and five months after the expiration of the letter of license, a period much within the time necessary to bar the action.

§ 32. *The assignee of a bond acquires no greater right or interest than his assignor had.*

The next inquiry is whether Scott, the assignee of Janney, has acquired any greater right or interest in these bonds than Janney himself had. So far as relates to the question whether the consideration had failed, the assignee stands precisely in the situation of the original party. He took the bond subject to all existing equities. This is the settled rule in chancery, and that which is recognized by the laws of Virginia, which are in force in Alexandria. Nor has anything occurred since the assignment to give to Scott or the creditors of Janney any additional rights. These bonds were assigned by Janney as his own property, and for the benefit of his own creditors, which was a violation of the trust and confidence reposed in him by Shreeve. They were given expressly, according to the agreement of the parties, to provide for the payment of the note to the Bank of Potomac; and it is admitted that no part of this note has been paid out of the funds of Janney. The note had been reduced from \$6,300 to \$3,306, at the time Janney failed in the spring of 1809; but these payments were made out of Shreeve's funds, assigned by Janney to Roberts by the deed of the 11th of August, 1808. And it is also admitted that Scott, the assignee, has made no payments upon this note since the assignment to him. The creditors of Janney have, therefore, been deprived of none of his funds, nor can they have any right to claim the benefit of those bonds, which must be deemed to have been held by Janney in trust for the bank, and not as his own property.

§ 33. *Special case in which the obligation of a third party was held not to be taken as a substitute for that of the original debtor.*

The only remaining inquiry is, whether the bank, by any express or implied agreement, accepted Janney as their debtor, and discharged Shreeve from his responsibility. The answer of the appellant, Scott, alleges that Janney considered himself as having assumed the payment of the note in question, and that he was considered debtor to the bank for the same, and was solely relied upon by the bank for the payment of the note; that he believed the bank had full knowledge of the deed of the 11th of August, 1808, by which provision was made for the payment of the note, and were satisfied with it. And he further alleges that the bank was so well satisfied with this provision that it considered neither Janney nor Shreeve liable for it. If these allegations were supported by proof, they would go far, if not conclusively, to show that the bank had adopted Janney as solely responsible for the note, and had discharged Shreeve. If so, the payment by Shreeve would be considered voluntary, and without any legal obligation, and would form no objection to the recovery on the bonds. The bank, however, denies it was a party to the arrangement made by the deed of the 11th of August, 1808, or that it made any stipulation or agreement with Shreeve or Janney, in any manner connected with that deed, unless the order of the 12th of January, 1809 (the letter of license), be consid-

ered as connected with it. The answer further denies that the bank ever did release or agree to release Shreeve, or that it ever did look solely to Janney, or the trust estate created by the deed of the 11th of August, 1808. It admits that, when this deed was executed, Janney and Roberts were both directors of the bank, but avers that no proposition in relation to it ever came before the board previous to the 12th of January, 1809, when the letter of license was granted to Shreeve, with the concurrence of Janney and Roberts, sitting and acting as directors of the bank. The answer of Scott is not evidence against the bank, and his allegations with respect to the bank's having accepted Janney as the sole debtor for this note are entirely unsupported by proofs, and must be laid out of view, as they are positively denied by the answer of the bank, and which answer is strongly supported by the order for the letter of license, which was granted subsequent to the arrangement between Shreeve and Janney. For, if the bank had considered Shreeve exonerated from the payment of the note, there could have been no necessity for or propriety in giving him a letter of license. Indeed, it would have been absurd to give a letter of license to a man who was not a debtor to the bank. The order for this purpose is cautiously drawn, so as to retain the responsibility of both maker and indorser. The indulgence is granted expressly upon the condition that it is sanctioned by Janney, and without lessening the right of the bank against him. Nor is the bank chargeable with negligence that can in any manner prejudice its rights, or of which the appellant has any right to complain. The indulgence was granted with the concurrence of Janney, and under an impression, no doubt, by all parties, that the trust fund created by the deed of the 11th of August, 1808, would be sufficient to satisfy this note. And it was upon this supposition, no doubt, that the letter of license for seven years was granted to Shreeve. No steps would be taken against him until the expiration of that time, and demand of payment was made as soon thereafter as he returned to Alexandria.

§ 34. *A creditor is not bound to resort to the principal obligation before he can proceed upon a collateral obligation.*

The utmost, then, that can be alleged against the bank is, that it had full knowledge of the provision made by the deed of the 11th of August, 1808, for the payment of this note. And, admitting that provision to have been amply sufficient, it would not bind the bank, without its assent, to resort to that fund alone, and discharge the parties to the note. The bank could have no objection to the provision made by that deed for the payment of the note, as it would add to its security if the maker and indorser were also held responsible. And the proceedings in relation to the letter of license are conclusive to show that it was the understanding of all parties that the bank had not, at that time, relinquished its claims upon Janney and Shreeve for the payment of the note.

We are, accordingly, of opinion that the decree of the court below, granting a perpetual injunction against the appellant, and a dismissal of the bill as to the bank, be affirmed, with costs.

MASSEY v. SCHOTT.

(Circuit Court for Pennsylvania: Peters, C. C., 182-188. 1815.)

STATEMENT OF FACTS.—In the year 1808, Pearson, Hodgson & Massey, of London, were indebted to Davidson, of Philadelphia, in about \$6,400. In July, 1809, Davidson became insolvent and assigned his estate to defendants. In

November, 1809, Davidson and the defendants wrote to the house of Pearson, Hodgson & Massey directing them to pay to W. and J. Bell & Co., of London, the balance due to Davidson on his estate, and soon after the defendants authorized Potter to collect the money, Bell & Co. brought suit in chancery in England against Pearson, Hodgson & Massey. While this suit was pending Massey came to Philadelphia and was arrested by defendants and paid the debts, taking from the defendants a bond to indemnify the firm against any loss by compulsion of law in consequence of suits brought against them in England or elsewhere on account of said debt. Soon after the execution of this bond Pearson, Hodgson & Massey filed a bill of interpleader in London against Bell & Co., Davidson and his assignees, and Potter, and paid the money into court. This suit was brought upon the bond executed by defendants to Massey. Further facts appear in the charge to the jury.

§ 35. *In an action on a bond with a collateral condition nothing can be recovered but what the obligee is entitled to on breach of the condition.*

Charge by WASHINGTON, J.

This is an action of debt, brought upon a bond with a collateral condition; and therefore the plaintiff cannot recover anything but what he is entitled to upon a breach of that condition. The condition is that the defendants should discontinue their suit against the plaintiff, should endeavor to obtain a discontinuance of any suits in England against Pearson, Hodgson & Massey, in consequence of any orders of Davidson or of the defendants; to indemnify said Pearson, Hodgson & Massey, and every of them, against any damages they might sustain by legal compulsion, in consequence of any suit brought in England, or elsewhere, against them, by virtue of any order given by Davidson, or by the defendants, or in consequence of any foreign attachment, levied in their hands, by any creditor of Davidson, and to indemnify them against all damages they might sustain by reason of a double payment of the balance. It is admitted that there has been no breach of the two first parts of the condition; nor has any attachment been levied; neither was the over-payment made on the 27th July, 1810, by compulsion of law, in consequence of any suit brought against Pearson, Hodgson & Massey, or by virtue of any order given by Davidson or the defendants; nor was such over-payment a double payment, that being the first payment, and the payment into the banks doubled it, so far as it went. But, as to the difference between the sum paid on the 27th July, 1810, and that paid on the 17th August into the bank, there has never been any double payment of that sum, and of course it cannot come under the last clause of the condition. The plaintiff, if he inadvertently paid to the defendants more than his house owed, may recover it back in an action for money had and received, but not in this action.

§ 36. *The condition of a bond indemnifying plaintiff and his partners against any "compulsory payment" exacted or to be exacted from them is not broken by their voluntary payment of money into court.*

As to the second question, it is the opinion of the court that the action cannot be maintained. The recitals in the condition of the bond express in most intelligible language the intention of the parties. The defendants, having arrested the plaintiff in this country for the balance due to them by his house, and held him to bail, had obtained a security which they were only induced to relinquish upon receiving payment of what was supposed to be due. But, as it was possible the house of Pearson, Hodgson & Massey might be compelled, by legal process, to pay the same money again to the Bells, or to some other per-

son; or that they might have paid, or before they could have notice of the settlement in Philadelphia, might pay, voluntarily, that balance, upon orders drawn by Davidson, or by the assignees, it was but just that the defendants should indemnify those persons against a double payment, made under any of those circumstances. That this was the design of the parties is clear from the recitals; and the condition is precisely accommodated to that intention. The recital as to the compulsory payment states that the defendants had agreed to secure Pearson, Hodgson & Massey against the event of a double payment of the said claim; which might take place if they should have been compelled, by course of law, to pay the demand made on them by the Bells. In execution of this agreement, the defendants oblige themselves to indemnify the said Pearson, Hodgson & Massey against any damage they may, by compulsion of law, sustain, by reason of any payment, in consequence of any suit brought against them by virtue of any order given by Davidson or by the defendants. But the payment made into the bank was not made by compulsion, or in consequence of any suit brought against Pearson, Hodgson & Massey, but it was made under an order obtained upon the prayer of Pearson, Hodgson & Massey, and in a suit in which they were complainants, not defendants. This proceeding was a violation, not only of the words, but of the intention of the parties. The defendants did not admit the claim of the Bells, but on the contrary obliged themselves to endeavor to have it discontinued; and, that the cause might be defended, they bound themselves from the date of the bond to pay the costs. Had Massey himself filed the bill of interpleader, and prayed to be permitted to pay the money into the bank, it would have been a gross fraud, inasmuch as he would have attempted to deprive the defendants of the security they had obtained by his arrest, and then, by a voluntary abandonment of the cause of the defendants, and a payment of the money, to compel the defendants to restore the security which they had taken in lieu of the person of Massey. But although this case is clear of fraud, the payment in England having taken place in about twenty days after the compromise was made in Philadelphia, still, it cannot for a moment be contended that a payment made upon the prayer of Pearson, Hodgson & Massey, and in a suit brought by them, was a payment made by compulsion of law in a suit brought against them.

As to any voluntary payment which Pearson, Hodgson & Massey might have made before the date of the bond, or might make before any countermand, to be given by the defendants, of such payment should reach Pearson, Hodgson & Massey in England, the recital states an agreement by the defendants to indemnify Pearson, Hodgson & Massey against any payment made to Potter, or to any other person, on behalf of Davidson, *or his assignees*, in any manner before those periods. Then comes the condition intended to fulfil the agreement, and it stipulates to indemnify the said Pearson, Hodgson & Massey from all damages which they might sustain by reason of a double payment of said balance *as aforesaid*. These words, *as aforesaid*, clearly refer to the double payment mentioned in the recital; that is, a payment made to *Potter, or to any other person, on behalf of the said Davidson, or his assignees*. But the payment in England, for which this suit is brought, was not made to Potter or to any other person on behalf of Davidson or the assignees. Persons claiming on behalf of Davidson or the assignees could never be persons claiming adversely to them; but it is most obvious that persons claiming for their benefit were intended. It is impossible that the Bells, the only defendants to the bill of interpleader who claimed adversely to Davidson, or to his assignees, could be

intended; because, in the same sentence, but a line or two preceding these expressions, payment by *compulsion* of law is expressly referred to the Bells by name. It would then have been absurd immediately afterwards to permit a voluntary payment to them. It is of no consequence, indeed, whether the words "as aforesaid" refer to the payments mentioned in the recital or the words "said balance;" because, if they were omitted altogether, the meaning of this part of the condition is ascertained by the obvious meaning of the recital; both of which refer to voluntary payments. That the words "his assignees," in the condition, mean the defendants, and not the Bells, or any other to whom Davidson had given an order to receive the money, is obvious; not only from the preceding words which, in reference to the Bells, speak of a compulsory payment, and consequently the order of Davidson in their favor could not be on his behalf, but because the defendants are immediately afterwards described in the same words, viz., "the said assignees." For these reasons it seems clear that the plaintiff cannot recover in this action.

SPEAKE v. UNITED STATES.

(9 Cranch, 28-39. 1815.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by Mr. JUSTICE STORY.

STATEMENT OF FACTS.—This is an action of debt brought upon a bond given under the first section of the embargo act of the 9th of January, 1808, ch. 8 (2 Stats. at Large, 453). After oyer of the bond and condition various pleas were pleaded by the defendant; but it is unnecessary to consider any others than those upon which questions have been argued at the bar. The second separate plea of the defendant Robert Ober, and the first joint plea of all the defendants, alleges, in substance, that the bond was taken by the collector of the customs at Georgetown, by color of his office and by pretense of the act of congress aforesaid, and that the bond and condition were not taken pursuant to the act of congress, but contrary thereto, in this, to wit: that the bond was not sealed or delivered until after the vessel in the same condition mentioned had received a clearance in due form, and after she had actually departed from the port of Georgetown under the clearance, by reason whereof the bond is void. To this plea there was a general demurrer and joinder in demurrer, on which the court below gave judgment for the United States. It is argued by the plaintiffs in error that the act of congress of the 9th of January, 1808, section 1, having declared that no vessel licensed for the coasting trade shall be allowed to depart from any port of the United States, or shall receive a clearance, until the owner, etc., shall give bond to the United States, in a sum double the value of the vessel and cargo, etc., the time of giving the bond is of the essence of the provision; and that if the bond be not taken until after the clearance or departure of the vessel, it is illegal and void.

§ 37. *Statutory provision directing bond to be taken before a clearance, held directory; bond taken after a clearance not invalid.*

We cannot yield assent to this argument. In our opinion the statute as to the time of taking the bond and granting a clearance is merely directory to the collector. It is undoubtedly his duty to comply with the literal requirements of the statute. If he neglect so to do, it is an irregularity which may subject him to personal peril and responsibility. If the state of facts has existed to which the statute provision is applicable, the authority to require and

the duty to give the bond attaches; and by the voluntary consent of the parties it may well be given *nunc pro tunc*. Upon any other construction the owner of the vessel might be involved in great difficulties. If the collector be not authorized to receive the bond after a clearance, neither is he authorized to grant a clearance before he has received the bond. A clearance, therefore, granted before such bond should be given, would be illegal and void; and a departure from port under such void clearance would subject the owner, vessel and cargo to the forfeiture inflicted by the third section of the act. There is no error in the judgment of the court below on this plea.

§ 38. *Parties to a penal bond required by law are estopped, in the absence of fraud, from denying that a sum inserted by mutual assent as the proper one is the sum required to be inserted.*

The second joint plea of the defendants alleges that the bond was not taken pursuant to the act of congress, but contrary thereto, in this, that the bond was taken in a sum more than double the value of the vessel and cargo, whereby the bond became void. On demurrer to this plea and joinder in demurrer, the court below gave judgment for the United States; and we are of opinion that the judgment so given ought to be affirmed. There is no allegation or pretense that the bond was unduly obtained by the collector, *colore officii*, by fraud, oppression or circumvention. It must, therefore, be taken to have been a voluntary *bona fide* bond. The value was a matter of uncertainty, and the ascertaining of that value was the joint act and duty of both parties. When once that value was ascertained and agreed to by the parties, and a bond executed in conformity to such agreement, the parties were estopped to deny that it was not the true value. If an issue had been taken upon the fact, the evidence on the face of the bond would have been conclusive to the jury; and if so, it is not less conclusive upon demurrer. It would be dangerous in the extreme to admit the parties to avoid a sealed instrument by averring that there was an error in the value by an innocent mistake or by accident, or by circumstances against which no human foresight could guard. A mistake of \$1 would be as fatal as of \$10,000. Suppose the double value were underrated, could the United States avoid the bond and thereby subject the party to the penalties of the third section? Where the law provides that the penal sum of a bond shall be equal to the double value, and the parties voluntarily and without fraud assent to the insertion of a given sum, it is as much an estoppel as if the bond had specially recited that such sum was the double value.

§ 39. *The alteration of an instrument by the consent of all the parties does not avoid it. Parol evidence is competent to show that an alteration was made by consent.*

The third joint plea in substance alleges that after the execution of the bond, and after the clearance and departure of the vessel and cargo, the bond was, by the authority, consent and direction of the collector, materially altered and changed, in this, that the name of Ebenezer Eliason was canceled and erased from the bond, and the name, signature and seal of the defendant, Robert Ober, substituted and inserted therein, without the license, consent or authority of the defendant, Robert Beverly, whereby the bond became of no force. To this plea the United States replied that the bond was so altered and changed with the assent and by the concurrent license, direction and authority of all the defendants, and of the said Ebenezer Eliason, and not without the license, consent and authority of the defendants, and prayed that the same might be inquired of by the country. To this replication there was a general demurrer

and joinder in demurrer, on which the court below gave judgment for the United States; and we are of opinion that the judgment was right. It is clear, at the common law, that an alteration or addition in a deed, as by adding a new obligor, or an erasure in a deed, as by striking out an old obligor, if done with the consent and concurrence of all the parties to the deed, does not avoid it. And this principle equally applies whether the alteration or erasure be made in pursuance of an agreement and consent prior or subsequent to the execution of the deed; and the cases in the books in which erasures, interlineations and alterations in deeds have been held to avoid them will be found, on examination, to have been cases in which no such consent had been given. It has been objected that this principle of letting in parol evidence to prove alterations in a deed to be made by consent exposes to all the mischiefs against which the statute of frauds was intended to guard the public. If this objection were valid, it would equally apply to such alterations when made before the execution of the deed; for, if not taken notice of by a memorandum on the deed itself, they must be proved in the same manner. But it is to be considered that the parol evidence is not admitted to explain or contradict the terms of the written contract, but only to ascertain what those written terms are. On *non est factum*, the present validity of the deed or contract is in issue; and every circumstance that goes to show that it is not the deed or contract of the party is provable by parol evidence. It is of necessity, therefore, that the other party should support it by the same evidence. The fact that there is an erasure or interlineation apparent on the face of the deed does not, of itself, avoid it. To produce this effect it must be shown to have been made under circumstances that the law does not warrant. Parol evidence is let in for this purpose; and the mischief, if any, would equally press on both sides. The principle, however, which has been already stated is too firmly fixed to be shaken by any reasoning *ab inconvenienti*.

The decision upon the third joint plea renders it unnecessary to examine the bill of exceptions taken at the trial on the issue of *non est factum*. That bill presents the same point as the third joint plea, with this difference only, that the alteration in the deed by the addition of a new obligor was in fact made in pursuance of an agreement entered into between the parties prior to the original execution of the deed. On the whole, the majority of the court are of opinion that the judgment of the court below must be affirmed.

LIVINGSTON, J., dissented, holding that no alteration injurious to either party should be permitted, but not denying the authority of the case in Levinz, 11, 35, that a new obligor may be introduced by parol. MARSHALL, C. J., was of the opinion that, if the bond was taken for more than double the value of the vessel and cargo, it was void in law.

BERGEN v. WILLIAMS.

(Circuit Court for Michigan: 4 McLean, 125-128. 1846.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is a proceeding by *scire facias* to obtain execution for further breaches in debt on a bond. At June term, 1841, a judgment was entered in favor of Bergen, against Williams, for \$20,000, and an award of execution for \$977.14, the amount ascertained to be equitably due to Bergen when the judgment was rendered. The judgment was entered for the penalty

of the bond, which was given on the 9th of August, 1830, jointly, by Williams and William Stevens, "conditioned that Stevens should pay, discharge and liquidate all the debts, engagements and liabilities of every kind, and all the demands, of whatsoever nature, contracted by the firm of Bergen & Stevens, then due or thereafter to become due, against the said firm, without recourse to the plaintiff, and should well and truly save harmless and keep indemnified the said Bergen and his representatives therefrom," etc. In the *sci. fa.* it is averred that, at the time the bond was executed, the copartnership of Bergen & Stevens was indebted to — — in — —, a certain sum, on which suit was instituted and judgment recovered, stating the amount of the judgment for — —, which remains in full force, etc. The defendant pleads a set-off that, at the time of suing out the *scire facias*, the plaintiff was indebted to him in the amount of certain promissory notes, made by the plaintiff, payable to different individuals, by whom they were indorsed to defendant. The defendant also pleaded that the partnership of Bergen & Stevens was not, at the time the penal bond was executed, indebted in the said sums demanded by the plaintiff, etc. Both of these pleas were demurred to, and joinder. The demurrer raises the question whether, on a *sci. fa.* to obtain execution for further breaches of the condition of a bond, judgment having been entered for the penalty, the defendant can set off a demand against the plaintiff. In answer to the objection that the *sci. fa.* is an action upon the judgment, and that, in an action upon a judgment, no defense can be set up which might have been pleaded to the original action. Also, that the notes set forth in the plea and notice of set-off having matured since the judgment for the penalty, the defendant is prevented from using them as a set-off by the statute, "which provides that no demand shall be set off unless it existed at the time of the commencement of the suit." R. S., 447, sec. 4. The defendant's counsel contends that the *sci. fa.* for further breaches is, to all intents and purposes, and within the meaning of the statute above cited, an original action. Whether this procedure for the purposes of set-off may be considered as an original action under the statute is not necessarily a question in this case. There is a question behind that which is decisive of the plea or notice.

§ 40. *Where plaintiff is a trustee for other parties, notes acquired by defendant against him cannot be set off in an action for the benefit of such other parties.*

As stated in the *scire facias*, this proceeding is had at the instance of certain judgment creditors of the firm of Bergen & Stevens. The name of Bergen is used as a trustee; but the suit is for the benefit of the above creditors. The condition of the bond is that the defendant shall pay those creditors, so as to save harmless the said Bergen, not only from the debt, but from all costs and charges. An attempt, then, to plead offset against Bergen, arising on promissory notes acquired since the original judgment, is in direct conflict with the condition of the bond. The condition is, to pay the creditors, and not Bergen; and the creditors prosecute this suit for their benefit. This interest of the creditors, arising under the original judgment, would be recognized and enforced, if necessary, by a court of chancery. And a court of law will also protect and enforce their rights, in the name of Bergen. The issue is between the creditors and the defendant, and, as they have reduced their claims to judgment, an offset against them could not be allowed, at least so far as Stevens is concerned, with whom the defendant Williams is jointly liable. It need not now be said whether Williams, being a stranger to the judgment in favor of

the creditors, might not be allowed to set up a defense, which would not be proper for Stevens, who was a party to the judgment, because no such question is raised.

§ 41. *Nul tiel record can only put in issue the fact of the judgment.*

Under the plea of *nul tiel record*, the record of the judgment only can be examined. If the defendant had notice, and judgment for the amount stated was rendered, no other question can be considered under that plea.

§ 42. *Nul debet, when not available.*

The plea that the copartnership of Bergen & Stevens did not owe at the time the bond was executed is subject to two objections: 1. The bond obligated the defendant, jointly with Stevens, not only to pay the debts of the firm then due, but also those that should thereafter become due. 2. *Nul debet* cannot be pleaded to a judgment. The judgment closes the controversy, and it is indisputable, so long as it remains in force.

The demurrers to both pleas are sustained. On motion and affidavit of defendant, the order for execution was set aside, and leave to plead granted.

BERGER v. WILLIAMS.

(Circuit Court for Michigan: 4 McLean, 577-590. 1849.)

Opinion by the COURT.

STATEMENT OF FACTS.—Berger and one Stevens being in partnership, Stevens purchased the stock on hand and gave bond, with Williams security, in the penalty of \$20,000, "conditioned to discharge and pay all the debts and engagements of every kind due by the said firm, and to which it might be liable, be the same of whatever nature." Judgment for the penalty was recovered on this bond, and a *sci. fa.* in the name of the plaintiff alleges a breach, etc., and to recover a debt recovered by Chauncey Moss, against the late firm, in the state of New York. The defendant demurs to the sufficiency of the breach, on the ground that setting forth the judgment is not sufficient; that the consideration or cause of action, on which the judgment was rendered, should have been averred. A suit between the same parties on the same judgment, by a prior *sci. fa.*, for the benefit of a creditor, was before this court at the June term, 1846 (4 McL., 125; §§ 40-42, *supra*). The present *sci. fa.* has been issued at the instance of a different creditor and involves questions not before the court in the former suit.

§ 43. *A judgment against a principal is prima facie evidence against the surety. He may, however, show fraud or mistake.*

Is the judgment rendered against the late firm, in the state of New York, evidence in the case? We think it is, though it may not be conclusive evidence. The defendant is not a stranger to the judgment, though he is not a party to it. He has covenanted to pay this debt jointly with Stevens, if it were a genuine debt, for which the late firm of Berger & Stevens were liable. The judgment establishes this liability, unless fraud be shown. And this the surety may show. And further he may show a mistake in the amount of the judgment. The evidence of indebtedment is merged in the judgment. In 12 Wheat., 515, it was held that a judgment was *prima facie*, though not conclusive, evidence against a guarantor. He may show a clerical mistake in the calculation of the judgment, or that it was obtained through collusion and fraud. Whether the judgment is final or conclusive is the only question in the case. Lord Hardwicke, in *Querside v. Benson*, 2 Atk., 252, held that such a judgment is

conclusive against the surety. The same doctrine was held, 1 Ohio, 446; *Heard v. Giles*, 20 Pick., 53; 10 Barn. & Cress., 317. An entry in a book against the interest of a party is evidence against a third person. The case of *Moss v. McCullough*, 5 Hill, 132, is relied on by the defendant, as showing that such judgment is not evidence, etc. In that case the superior court held a judgment against the principal was conclusive against the surety. And that was a point before the court. A new trial was granted. But that decision is in conflict, it would seem, with the case of *Slee v. Bloom*, 20 Johns., 669. The reasoning of Judge Cowen beyond the case cannot be considered as authority, any more than his notes on Phillips' Evidence. In *Douglass v. Howland*, 24 Wend., 58. Cowen founds the decision on the authority of the two cases of *Beall v. Beck*, 3 Har. & McH., 242; and *Keller v. Powell*, 4 Hawks, 34. The first of the above two cases is most unsatisfactory. Suit was brought against the surety of a deputy sheriff collector. On the trial the collector was offered as a witness, and objected to, and the court being divided, as to the admission of the witness, the evidence was not permitted to go to the jury. This, I suppose, must have been a mistake of the reporter. The objections to the admission of the evidence fails where the court are divided, and, as a matter of course, the evidence goes to the jury. On an appeal the judgment was affirmed. No argument of counsel or opinion of the court is published. In *Jacobs v. Hill*, 2 Leigh, 393, confession of judgment by the principal, a sheriff, is evidence against the surety, overruling the case of *Munford*.

We think on reason and authority the law is clear that a judgment against the principal is *prima facie* evidence against the surety. To avoid its effect, the surety may show collusion and fraud, that the demand has been paid, or that there is a clerical mistake in entering up the judgment. We think, also, that the breach to which an objection has been made is sufficient. The breach is alleged in the terms of the condition of the bond. The demurrer is overruled. On motion and affidavit of defendant, execution is set aside, and leave given him to plead.

§ 44. *Validity*.—The law presumes everything in favor of the validity and binding effect of a bond against the obligors. *In re Mayo*,* 4 Hughes, 377.

§ 45. "The United States of America" is such a corporation that a bond may run to it and be valid. *Dixon v. United States*, 1 Marsh., 181.

§ 46. A married woman is not a competent surety on a bond given for the release of a libeled vessel. *The Ship Antelope*, 1 Ben., 521.

§ 47. A bond to convey a certain lot of land to the board of justices of a county that may hereafter be organized, upon the condition that the seat of justice of the county should be established at that place, is said to be so far valid that, after conveyance of the land, the defense that the justices who were the obligees in the bond were not *in esse* when the bond was executed and the bond was never delivered to them, could not be maintained in a court of chancery. *Sargeant v. State Bank of Indiana*, 4 McL., 339.

§ 48. It seems that bonds taken by a federal officer, running to the United States, to prevent the commission of an act rendered culpable by statute, if not valid under the statute, cannot be supported at common law. *Dixon v. United States*, 1 Marsh., 189.

§ 49. It seems that if a bond be given at common law, where both the obligor and obligee are free agents, acting for themselves on an equal footing, and a part of the condition be void, but there is no statute annulling the bond on account of that condition, the instrument is valid as to so much as is lawful. *Ibid*.

§ 50. A bond in restraint of trade is good at law if taken at a time when the policy of the law is to restrain trade, unless it goes beyond the law. *Ibid*.

§ 51. A penal bond conditioned that the obligors should pay certain drafts drawn in another state, but which by the laws of such latter state are void, is vitiated and rendered void by the illegal transaction to which it relates. *Hayden v. Davis*, 3 McL., 279.

§ 52. *Execution*.—Where the law requires a bond, an instrument without a seal does not conform to the requirement. *United States v. Linn*, 15 Pet., 290 (§§ 190-194). See §§ 223-229.

§ 53. A mark in ink thus, [L. S.], acknowledged by the party to be his seal, is a sufficient sealing of a custom-house bond to maintain an action of debt thereon. *United States v. Coffin*, * Bee, 140. See §§ 176, 224.

§ 54. A bond to be accepted by the United States should be executed by the obligees and not by their attorney. *Sombrero Island*, * 9 Op. Att'y Gen'l, 128.

§ 55. A misnomer of the obligee in a bond, *e. g.*, "the United States of North America," instead of America, is cured by the averment of identity in the declaration. *United States v. Bradley*, 10 Pet., 848 (§§ 188-189).

§ 56. A joint and several bond, where it is offered merely as to one of the obligors, and is connected with a title derived from him, may properly be admitted in evidence on proof of its execution by him. *Conard v. Atlantic Ins. Co.*, 1 Pet., 451.

§ 57. A by-law of Georgetown, providing for licensing auctioneers, required them to give bond to the mayor and directed the licenses to be granted under the seal of the corporation. A bond was taken, under said by-law, to the corporation, by its corporate name, and the license granted was without seal. *Held*, that the bond was void because given to the corporation and not to the mayor, and, as the license was not granted under the corporate seal, the auctioneer never became such an auctioneer as was contemplated by the by-law. *The Mayor v. Baker*, 2 Cr. C. C., 291.

§ 58. Where the bond required to be given by distillers on removal of spirits from a bonded warehouse was executed in blank, and the quantity of spirits to be removed, as well as the sum to be paid the government in case of a breach of the bond, were filled in afterwards without the assent of the obligors, *held*, that the bond was not valid unless subsequently ratified by the obligors. *United States v. Turner*, 2 Bond, 379.

§ 59. The bond of an individual to pay all the costs of a certain described action, without naming any obligee, is good, and binds the obligor to pay the costs to whomsoever is entitled thereto. *Buckingham v. Burgess*, 3 McL., 368.

§ 60. An embargo bond was made payable to the United States. The statute required the bond to be given to the collector. *Held*, that as there was no clause in the act providing for the disposal of the penalty, that as it provided the bond should be sent to the secretary of the treasury, and as another act provided for the institution of suits on bonds taken in the name of the United States under this act, the bond in such cases was to be taken by the collector in the name of the United States. *Dixon v. United States*, 1 Marsh., 182.

§ 61. A bond given by the master of a vessel to the United States was held to be valid under the act of February 28, 1808, although not expressed to be taken in pursuance of said act, and although it was not stated on the face of the bond which of the obligors was the principal and which the surety. And a declaration thereon was sustained without an averment that the bond was given pursuant to the act referred to. *United States v. Hatch*, 1 Paine, 386.

§ 62. Where in a bond for a deed, executed by attorney, the baptismal name of the obligor was, by inadvertence and mistake, written "Jean," the intention of the attorney being to execute the instrument in the name of "René Marie," the true baptismal name of his principal, *held*, that the mistake did not avoid the bond. *Dolton v. Cain*, 14 Wall., 472.

§ 63. *Delivery*.—A special plea of *non est factum*, averring that the supposed bond sued on was a mere escrow, is insufficient unless it avers that the supposed bond was delivered to some third person to be delivered to the obligee only on the performance of the condition pleaded. *United States v. Dair*, 4 Biss., 280.

§ 64. In debt on an auctioneer's bond, it is pleaded by the defendant that the bond was delivered by him as an escrow to be his deed if signed by two others. A demurrer to this plea, that the plaintiffs were not privy to the delivery as an escrow, and the thing to be performed was to be done by strangers and not by plaintiffs, is overruled. Proof of his signature by the attesting witness is not proof of the delivery of the bond, where the attestation is "sealed and delivered in the presence of Cleon Moore." *Mayor, etc., v. Moore*, 1 Cr. C. C., 198.

§ 65. Where the several obligees in a bond constitute a partnership, the bond cannot be delivered to one of them as an escrow. A delivery to one is a delivery to all. *Moss v. Riddle*, * 5 Cr., 351.

§ 66. *Condition*.—The express condition of a bond will not be controlled and overcome by usage. *Union Bank of Georgetown v. Forrest*, * 8 Cr. C. C., 218.

§ 67. Courts frequently depart from the letter of the condition, in the construction of bonds, to carry into effect the intention of the parties. A condition as follows: "Whereas A. lent B. \$2,500, the money of C., and B. paid \$500; and whereas A. has sued B. for the money lent: Now, . . . if A. shall well and truly pay to C. the whole sum lent, if it can be recovered from B., or in case it cannot be recovered, will lose the one-half of that sum which cannot be recovered, then this obligation to be void," etc., was held to entitle C. to recover the \$500 paid by B. at all events. *Cooke v. Graham*, 3 Cr., 229.

§ 68. It seems that bonds taken under color of office should contain no condition not warranted by law. *Dixon v. United States*, 1 Marsh., 186.

§ 69. The omission of a material condition from a statutory bond renders such bond void. *Ibid.*

§ 70. In a suit on a bond the parties are bound for nothing whatsoever but what is contained in their bond. So where the condition of a bond for jail liberties was that the prisoners should not depart without the jail yard, the fact that they did not sleep at night within the prison walls was held not to be a breach of the bond, though it was the duty of the officer taking the bond to have inserted that condition. *United States v. Knight*, 14 Pet., 801.

§ 71. Where the conditions of a bond are severable, those that are good may be enforced and the others disregarded. So where a bond, taken under the act of May 20, 1862 (12 Stat., 404), in connection with the treasury circular issued under it, contained a condition requiring the goods to be consumed in the republic of Mexico, and the other conditions were in conformity with the instructions, it was held that the former condition was separable, and, if not sustainable, might be rejected as mere surplusage. *United States v. Mora*, 7 Otto, 413.

§ 72. A bond was given in the district court for the release of a vessel libeled for violation of the embargo laws, conditioned to perform the decree of "the court." An appeal was taken from the sentence of the district court dismissing the libel to the circuit court, where the sentence was reversed. *Held*, that "the court," in the condition, meant the court which should ultimately decide the cause. *United States v. The Schooner Little Charles*, 1 Marsh., 380.

§ 73. If the condition of a bond, instead of specifying the particular purposes for which the bond was given, refers to a paper which does specify those purposes, it is equivalent to an enumeration of those purposes in the body of the bond itself. *United States v. Maurice*, 2 Marsh., 96.

§ 74. In an action upon the bond of a teller of the Bank of the United States, it was held that the words in the condition of the bond, that he shall "well and faithfully execute the office, and in all things relating to the same well and faithfully behave," mean substantially the same as the words in the rules and regulations of the bank under authority of which the bond was executed, that he shall "faithfully perform the trust reposed in him;" and the sureties on the bond were bound only for the teller's fidelity, and not his skill. *Bank of the United States v. Brent*, 2 Cr. C. C., 696. See § 104.

§ 75. *Performance excused.*—Performance of the condition of a bond is excused where it is prevented or rendered impossible by the acts of the officers or agents of the obligee. Thus it was held to be a defense to an action on a transportation bond conditioned for the transportation of a quantity of spirits from one collection district to another, that, while the obligors were in the act of performing the condition, the spirits were seized by the revenue officer of the United States; nor is it of any consequence that such seizure was made by reason of the wrongful act of some person who had the spirits in charge. *United States v. Stewart*, 2 Bias., 408.

§ 76. An alteration was made in a bond, the taking and custody of which was by law intrusted to the collector of customs, by a clerk in the custom-house, and consisted in erasing the word "of," and inserting in lieu thereof the word "to." *Held*, (1) the alteration must be considered as made by a stranger; (2) it was immaterial, as the word "of," in the connection in which it was used, would have been construed to mean "to." *United States v. Hatch*, 1 Paine, 336. See §§ 701-753.

§ 77. A plea alleging that the supposed bond sued on had been materially altered "without the consent, direction or authority of the defendant," by affixing a seal to his name, without alleging by whom the alteration was made, or that it was made with the knowledge or privity of the obligee, or denying that it was made with his own knowledge, is insufficient. *United States v. Linn*, 1 How., 104.

§ 78. Where a bond was shown to have been in the possession of parties claiming adversely to it, alterations therein were presumed to have been made by them, rather than by parties claiming under the bond, whose rights were not enlarged by the alterations. *Coulson v. Walton*, 9 Pet., 62.

§ 79. Where a joint bond is executed for the payment of purchase money for land, and the bond is secured by a deed of trust on the land, the indorsement on the bond by one of the obligors, that the bond shall bear twelve per cent. interest instead of six, as stated in the bond, and that the deed of trust may be executed if the interest is not paid semi-annually, does not invalidate the bond as a lien upon the land, nor does it change the effect of the bond in the least. It does not affect the junior lienors. *In re Hutchison*, 2 Hughes, 245.

§ 80. *Relief in equity.*—Where the obligee in a bond acquired the legal estate in the lands, which constituted the consideration of the bond, and never conveyed or offered to convey the same to the obligor or his representatives, and a part of said lands was lost in conse-

quence of the neglect of the obligee to pay the taxes due thereon, *held*, that the obligee was not entitled to the aid of equity to enforce the execution of the bond or to obtain satisfaction of a judgment at law founded thereon. *Skilern v. May*, 4 Cr., 187.

§ 81. The state of Georgia became entitled, by confiscation, to money due on a bond. The obligee sued on the bond and recovered judgment. On application by the state the court issued an injunction, to prevent the marshal from paying over the money until the state could try her right at law. *State of Georgia v. Brailsford*,* 2 Dal., 415.

§ 82. If a bond executed in pursuance of articles of agreement does not conform to the terms of the articles, relief may be obtained in equity, but the departure must be made clearly to appear. Hence where A. and B. were copartners, carrying on two stores, one a jewelry store, under the management of A., and the other a hardware store, under the management of both partners, and it was agreed to dissolve the copartnership, and articles were entered into to the effect that A. should withdraw all property contributed by him, and should have the goods in the jewelry store and the debts due that store, in lieu of profits arising from the whole business, and that B. should have the goods in the hardware store, and should indemnify A. from "all claims or demands upon the said concern;" and B. executed a bond, binding himself to satisfy all debts due from the copartnership, including debts due for goods ordered by A. and received by the firm; and goods had been ordered by A. and were received by the firm for the jewelry store; and it was claimed by B. that he was not bound by the articles to satisfy the debt incurred therefor, and that such debt was included in the bond by mistake; and it did not appear that the bond was signed by B. without knowledge of its contents,—*held*, that there was not such repugnancy between the bonds and articles as would warrant the interposition of equity. *Finley v. Lynn*, 6 Cr., 288.

§ 83. Assignment.—Bonds with collateral conditions, on which it is necessary to assign breaches and call a jury to assess the damages, are not assignable under the laws of Virginia. A bond in which it is provided that, on the application of the obligee by a certain day, payment may be made in certain certificates instead of money, is such a bond. *Lewis v. Harwood*,* 6 Cr., 82.

§ 84. Unless the obligor on an assigned bond, who has equitable discounts against it, inform the assignee of his claims when notice of the assignment is given to him, he loses his equity against the assignee. *Scott v. Jones*, 1 Marsh., 247.

§ 85. A bond conditioned that the obligor shall convey certain lands to the obligee on the payment of a certain sum, is assignable by the statutes of Indiana. *Wescott v. Cole*, 4 McL., 79.

§ 86. Although bonds are assignable under a state statute, the obligor may plead against the assignee any defense which he had against the obligee. *Bell v. Nimmo*,* 5 McL., 109.

§ 87. Indemnity.—It seems that covenants to save harmless and to account for certain certificates are to be considered together; and the bond being one of indemnity, the obligee, in a suit thereon, must aver in what way he has been damnified. *Coe v. Rankin*,* 5 McL., 854.

§ 88. No action can be maintained on a bond to indemnify until the party to be reimbursed shall actually be damnified. *Hayden v. Davis*, 3 McL., 379; *Hood v. Spencer*, 4 McL., 169.

§ 89. One partner in a firm having purchased the interest of the other, gave the latter a bond with sureties conditioned "to relieve him from any and all claims, debts, dues and demands against the late firm that are now due, or that may become due hereafter; and that we will assume the payment of the whole of them, and pay them out of our own funds as they may become due." *Held*, that under this bond the obligor was bound to pay the debts, etc., and not merely to indemnify the obligee. *Hood v. Spencer*, 4 McL., 169.

§ 90. Death of a party.—A joint and several bond, taken on the instance side of the court, is a stipulation in admiralty; and if one of the obligors dies, the court may proceed by motion against the representatives of the deceased, or, at the option of the parties, may proceed at the same time against the survivor. *The Ship Octavia*,* 1 Mason, 149. See §§ 536-560.

§ 91. Under the practice in New York, in case of the death of one of the four obligors in a joint and several bond, the executors of the deceased obligor and the three surviving obligors may be joined as defendants in an action at law on the bond, without showing the insolvency of the surviving obligors as a reason for such joinder. *United States v. Tracy*, 8 Ben., 1.

§ 92. A bond conditioned for the payment by a firm of all taxes upon tobacco manufactured by it, signed by A. and B., recited as composing the firm, as principals, and others as sureties, is not a firm contract, upon which no action can be sustained against the representative of a deceased partner, unless the surviving partner is insolvent and all remedies against him have been exhausted. *United States v. Lawrence*, 14 Blatch., 229.

§ 93. Amount of recovery.—When a bond with a penalty is given for the performance of covenants, a recovery thereon must be limited to the penalty, with interest from commencement of suit or from the time the penalty was demanded or acknowledged to be due. *Bank of United States v. Magill*, 1 Paine, 661. See §§ 478-501.

§ 94. In an action on a duty bond, the plaintiff cannot recover more than the penalty of the bond, with interest from the date of the breach, although the duties amount to a greater sum. *United States v. Arnold*, 3 Gall., 348.

§ 95. In an action on a bond to secure the payment of money by instalments, the jury was directed to find the amount of interest and principal then due, and what further sum would be due in the future, and when. Judgment was rendered for the penalty and costs, to be released by the payment of the amount then due and of the future instalments when they should become due. *Davidson v. Brown*, 1 Cr. C. C., 150.

§ 96. In an action on a bond no more than the penalty can be recovered. *Goldhawk v. Duane*, 2 Wash., 833.

§ 97. In an action on a penal bond conditioned to make a deed for certain lots, judgment was rendered by default for the full amount of the penalty, with an additional amount as damages. This was held to be error, because (1) the judgment could not be greater than the penalty, and (2) an interlocutory judgment should have been entered on default, and an order made that the truth of the breaches assigned be inquired into, and the damages assessed by a jury. *Simmons v. Garrett, McCahon*, 88.

§ 98. The obligee in a penal bond may, at common law, sue for the whole penalty, and must be satisfied with it, or he may bring covenant, and recover in damages more or less than the penalty. If, in the latter case, the sum stipulated to be paid is not a penalty, but intended as compensation for non-performance, it must govern the jury in the assessment of damages. *Martin v. Taylor*, 1 Wash., 1.

§ 99. Judgment on a bond will not be arrested because entered for the amount due, when it should have been for the penalty of the bond. *Huff v. Hutchinson*, 14 How., 586.

§ 100. In debt on a bond, the *ad damnum* covers only the interest. *Ibid.*

§ 101. The cancellation by a collector of customs of a custom-house bond, without actual payment of the duties for which it was given, is void, and an action can be maintained thereon notwithstanding. Such action by the collector does not estop the government, nor does his receipt in such a case work an estoppel. A check given the collector, and afterwards exchanged for the note of the debtor, is not a payment of the duties. A check is not a payment of the duties until actually paid by the bank on which it is drawn. *Johnson v. United States*, 5 Mason, 426.

§ 102. A collector of customs canceled a duty bond, on receiving a check which he accepted as satisfaction, and gave a receipt in full for the bond. He never presented the check for payment, but, after holding it for three weeks, returned it to the drawer, who gave him a note payable to the collector's order. The note was transferred to the surety in the bond in question for his indemnity. Duty bonds in that collection office were usually paid by check. *Held*, that payment by check was not a payment of the bond till the check was paid; that the collector's receipt was not conclusive, and that the canceled bond might be declared on as an existing obligation. *United States v. Williams*, 1 Ware, 173.

§ 103. Cashier's bond.—The charter of a bank provided that each cashier, before he entered upon the duties of his office, should give a bond to the satisfaction of the directors. A lawful by-law of the bank declared it the duty of the cashier to attend all meetings of the board of directors and keep a fair and regular record of its proceedings. *Held*, that if no record had been kept of the acceptance of a cashier's bond, such acceptance might be established by proof outside the record, as that the cashier acted as such and was recognized by the board of directors. *Bank of the United States v. Dandridge*, 12 Wheat., 64.

§ 104. Bank teller.—The bond of a bank teller covers defalcations under an extension of the charter of the bank. *Union Bank of Georgetown v. Forrest*,* 3 Cr. C. C., 218. See § 74.

§ 105. The condition of a bank teller's bond was that he should "well and faithfully perform all the duties assigned to him in said bank and make good to the said bank all damages which the same should sustain through his unfaithfulness or want of care." The breach assigned was that he received a check on another bank, as cash, which was not paid. *Held*, that if the teller, in receiving the check, did only what was usual in the ordinary course of trade and business of banking, it was not a breach of his bond. *Union Bank v. Mackall*, 2 Cr. C. C., 695.

§ 106. Attorneys' fees.—A bond provided that in case of default the obligor should pay, etc., "including an attorney's commission of five per cent.," and the warrant of attorney accompanying the bond authorized the confession of judgment for the penalty, etc., and attorney's commissions. Judgment was confessed for, etc., including commissions, and was sustained against the estate of the obligor in bankruptcy. *In re Penney*,* 2 Fed. R., 765.

§ 107. Internal revenue.—Conceding that section 161 of the internal revenue act of June 30, 1864, touching security to be given by manufacturers of friction matches, etc., desiring credit for stamps, to mean that the bond should be payable to the treasurer, a bond in which the United States is the obligee, and which is conditioned that payment for stamps advanced

shall be made to the treasurer, is a valid obligation at common law, and suit upon such bond in the name of the United States can be sustained. *Jessup v. United States*, 16 Otto, 147.

§ 108. In an action on a bond, conditioned to pay to the treasurer of the United States for the use of the United States all sums due the government for stamps, evidence tending to show that the obligor was indebted to the United States for stamps was held to be competent, whether they were furnished by the officer named in the statute, the commissioner of internal revenue, or by the assistant treasurer. *Ibid*.

§ 109. The bond required by section 161 of the internal revenue act of June 30, 1864, to be given by manufacturers of friction matches, etc., desiring credit for stamps, conditioned to pay such sum as may be owing to the United States for stamps furnished, within the time prescribed for payment, is continuing, and applies not merely to the first advance of stamps made thereunder, but also to subsequent advances. *Ibid*.

§ 110. Jail limits.—The obligors in a bond, given to a marshal, that a defendant taken on a *ca. sa.* will remain in the bounds of the jail, are not released from the obligation arising from an escape by the defendant, by the fact that when the defendant had escaped a second time from imprisonment in a suit against him on the jail bond, and had been again arrested by the marshal, he produced the written consent of the plaintiff to his release, obtained after the first escape. *Slocum v. Hathaway*, 1 Paine, 290.

§ 111. Where the condition of a jail bond recites that the prisoner should faithfully and absolutely remain within the limits of the jail yard and should not depart therefrom until he should be lawfully discharged, such condition is not broken by the escape of the prisoner on his becoming insane. *Hazard v. Hazard*, 1 Paine, 295.

§ 112. Under the laws of New York, which were adopted by congress, it was the duty of sheriffs to admit to the privileges of the jail limits, on their giving the required bond, all prisoners in their custody confined by virtue of civil process from the courts of the United States. *United States v. Noah*, 1 Paine, 368.

§ 113. It was the duty of a sheriff, on the request of the party at whose suit the prisoner was confined, to assign the bond to such party who was authorized to sue thereon. And a party to whom, at his request, such bond was assigned could not sue the sheriff for an escape. *Ibid*.

§ 114. A person imprisoned for debt entered into a bond to remain a true prisoner until discharged. While confined he petitioned the legislature according to the provisions of a law then in force, and was discharged by resolution of the legislature on complying with the terms imposed by it. *Held*, that such discharge and acceptance was no breach of the bond. *Mason v. Haile*, 12 Wheat., 375.

§ 115. By a partner.—A custom-house bond issued by one partner in his own name merely, under a power of attorney by the partners, mutually authorizing each other in their several and respective names to sign, seal and deliver bonds at the custom-house, and agreeing to be jointly and severally bound for the payment of such bonds as if they had severally signed, sealed and delivered the same, does not bind the other partners. Such a bond is not admissible in evidence, in an action against the partners for money had and received, to show the amount, since it extinguished the simple contract debt due by the partners and made it the debt of the partner alone who executed the bond. Nor is this bond admissible to show the debt of the one obligee, when it had already been merged into a judgment against him. *United States v. Astley*, 8 Wash., 508.

§ 116. Bond by grantee to grantor.—A bond is given by a grantee of land to his grantor, for the payment of the purchase money, and in consideration of the conveyance by a warranty deed by the grantor. An agreement on the part of the grantor is indorsed upon the bond to the effect that he would not enforce the bond if his title should fail. It is judicially determined, in ejectment by the grantee against one in possession of the land, that no title passed by the conveyance from the grantor to the grantee, and that the party in possession is seized. It is decided that this may be pleaded in release of the obligation in the bond, although the ejectment suit was not determined until after the bond became due, and that it had been formerly determined, in a foreclosure of the mortgage also securing the purchase money, that the grantor's title had not at that time failed. *Noonan v. Bradley*, 9 Wall., 394.

§ 117. Individual liability.—Where the recital in a bond is to the effect that an agreement has been entered into between the United States on one part, and the president and directors of said bank, etc., of the other part, this indicates an agreement by the president and directors in the corporate character in which they are mentioned in the bond, rather than in their individual characters in which they are not mentioned, and the obligors are liable as sureties. *United States v. Robertson*,* 5 Pet., 641.

§ 118. And where it was stipulated that "the directors agree to pledge to the government of the United States the entire estate of the corporation as security," etc., and that "they will bind themselves individually," etc., with the further stipulation that they did not bind

themselves for the "absolute payment of the said sum of money from their private estates," but only guaranteed that the said president and directors, etc., would fulfil their agreement, etc., it was held that they only become liable for the default of the bank, and not for the acts or default of individual members. *Ibid.*

§ 119. **Penalty too large.**—A statute required a bond to be taken for double the value of the vessel and cargo, and in a suit on a bond executed under said statute, the plea set up the defense that the penalty exceeded that amount. *Held*, that the defense was good. But it seems that if the estimate in such case should exceed the real value only by a small amount, it would be a question for the jury whether the signature to the bond, without objection, might not be considered an assent to the estimate. (In this case the estimate was alleged to be too large by \$8,000.) *United States v. Gordon*,* 1 Marsh., 190. See § 11.

§ 120. **Duty bond.**—A bond for duties conditioned in the form prescribed by act of March 2, 1799, for the payment of a specific sum, "or the amount of duties to be ascertained to be due and arising on the goods imported," is discharged by a payment or tender of the sum specified, although the amount of the duties exceeds such sum. *United States v. Thompson*, 1 Gall., 388.

§ 121. In an action on a custom-house bond, it is no defense that the bond was given for an antecedent debt, consisting of duties due at the custom-house, the payment of which was secured by three other bonds, given more than twenty years before the execution of the bond in suit. *United States v. McKewan*, 4 Blatch., 388.

§ 122. Under § 62, ch. 128, of the collection act of 1799, the bond therein required should be signed by all the importers when several are interested in an importation. *Meredith v. United States*, 13 Pet., 486.

§ 123. **Distiller.**—The condition of a distiller's bond was for his faithful compliance with all the requirements of law in relation to distilled spirits. The breach assigned was that he sold and removed for sale one thousand gallons of spirits manufactured at his distillery without first paying the tax thereon. A plea that he did not sell or remove for sale one thousand gallons of distilled spirits or any amount whatever without first paying the tax thereon was held sufficient on general demurrer. *United States v. Hamond*, 4 Bias., 288.

§ 124. A distiller of coal oil obtaining a license and executing his bond to conform to all the requirements of "an act to provide internal revenue," etc., approved July 1, 1862, having in fact obtained his license and executed his bond under the act of July 30, 1864, which repeals the former act of 1862, is held not liable for any breach after his license expires, since it is so provided in the latter act. *United States v. Smith*, 8 Wall., 587.

§ 125. **Limitation.**—Twenty years, exclusive of the period of the plaintiff's disability, must have elapsed to create the presumption of the payment of a bond. *Dunlop v. Ball*, 2 Cr., 180.

§ 126. It was held not error for the court to instruct the jury that evidence of an acknowledgment by the obligee that a sum less than the amount of the bond had been received in full of all his claims would warrant a finding that the whole amount due on the bond had been paid, because such acknowledgment, on receiving part of the money, raised a presumption that the remainder had been paid previously. *Henderson v. Moore*, 5 Cr., 11.

§ 127. The circumstance that a bond is given in Calcutta, and that the obligee promised to pay it after it became due, and afterwards moved to this country while the plaintiff lived in Calcutta, is sufficient to repel any presumption of payment arising from the lapse of less than twenty years. *Goldhawk v. Duane*, 2 Wash., 323.

§ 128. A suit is instituted in a state court by the libelants of a vessel against the sureties of a United States marshal, on his bond, for failure to restore the proceeds of the vessel to them, as decreed by the United States district court. The plaintiffs, suing in their own names and not in the name of the United States, recover, and the judgment is affirmed by the supreme court of the state. On appeal to the supreme court of the United States, it is decided that this court has no jurisdiction to re-examine the question whether the plaintiffs could maintain the action in their own names, without using the name of the United States. It has jurisdiction to re-examine the question of limitation of the action, and hold that plaintiffs' cause of action did not accrue until the final judgment was rendered by this court, affirming the decree of the district court, ordering the money to be paid to plaintiffs, and the statute did not begin to run until that date. *Montgomery v. Hernandez*, 12 Wheat., 129.

§ 129. Judgment on a forthcoming bond will not be reversed because the execution on which the bond was given was for several specific sums, making an aggregate, and the recital of the execution in the bond stated one of these sums incorrectly, but made the correct aggregate according to the execution. *Williams v. Lyles*, 2 Cr., 9.

§ 130. A judgment on a collector's bond will be reversed under the act of July 11, 1798 (1 Stat. at Large, 594, § 14), where it has been taken by default, the writ not having been executed fourteen days before the return day thereof. *Dobynes v. United States*, 3 Cr., 241.

§ 131. Assigning breaches; jury trial.—In an action on a penal bond for the conveyance of land a declaration which does not assign any breaches of the condition in the bond is demurrable. And a judgment on such declaration, without any writ of inquiry or the intervention of a jury, will be reversed. *Burnett v. Wylie, Hemp., 197.*

§ 132. A declaration, in an action on an administration bond, against two of the three obligors, which charges as a breach that the defendants have not paid the sum demanded, will not sustain an action, because, for aught that appears in the declaration, the third obligor may have paid it. *Robins v. Pope, Hemp., 319.*

§ 133. It is said to be error that the breaches of the bond were not assigned until after judgment by default. *Ibid.*

§ 134. In an action on a penal bond, it is a sufficient allegation with reference to one of the obligors that she did not, before her intermarriage, pay or discharge the bond. After her intermarriage she had no right to pay except as the agent of her husband. *Campbell v. Strong, Hemp., 265.*

§ 135. In a suit on an administration bond, assigning as a breach the failure to pay a sum allowed against the estate by a competent court, no inquiry can be had as to the correctness of the judgment of allowance. Where there is a declaration in such an action upon the penalty, without setting out the conditions, and a plea of a general performance, the replication should allege the judgment of allowance and that it is still in full force and effect. If it does not, a demurrer to it will be sustained. *Ibid.*

§ 136. A breach of a bond is well assigned by directly negating the words of the condition. *United States v. Spalding, 2 Mason, 478.*

§ 137. If the condition of the bond as set forth in the declaration shows that no cause of action exists, unless there has been a breach of the condition, the declaration must show such breach, and the mere averment of the non-payment of the penalty is insufficient, even after verdict. *Hazel v. Waters, 3 Cr. C. C., 682.*

§ 138. The assignment of breaches in an action on an embargo bond is an essential part of the record, and cannot be stricken out by amendment, because the declaration would be good without it. *Dixon v. United States, 1 Marsh., 177.*

§ 139. A declaration in covenant on a bond, by which the obligors bind themselves in a penal sum, and containing a condition for performance of the duties of an office, etc., assigned as a breach neglect to perform the condition. *Held*, that the declaration was bad; that covenant would lie upon the penalty, but not upon words which were inserted by way of condition or defeasance by performance of some collateral act. *United States v. Brown, 1 Paine, 422.*

§ 140. Defenses.—In debt on a bond executed by the defendant to the plaintiff in the penalty of £20,000, and conditioned for the payment of £10,000, where the declaration claims \$140,000, averring that the said sum of £20,000 is equal to this amount, a plea denying the equivalence of the two sums, and averring that the bond was given to secure the payment of a running account which did not amount to \$140,000, sets up no defense. It is held in such a case that the plaintiff is, by act of congress, entitled to recover so much of the condition of the bond as is, according to equity, due the plaintiff, and the parties are entitled to a jury to determine how much is due. *Gurney v. Hoge, 6 Blatch., 499.*

§ 141. *Non damnificatus* cannot be pleaded to an action on a bond conditioned for the performance of certain acts; as, to surrender a mill, and the engine and boilers, in good condition, at the expiration of a lease. *Hayes v. N. Y. Mining Co., 2 Colo., 273.*

§ 142. In suit on a replevin bond, a plea of "general performance" and also of *non damnificatus* is bad, after an assignment of special breaches. A plea that the plaintiff had no property in the goods replevied is also bad, none being averred in the petition. And likewise a plea that the court did not order a return of the goods, pleaded to the whole declaration, when it is only an answer to one of the breaches assigned. *Wood v. Franklin, 3 Cr. C. C., 115.*

§ 143. A. is in possession of a mill, under a lease from B. He sells to B. certain engines and boilers which are in the mill, and gives bond to B. conditioned for the delivery of the mill, and engines and boilers, in good condition at the expiration of the lease. In an action on this bond it is decided that a plea that B. was not the owner of the mill at the time of the sale, and that the engines, etc., being in the mill, were part of the realty, and therefore belonged to the third person, will not avail, since it does nothing else but set out a breach of the bond. Such a plea is of no force as showing a right of action on the bond in the owner of the freehold, because, if B. was not the owner of the land, the right of action on the bond could not pass to an assignee. A plea that B. was the owner of the mill when the engines and boilers were attached and became part of the realty, and that the mill was sold in execution of a judgment against B., before the expiration of the lease, and that the engines and boilers passed with the mill to the purchasers, is good, since the covenant in the bond passed

with the mill to the purchasers at the sheriff's sale, and can no longer be enforced by *B. Hayes v. N. Y. Mining Co.*, * 2 Colo., 273.

§ 144. An action may be brought on a bond conditioned to pay three instalments, upon the failure to pay the first instalment when due. *Nailor v. Kearney*, 1 Cr. C. C., 112.

§ 145. A plea to an action on a bond, that it was demanded and received by the collector by color of his office, and that the condition is not conformable to or in pursuance of the statute in such case made and provided, without stating what that case is, is bad. *United States v. Sawyer*, 1 Gall., 86.

§ 146. A plea in an action on a distiller's bond, that the quantity of spirits removed and the amount of taxes unpaid is less than stated in the declaration, is insufficient. *United States v. Dair*, 4 Biss., 280.

§ 147. Where all the defendants joined in a plea of *non est factum*, and the proof showed that seals were added by one of the defendants, without the knowledge or consent of the other defendants, to his own name and to the names of the other defendants, *held*, that the plea being false as to him was bad as to all the defendants, on the principle that a plea bad in part is bad *in toto*. *United States v. Linn*, 1 How., 104.

§ 148. *Nul debet* is an improper plea to an action of debt on a specialty. *Sneed v. Wister*, 8 Wheat., 690.

§ 149. A plea to an action upon the bond of an internal revenue gauger, averring that he had been indicted and convicted for the same acts assigned as breaches of the bond, was held bad. But a plea, that after such conviction he was pardoned, upon a condition which has been complied with, states a defense. *United States v. Cullerton*, 8 Biss., 166.

§ 150. A declaration on bonds executed to the president of the United States and his successors, for the use of the orphan children, provided for in the nineteenth article of the treaty with the Choctaw Indians, of September, 1890, is not demurrable for failure to state that the bonds were issued by authority of law. The bonds being voluntarily made are valid, though not expressly authorized by law. A demurrer setting up want of consideration cannot be sustained. It is no objection to the declaration that it does not name the parties for whose use the suit is brought, since all Choctaw orphans entitled to lands under the treaty are interested. *Tyler v. Hand*, 7 How., 578.

§ 151. *Oyer and profert*.—In an action upon a bond for performance of covenants in another deed, *oyer* of such deed cannot be craved. *Sneed v. Wister*, 8 Wheat., 690.

§ 152. Where the declaration sets forth the condition of a bond, and *profert* is made of the whole instrument, it is unnecessary to make a separate *profert* of the condition. *United States v. Spalding*, 2 Mason, 478.

§ 153. *Oyer* of the condition of a bond does not include *oyer* of the bond itself, but it must be demanded of both if wanted, for the bond and condition are considered distinct, the bond being complete without the condition, and *oyer* of one may be without the other. *United States v. Sawyer*, 1 Gall., 86.

§ 154. *Variance*.—Where the plaintiff declares upon a bond dated the 3d of October, and upon *oyer* the bond appears to bear date the 3d of January preceding, the variance is fatal. *Cooke v. Graham*, 2 Cr., 299.

§ 155. Where the declaration averred that the bond was payable "on or before" a certain day, and the words "on or before" were not in the bond, *held*, a variance. *Kikindal v. Mitchell*, * 2 McL., 402.

§ 156. A collusive capture by an American privateer, under color of which goods are introduced into the United States contrary to the provisions of existing statutes, is a breach of a bond conditioned that the owners, officers and crew, who shall be employed on board such vessel, "shall and will observe the treaties and laws of the United States." *Greeley v. United States*, 9 Wheat., 260.

§ 157. *Actions*.—It is no objection to an action on a probate bond that it was commenced prior to the time when, by order of the court of probate, the defendants were to render an account of their administration, the action being founded on the not making and exhibiting a true and perfect inventory within the time mentioned in the condition of the bond. The administrator is liable on his bond for failure to inventory real estate fraudulently conveyed to him by the intestate, where the fraud has already been established by a jury. And this before it is ascertained that such real estate is required to pay the plaintiff's debt. The amount of damages in such an action shall not exceed the amount of the plaintiff's debt, or the value of the estate omitted in the inventory. *Minor v. Mead*, * 3 Day (Conn.), 299.

§ 158. An action on an attachment bond may be brought in the name of the marshal to whom it was given, though he has been succeeded in office by another. *Huff v. Hutchinson*, 14 How., 566.

§ 159. The district courts have jurisdiction of an action on an attachment bond brought by the United States marshal against citizens of the same state with himself, the declaration

stating that the action is brought for the use of certain parties named who are averred to be citizens of a different state. *Ibid.*

§ 160. Debt will not lie on a sealed instrument, for interest, before the principal becomes due, unless the payment be secured by a penalty. Where there is no penalty in a bond payable by instalments, covenant is the proper remedy to recover the instalments as they fall due. *Fontaine v. Aresta*, 2 McL., 127.

§ 161. Parol evidence is admissible to prove that a bond which, upon its face, purports to have been delivered absolutely, was delivered as an escrow. *Pawling v. United States*, 4 Cr., 219.

§ 162. In New York, in the case of a joint and several bond, the plaintiff may join the surviving obligors, and the representative of a deceased obligor, as defendants in an action thereon. *United States v. Lawrence*, 14 Blatch., 229.

§ 163. No person except the obligee can sue on a bond unless the right is given by statute. So where the proprietor of a lottery gave a bond to a municipal corporation, conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance," it was held that the holders of a ticket could not sue in the name of the corporation without its consent. *Corporation of Washington v. Young*,* 10 Wheat., 406.

§ 164. In an action on a bond in the federal courts judgment cannot be rendered on the bond before the amount due the government has been ascertained. *United States v. White*,* 4 Wash., 414.

§ 165. A foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of estates. So where A. became a surety upon the bond of B., as administrator of the estate of C., and B. received assets of the estate of C., committed a *devastavit*, was summoned to an accounting before a probate court, and a decree was made requiring him to pay the sum in which he was found indebted; and A. and B. died insolvent, without complying with the decree; and D. became administrator of A., and E. became a surety in D.'s bond; and D. had assets in his hands as administrator of A., and a portion of the assets were in the hands of E., his surety; and administration of the estate of A. was pending in a probate court of the state of Mississippi,—*held*, that the heirs of C. could maintain an action against D. and E., to subject assets of A.'s estate in their hands to the payment of the claim upon the administration bond given by B., and that it was not necessary to first proceed against the estate of the principal obligor. *Green v. Creighton*, 23 How., 90.

§ 166. A *nolle prosequi* which was entered against the principal obligor, in a bank cashier's bond, after he had pleaded and after judgment against the sureties had been given upon the pleadings, where the bond was joint and several, and the defendants severed in their pleadings, was held to be regular. *Minor v. Mechanics' Bank of Alexandria*, 1 Pet., 45.

§ 167. Miscellaneous.—The third section of the act of May 20, 1862, gave the secretary of the treasury power to require reasonable security that goods should not be transported to any place under insurrectionary control, and should not in any way be used to give aid or comfort to the insurgents, and to establish such regulations as he should deem necessary or proper to carry into effect the purposes of the act. *Held*, that a bond taken by a collector of a port, pursuant to instructions of the secretary of the treasury, in double the value of the goods, and executed by the shipper and two sureties, was not more than reasonable security. *United States v. Mora*, 7 Otto, 413.

§ 168. Where a collector of a port was empowered to absolutely refuse a clearance of goods where there was good ground to believe that they were intended for the use of insurgents, this included power to take a bond with security to prevent such use, and the execution of such bond is *prima facie* evidence that it was executed voluntarily. *Ibid.*

§ 169. Taxes were collected by the authorities of Ralls county under a law of the state for the purpose of paying interest on certain bonds issued by the county to aid a certain railroad. These taxes having been paid into the treasury, the county authorities, in pursuance of law, loaned out a part of this fund so collected, and took a bond for payment at a certain date. Under an execution on a judgment rendered against the county in favor of a holder of these county bonds, garnishment process was served on the debtor to the county on the bond for the taxes loaned, and the plaintiff was held entitled to judgment against the garnishee, although the bond was not yet due. *George v. Ralls County*, 8 Fed. R., 647.

§ 170. In an action on a bond, that A. will pay the amount which B. shall recover against C. in a suit then pending, given on the agreement that C. shall be released from his imprisonment in that suit, the judgment against C. as to its amount is conclusive against A. It is also conclusive of any matter of fraud which might have been set up in defense of the civil suit. In an action on such a bond, the defendant cannot plead that the plaintiff procured a fraudulent bill of indictment against the original defendant, for the purpose of bringing him by requisition to another state and confining him in prison, and to induce his friends to become

responsible for him in the civil suit in which the bond was given, there being no allegation of a fraudulent conspiracy between B. and C. *Greathouse v. Dunlap*, 8 McL., 803.

§ 171. On a bond with the penalty of \$5,000, and with the following condition, "Whereas C. did lend to W. twenty-five hundred dollars of G.'s money; the said W. having failed, but before he failed, paid five hundred dollars; and whereas said C. hath instituted suit against the said W. for the recovery of the said money; now the condition of this bond is such, that if C. shall well and truly pay the whole sum so lent, if it can be recovered from said W. or his indorser; or, in case it cannot be wholly recovered, will lose the one-half of that sum which cannot be recovered, then the above obligation shall be void," the court held that the plaintiff was entitled to recover \$500 at all events; he was also entitled to recover the balance of the \$2,500, if the jury should be of the opinion that the defendant could have recovered the same of W. or his indorser, and if no part of said residue could have been so recovered, then the plaintiff is entitled to recover of defendant one-half of said residue in addition to said \$500. *Cooke v. Graham*, 2 Cr., 229.

§ 172. *Whaling voyage; list of ship's company.*—The act of 1808, chapter 62, provides that, before a clearance shall be granted to any vessel bound for a foreign voyage, the master thereof shall deliver to the collector of customs a list containing the names, places of birth and residence, and a description of the persons who compose the ship's company, and that the master shall enter into a bond in the sum, etc., that he shall exhibit a certified copy of the aforesaid list to the boarding officer on return of the vessel, and then and there produce the persons named in the list to such officer. It is decided that a whaling voyage is not, in the sense of this act, a foreign voyage, and a bond given in such a case is a mere nullity. *Taber v. United States*, 1 Story, 1.

§ 173. *Breach.*—In debt on a bond given to the United States to secure the payment of any sums not exceeding \$10,000 which might be advanced by the commissary-general to one Parker, under a contract that Parker should manufacture and deliver at certain times so many yards of woolen kersey, it is held that orders drawn by Parker on the commissary-general and accepted by him, but not paid, cannot be considered as advances, and alone will not support a breach of the bond. *Parker v. United States*, Pet. C. C., 262.

II. VOLUNTARY BONDS.

SUMMARY—*By a purser of the navy*, § 174.—*Conditions not required by law*, §§ 175, 177.—*No seal; consideration*, § 176.—*Valid in the absence of a statute*, § 178.—*Given for a sum larger than required*, § 179.—*Postmaster's bond*, § 180.

§ 174. A voluntary bond, taken under authority of the proper officers of the treasury department, and given by a purser in the navy to secure the faithful performance of his duties, is binding upon the purser and his sureties, although such a bond is not required or prescribed by positive law. But where the secretary of the navy, under color of his office, extorts from a purser, as a condition to his remaining in the service, a bond with conditions and obligations different from those required by law, the bond cannot be enforced. *United States v. Tingey*, §§ 181, 182.

§ 175. A paymaster executes his bond to the United States for the faithful performance of his official duties, containing conditions and provisions in addition to those required by the act of congress which prescribes the form and purport of paymasters' bonds. In an action on the bond it is held (1) that the United States has the power to take a voluntary bond from one of its officers to secure fidelity in office, where none is required or prescribed by positive law; (2) that so much of the bond as conforms to the act of congress prescribing the form and purport of the bond of a paymaster is valid; (3) that the act of congress prescribing the form of paymasters' bonds does not prohibit the taking of bonds from paymasters in any other form than that prescribed; (4) the breach assigned being a part of the condition which is in conformity with the act, the plaintiff can recover; (5) the execution of a bond conforming to the act is not necessary before the paymaster could undertake the duties of the office. *United States v. Bradley*, §§ 183-189.

§ 176. A. and his sureties executed their writing binding themselves in a certain amount to the United States, to secure the performance by A. of his duties as receiver of moneys, but no seals were added to their signatures. *Held*, (1) that this is not a bond within the act of congress which requires a receiver to give bond for the faithful discharge of his trust; (2) that the emoluments of the office are a sufficient consideration for the obligation of A., and also that of his sureties; (3) that this is not a past and executed consideration; (4) that this obligation is good as a common law contract, notwithstanding the act of congress which

directs that a receiver, before he enters upon the duties of his office, shall give bond for the faithful discharge of his trust. *United States v. Linn*, §§ 190-194. See §§ 58, 294.

§ 177. A distiller's bond containing conditions and obligations, in addition to those prescribed by act of congress as required in such a bond, is not for that reason void, if voluntarily made. The bond is not only good as to that part which conforms to the act, but it is good as a common law contract between the distiller and the United States. *United States v. Hodson*, §§ 195-199.

§ 178. It seems that voluntary bonds of public officers are valid in the absence of any statute prescribing bonds with different penalties or conditions. *United States v. Humason*, §§ 200-202.

§ 179. An act of congress provided that Indian agents should give a bond in the sum of \$2,000, but that the president might require a bond in a larger amount. An action being brought upon the bond of an Indian agent, given in a larger sum, it was claimed that, as no evidence was produced to show that the president had required a bond in a greater sum than that mentioned in the statute, the bond was void as to the excess. *Held*, that the bond having been taken in a larger sum, it must be supposed that it was required to be in that sum by the president. *Ibid*.

§ 180. A deputy postmaster and his sureties execute their bond that he shall faithfully account to the United States for all moneys, postage stamps, etc., he shall receive for the use and benefit of the postoffice department. Under the act of March 8, 1851, which was in force when the bond was executed, and which recites "that it shall be the duty of the postmaster-general to furnish to all deputy postmasters, and all other persons applying and paying therefor, suitable postage stamps," it is held that the deputy has a right to receive postage stamps without prepayment, and he and his sureties are liable on his bond for his failure to account for stamps so received. Also held that the bond is enforceable as a common law contract, independent of the statute. *United States v. Mason*, §§ 208-205.

[NOTES.—See §§ 206-222.]

UNITED STATES v. TINGEY.

(5 Peters, 115-181. 1831.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the District of Columbia, sitting at Washington. The original action was brought by the United States upon a bond executed by Lewis Deblois, and by Thomas Tingey and others as his sureties, on the 1st of May, 1812, in the penal sum of \$10,000, upon condition that if Deblois should regularly account, when thereto required, for all public moneys received by him, from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government of the United States as should be duly authorized to settle and adjust his accounts, and should, moreover, pay over, as might be directed, any sum or sums that might be found due to the United States upon any such settlement or settlements, and should also faithfully discharge, in every respect, the trust reposed in him, then the obligation to be void, etc. In point of fact, Deblois was at the time a purser in the navy, though not so stated in the condition; and there is an indorsement upon the bond, which is averred in one of the counts of the declaration to have been contemporaneous with the execution of the bond, which recognizes his character as purser, and limits his responsibility as such; and the bond was unquestionably taken, as the pleadings show, to secure his fidelity in office as purser. The declaration contains two counts: one in the common form for the penalty of the bond; and a second setting forth the bond, condition and indorsement, and averring the character of Deblois, as purser, his receipt of public moneys, and the refusal to account, etc., in the usual form. Several pleas were pleaded, upon some of which issues in fact were joined. To the third, fourth, fifth, sixth and eighth pleas, the United States demurred, and judgment upon the demurrers

was given for the defendant in the circuit court; and the object of the present writ of error is to revise that judgment.

There is no statute of the United States expressly defining the duties of pursers in the navy. What those duties are, except so far as they are incidentally disclosed in public laws, cannot be judicially known to this court. If they are regulated by the usages and customs of the navy, or by the official orders of the navy department, they properly constitute matters of averment, and should be spread upon the pleadings. It may be gathered, however, from some of the public acts regulating the departments, that a purser, or, as the real name originally was, a burser, is a disbursing officer, and liable to account to the government as such. The act of the 3d of March, 1809, ch. 95, s. 3 (2 Stats. at Large, 536), provided that, exclusively of the purveyor of public supplies, paymasters of the army, pursers of the navy, etc., no other permanent agents should be appointed either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement in any other manner of moneys for the use of the military establishment, or of the navy of the United States, but such as should be appointed by the president of the United States with the advice and consent of the senate. And the next section (s. 4) of the same act provided that every such agent and every purser of the navy should give bond, with one or more sureties, in such sums as the president of the United States should direct, for the faithful discharge of the trust reposed in him; and that, whenever practicable, they should keep the public money in their hands in some incorporated bank, to be designated by the president, and should make monthly returns to the treasury of the moneys received and expended during the preceding month, and of the unexpended balance in their hands. This act abundantly shows that pursers are contemplated as disbursing officers and receivers of public money, liable to account to the government therefor. The act of the 30th of March, 1812, ch. 47 (2 Stats. at Large, 699), made some alterations in the existing law, and required that the pursers in the navy should be appointed by the president, by and with the advice and consent of the senate; and that from and after the first day of May then next, no person should act in the character of purser who should not have been so nominated and appointed, except pursers on distant service, etc.; and that every purser, before entering upon the duties of his office, should give bond with two or more sufficient sureties, in the penalty of \$10,000, conditioned faithfully to perform all the duties of purser in the navy of the United States. This act, so far as respects pursers giving bond, and the imports of the condition, being in *pari materia*, operates as a virtual repeal of the former act. The subsequent legislation of congress is unimportant, as it does not apply to the present case.

§ 181. *A voluntary bond with conditions entered into by an officer of the United States, in favor of the United States, is valid and obligatory upon the principal and his sureties.*

It is obvious that the condition of the present bond is not in the terms prescribed by the act of 1812, ch. 47, and it is not limited to the duties or disbursements of Deblois, as purser, but creates a liability for all moneys received by him, and for all public property committed to his care, whether officially as purser, or otherwise. Upon this posture of the case a question has been made and elaborately argued at the bar, how far a bond voluntarily given to the United States, and not prescribed by law, is a valid instrument, binding upon the parties in point of law; in other words, whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond in

cases not previously provided for by some law. Upon full consideration of this subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. This principle has been already acted on by this court in the case of *Dugan v. United States*, 3 Wheat., 172; and it is not perceived that there lies any solid objection to it. To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine, to such an extent, is not known to this court as ever having been sanctioned by any judicial tribunal. We have stated the general principle only, without attempting to enumerate the limitations and exceptions which may arise from the distribution of powers in our government, or from the operation of other provisions in our constitution and laws. We confine ourselves, in the application of the principle, to the facts of the present case, leaving other cases to be disposed of as they may arise; and we hold that a voluntary bond, taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursement of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or legal view. Having disposed of this question, which lies at the very threshold of the cause, and meets us upon the face of the second count in the declaration, it remains to consider whether any one of the pleas demurred to constitutes a good bar to the action.

§ 182. *A bond extorted under color of office from an officer and his sureties, which is different in form and substance from that prescribed by the statute, is illegal and invalid.*

Without adverting to others, which are open to serious objections on account of the looseness and generality of their texture, we are of opinion that the fifth plea is a complete answer to the action. That plea, after setting forth at large the act of 1812 respecting pursers, proceeds to state that, before the execution of the bond, the navy department did cause the same to be prepared and transmitted to Deblois, and did require and demand of him that the same, with the condition, should be executed by him with sufficient sureties, before he should be permitted to remain in the office of purser, or to receive the pay and emoluments attached to the office of purser; that the condition of the bond is variant, and wholly different from the condition required by the said act of congress, and varies and enlarges the duties and responsibilities of Deblois and his sureties; and "that the same was, under color and pretense of the said act of congress, and under color of office, required and extorted from the said Deblois, and from the defendant as one of his sureties, against the form, force and effect of the said statute, by the then secretary of the navy." The substance of this plea is that the bond, with the above condition, variant from that prescribed by law, was under color of office extorted from Deblois and his

sureties, contrary to the statute, by the then secretary of the navy, as the condition of his remaining in the office of purser, and receiving its emoluments. There is no pretense, then, to say that it was a bond voluntarily given, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute, but to supersede the requisitions of law. It would be very different where such a bond was by mistake or otherwise voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office. The judgment of the circuit court is affirmed.

UNITED STATES *v.* BRADLEY.

(10 Peters, 343-365. 1836.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the District of Columbia, for the county of Washington.

The original suit was debt on a bond given to the United States by John Hall, Daniel Ott and Nicholas B. Vanzant on the 26th of May, 1818, the condition of which, after reciting that Hall was appointed paymaster of the rifle regiment in the army of the United States, was as follows: "Now, if the said John Hall shall well and truly execute, and faithfully discharge according to law, and to instructions received by him from proper authority, his duties as paymaster aforesaid; and he, his heirs, executors or administrators shall regularly account, when thereto required, for all moneys received by him from time to time as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose, and moreover pay into their treasury such balance as on a final settlement of the said John Hall's accounts shall be found justly due from him to the said United States, then this obligation shall be null and void, and of no effect, otherwise to be and remain in full force and virtue." In the court below the defendant pleaded six several pleas, and issues were joined on the first, second, fourth and sixth pleas. To the third and fifth pleas the United States replied. The defendant demurred to the replication to the third plea, and rejoined to the replication to the fifth plea, to which the United States demurred. Upon these demurrers the court below gave judgment in favor of the defendant. Upon these pleadings two questions have been made and argued at the bar. 1. Whether the bond is in conformity to the requirements of the act of the 24th of April, 1816, c. 69 (3 Stats. at Large, 297), for organizing the general staff, and making further provision for the army of the United States. 2. If not, whether the bond is wholly void; or void only so far as it is not in conformity to that act. The act (§ 6) provides "that all officers of the pay, commissary, and quartermaster's department, shall, previous to entering on the duties of their respective offices, give good and sufficient bonds to the United States fully to account for all moneys and public property which they may receive, in such sums as the secretary of war shall direct." It is plain that the condition of the bond is not, in its very terms, in conformity with this provision. But the argument on the

part of the United States is, that though in terms it varies from the act, yet, inasmuch as all the duties required of the paymaster by law begin and terminate in matters of account, that in substance the condition includes no more than what the prescribed terms of the act contemplate. In our view of the case it is wholly unnecessary to decide this question; because the only breach alleged is the non-accounting for, and non-payment of, moneys due to the United States by Hall, upon a final settlement of his accounts. So far as the condition of the bond requires Hall to account for moneys received by him, it substantially follows the provisions of the act of 1816; and if the bond be not wholly void, it is clear that the United States are entitled to recover upon the present pleadings in whatever way the first question may be decided.

§ 183. *A plea in discharge or avoidance of a bond should state positively and in direct terms the matter of discharge or avoidance.*

The second question, therefore, is that to which the attention of the court will be addressed. Upon the face of the pleadings this must be taken to be a bond voluntarily given by Hall and his sureties. There is no averment that it was obtained from them by extortion or oppression under color of office, as there was in the *United States v. Tingey*, 5 Pet., 115 (§§ 181, 182, *supra*). On the contrary, both the third and fifth pleas are wholly barren of any averments on the subject of the giving of the present bond. All they assert in substance is, that Hall never gave any such bond as is required by the act of 1816; and that the act of 1816 was the only law regulating the bonds of paymasters, with some collateral averments not material to be here mentioned. Now no rule of pleadings is better settled, or upon sounder principles, than that every plea in discharge or avoidance of a bond should state positively and in direct terms, the matters of discharge or avoidance. It is not to be inferred *arguendo*, or upon conjectures. Indeed, both these pleas are open to the objection of being merely argumentative, and are wholly destitute in the technical precision necessary for pleas in avoidance or discharge. The replication of the United States to the third plea does, however, exclude, so far as that plea is concerned, any inference of extortion or oppression *colore officii*; for it avers that the bond was given with the intent of complying with the act of congress, and by the direction of the secretary of war. It may be added that the bond is not only voluntary, but for a lawful purpose, namely, to insure a due and faithful performance of the duties of paymaster, a circumstance which must repel any supposition of an oppressive or unjust design.

§ 184. *A voluntary bond taken by the United States for a lawful purpose is valid, though not prescribed by any positive law.*

But passing from these considerations, the question which first arises is, whether a voluntary bond taken by the United States, for a lawful purpose, but not prescribed by any law, is utterly void. This question was elaborately argued in the case of *The United States v. Tingey*, 5 Pet., 115, and, upon full consideration, it was there held by this court that the United States, being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts, and take bonds in cases within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department to which those powers are confined, whenever such contracts or bonds are not prohibited by law, although the making of such contracts, or taking such bonds, may not have been prescribed by any pre-existing legislative act. The court laid down this as a general principle only, without (as was then said) attempting to enumerate the

limitations and exceptions which may arise from the distribution of powers in our government, and from the operation of other provisions in our constitution and laws. But the court, in applying the principle to the case then before them, further added: "We hold that a voluntary bond taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver, or an agent for the disbursement of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view." From the doctrine here stated, we have not the slightest inclination to depart; on the contrary, from further reflection, we are satisfied that it is founded upon the soundest principles of law, and the just interpretation of the constitution. Upon any other doctrine, it would be incompetent for the government, in many cases, to take any bond or security for debts due to it, or for deposits made of the public money, or even to enter into contracts for the transfer of its funds from one place to another, for the exigencies of the public service, by negotiable paper or otherwise, since such an authority is not expressly given by law in a vast variety of cases. Yet, in *Dugan v. United States*, 3 Wheat., 172 (4 Cond. Rep., 223), and in the *Postmaster-General v. Early*, 12 Wheat., 136 (6 Cond. Rep., 480), this right of the government was treated as unquestionable, and belonging to its general functions, as an appropriate incident. The United States, then, having, in our opinion, a capacity to take a voluntary bond in cases within the scope of the powers delegated to the general government by the constitution, through the instrumentality of the proper functionaries to whom these powers are confided, this consideration disposes of the whole of that part of the argument, and the cases cited in support of it, which are founded upon the distinction between bonds which are given to parties having a capacity to take, and bonds which are given to parties who have no such capacity; the former may be good in part, the latter are wholly void.

§ 185. *A voluntary bond taken under an act of congress, with conditions in addition to those prescribed, is valid so far as it conforms to the act.*

That bonds and other deeds may, in many cases, be good in part and void for the residue, where the residue is founded in illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. Thus, in *Pigot's Case*, 11 Co. Lit., 27 b, it was said that it was unanimously agreed in 14 Hen. VIII., 25, 26, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond, are against law, and some are good and lawful, that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good. And, notwithstanding the decision in *Lee v. Coleshill*, Cro. Eliz., 529, which, however, is distinguishable, being founded on a statute, the doctrine has been maintained and is settled law at the present day in all cases where the different covenants or conditions are severable and independent of each other, and do not import *malum in se*, as will abundantly appear from the case of *Newman v. Newman*, 4 Maule & S., 66, and the other cases hereafter stated, and many more might be added.

§ 186. — *authorities reviewed.*

But it has been urged, at the bar, that this doctrine is applicable only to cases where the case stands wholly at the common law, and not where the illegality

arises under a statute; and this distinction derives countenance from what was said in *Norton v. Simmes*, Hob., 12, where the distinction was taken between a bond made void by statute and by common law; for (it was there said) upon the statute of 23 Hen. VI., c. 9, "if a sheriff will take a bond for a point against that law, and also for a debt due, the whole bond is void, for the letter of the statute is so. For a statute is strict law; but the common law doth decide according to common reason; and having made that void which is against law, lets the rest stand, as in 14 Hen. VIII., 15." In the case of *Maleverer v. Redshaw*, 1 Mod., 35, which was debt upon a bail bond, Mr. Justice Twisden said he had heard Lord Hobart say: "That the statute, that is, 23 Hen. VI., c. 9, is like a tyrant; when he comes, he makes all void. But the common law is like a nursing-father; makes void only that part where the fault is, and preserves the rest." But Mr. Justice Twisden added that Lord Hobart put this doctrine upon the ground that the statute of 23 Hen. VI., c. 9, had expressly declared that if any of the sheriffs, etc., should take any obligation in any other form, by color of their office, that then it should be void. See 2 Saund., 55; *id.*, 59, Williams' note (3). The case in Hobart's Reports was put by the court expressly upon this distinction. And it was well remarked by Mr. Justice Lawrence, in *Kerrison v. Cole*, 8 East, 236, that this case is easily reconcilable with the general principle; for sheriffs' bonds are only authorized to be taken with a certain condition; and, therefore, if they are taken with any other condition, they are void *in toto*, and cannot stand good in part only. But that does not apply to different and independent covenants and conditions in the same instrument, which may be good in part, and bad in part; and so it was held by the whole court in that case; and notwithstanding the instrument (a bill of sale and mortgage of a ship) was, by statute, declared to be utterly null and void, to all intents and purposes, yet it was held that a covenant in the same instrument, to repay the money lent, was good as a personal covenant. The same doctrine was held in *Wigg v. Shuttleworth*, 13 East, 87; *Howe v. Synge*, 15 East, 440; *Mouys v. Leake*, 8 Term R., 411; *Greenwood v. The Bishop of London*, 5 Taunt., 727; S. C., 1 Marsh., 292. In this last case, the court took notice of the true line of distinction between the cases, namely, between those cases where the statute had declared the instrument taken in any other form than that prescribed by the statute to be utterly void, and those cases where it had declared the instrument void only as to the illegal act, grant or conveyance. It was the case of conveyance affected with simony, so far as the next presentation was concerned, but conveying the advowson in fee. On this occasion the court said: "There can be no doubt that the conveyance of an advowson in fee, which is of itself legal, if it be made for the purpose of carrying a simoniacal contract into execution, is void as to so much as goes to effect that purpose; and if the sound part cannot be separated from the corrupt, it is altogether void. It is not, as in the case of usury, and some others, avoided by the positive and inflexible enactment of the statute, but left to the operation of the common law, which will reject the illegal part and leave the rest untouched if they can be fairly separated." Here the doctrine was applied directly to the very case of a statute prohibition.

But the case of *Doe dem. Thompson v. Pitcher*, 6 Taunt., 359; S. C., 2 Marsh., 61, contains a still more full and exact statement of the doctrine. It was a case supposed to be affected by the prohibitions of the statute of charitable uses. 9 Geo. II., c. 36. Lord Chief Justice Gibbs, in delivering the opinion of the court, addressing himself to the argument that if the deed was void as to part it

must be void as to the whole, said: "If the objection had been derived from the common law, it is admitted that would not be the consequence. But it is urged that the statute makes the whole deed void. As the counsel for the plaintiff puts it, there is no difference between a transaction void at common law and void by statute. If an act be prohibited, the construction to be put on a deed conveying property illegally is, that the clause which so conveys it is void equally, whether it be by statute or common law. But it may happen that the statute goes further, and says that the whole deed shall be void to all intents and purposes; and when that is so, the court must so pronounce, because the legislature has so enacted, and not because the transaction prohibited is illegal. I cannot find in this act any words which make the entire deed void, etc. I think this grant of that interest in land, which by the terms of the grant is to be applied to a charitable use, is void, and that the deed, so far as it passes other lands not to a charitable use, is good." Such is the clear result of the English authorities. In this court a similar doctrine has been constantly maintained. It was acted upon in the case of the *Postmaster-General v. Early*, 12 Wheat., 136. It was taken for granted in *Smith v. The United States*, 5 Pet., 293, where the objection, indeed, was not taken; but the bond was not in exact conformity to the statute (act of the 16th of March, 1802, c. 9, § 16, 3 Stats. at Large, 135) under which it was given by a paymaster. It was also directly before the court in *Farrar v. United States*, 5 Pet., 373, where the bond, taken under the act of the 7th of May, 1822, § 1 (3 Stats. at Large, 697), wholly omitted one of the clauses required by the statute to be inserted in the condition. The court there entertained no doubt as to the validity of the bond, and only expressed a doubt whether a breach which was within the direct terms of the omitted clause, and yet which fell within the general words of the inserted clause, could be assigned as a good breach under the latter. But if the bond, being a statute bond, was totally void, because the condition did not conform to all the requirements of the act, it would have been wholly useless to have discussed the other questions arising in the cause. Upon the whole, upon this point we are of opinion that there is no solid distinction in cases of this sort between bonds and other deeds containing conditions, covenants or grants, not *malum in se*, but illegal at the common law, and those containing conditions, covenants or grants illegal by the express prohibitions of statutes. In each case the bonds or other deeds are void as to such conditions, covenants or grants which are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is when the statute has not confined its prohibitions to the illegal conditions, covenants or grants, but has expressly, or by necessary implication, avoided the whole instrument to all intents and purposes.

§ 187. *An act of congress prescribing the form of official bonds without negative words is directory.*

It has been urged, however, in the present case, that the act of 1816, c. 69, does, by necessary implication, prohibit the taking of any bonds from paymasters other than those in the form prescribed by the sixth section of the act, and, therefore, that bonds taken in any other form are utterly void. We do not think so. The act merely prescribes the form and purport of the bond to be taken of paymasters by the war department. It is in this respect directory to that department, and doubtless it would be illegal for that department to insist upon a bond containing other provisions and conditions differing from those prescribed or required by law. But the act has nowhere declared that all other

bonds, not taken in the prescribed form, shall be utterly void; nor does such an implication arise from any of the terms contained in the act, or from any principles of public policy which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. It would be a very mischievous interpretation of the act to suppose that, under such circumstances, it was the intendment of the act that the bond should be utterly void. Nothing, we think, but very strong and express language should induce a court of justice to adopt such an interpretation. Where the act speaks out it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act to declare the bond void, as to any conditions which are imposed upon a party beyond what the law requires. This is not only the dictate of the common law but of common sense. We think, then, that the present bond, so far as it is in conformity with the act of 1816, c. 69, is good; and for any excess beyond that act, if there be any (on which we do not decide), is void *pro tanto*. The breach assigned is clearly of a part of the condition (viz., to account for the public moneys), which is in conformity to the act, and therefore action is well maintainable therefor. The case of the Supervisors of Alleghany County v. Van Campen, 3 Wend., 48, proceeded upon grounds of a similar nature.

§ 188. *Officer; appointment; official bond; sureties; estoppel.*

Before concluding this opinion, it may be proper to take notice of another objection raised by the third plea, and pressed at the argument. It is that Hall was not entitled to act as paymaster until he had given the bond required by the act of 1816, in the form therein prescribed, and that, not having given any such bond, he is not accountable as paymaster for any moneys received by him from the government. We are of a different opinion. Hall's appointment as paymaster was complete when his appointment was duly made by the president, and confirmed by the senate. The giving of the bond was a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as paymaster. Having received the public moneys as paymaster, he must account for them as paymaster. Indeed, the condition of the bond having recited that he was appointed paymaster of the rifle regiment, he and his sureties are estopped to deny the fact, and by the terms of their contract they undertake that "he shall regularly account, when thereto required, for all moneys received by him as paymaster aforesaid."

§ 189. *Misnomer of obligee in bond is cured by averment of identity.*

The misdescription of the corporate or politic name of the plaintiffs in the bond, by calling them "The United States of North America," instead of America, is cured by the averment of identity in the declaration; and, indeed, it has not been insisted on at the argument. Upon the whole, we are of opinion that the third and fifth pleas, upon which the circuit court gave judgment in favor of the defendant, are bad in law, and therefore the judgment ought to be reversed, and judgment thereon be entered in favor of the United States, and the cause remanded to the circuit court for further proceedings.

UNITED STATES v. LINN.

(15 Peters, 290-318. 1841.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes from the circuit court of the United States for the state of Illinois, on a certificate of division of opinion upon the

following points: 1. Whether the obligation set out in the second and third counts in the declaration, being without seal, is a bond within the act of congress (3 Stats. at Large, 571). 2. Whether such instrument is good at common law.

§ 190. *An obligation without a seal is not a bond within an act of congress requiring security by bond.*

Upon the first point no doubt can exist. There being no seal to the instrument, it is not a bond. This point was abandoned by the attorney-general on the argument, and the question must, of course, be answered in the negative. And as the act of congress directs the security to be taken by bond, this answer necessarily implies that the instrument now in question is not in form the instrument required by the act of congress. And the second point presents the broad question whether the instrument is good and binding at common law, independent of the statute, as to the mere form of the security.

§ 191. *A voluntary security in the form of the bond required from an officer by an act of congress, taken by the United States instead of a bond, is valid at common law, if the act contains no negative words.*

If this is a contract entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law. In the case of *The United States v. Tingey*, 5 Pet., 115 (§§ 181, 182, *supra*), it was held by this court that the United States, being a body politic, have a capacity to enter into contracts, and take bonds or securities within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department to which those powers are intrusted, whenever such bonds or contracts are not prohibited by law, although the making such contracts or taking such bonds may not have been prescribed by any pre-existing legislative act. From this it follows that a voluntary contract or security taken by the United States for a lawful purpose, and upon a good consideration, although not prescribed by any law, is not utterly void. That the instrument in question was taken for a lawful purpose cannot be questioned. It was taken to secure the faithful performance of duties imposed by law upon a receiver of public money. Although the question came up in the circuit court upon a demurrer to the declaration, the point certified does not involve any inquiry respecting the sufficiency of the declaration. The declaration is referred to merely for a description of the instrument upon which the question arose. And if the instrument can be made valid and binding at common law by any averments and legal evidence, the question must be answered in the affirmative.

This instrument, as set out in the second and third counts in the declaration, bears date on the 1st day of April, in the year 1836, reciting that the president of the United States had, pursuant to law, appointed the said William Linn to be receiver of public money for the district of lands subject to sale at Vandalia, in the state of Illinois, for the term of four years from the 12th day of January, in the year 1835, by commission bearing date on the 12th of February, 1835. That the said defendants did then and there, in and by said instrument in writing, by the names, contractions, abbreviations, and descriptions, etc. (naming all the defendants), acknowledge themselves to be held and firmly bound unto the said plaintiff in the sum of, and promised to pay unto the said plaintiffs, \$100,000 of money of the United States; to which payment, well and truly to be made, they, the said defendants, bound themselves jointly and severally, their joint and several heirs, executors and administrators, by the said

instrument in writing; which said instrument in writing was, however, to be void and of none effect, in case and upon the condition that the said William Linn should faithfully execute and discharge the duties of his office of receiver of public moneys as aforesaid; otherwise the said instrument in writing should abide and remain in full force and virtue. And the question is whether this instrument is binding at common law, as a security for the faithful discharge of the duties of receiver of public moneys by William Linn. The argument urged to the court against the validity of this instrument has been presented under the following heads: 1. That the writing is without consideration. 2. If not without consideration, it was a past and executed consideration. 3. That it is contrary to the policy of the act of congress, and so void.

The recital in the instrument is that the president of the United States, pursuant to law, had appointed the said William Linn receiver of public money for the district of land subject to sale at Vandalia, in the state of Illinois, for the term of four years from the 12th of January, 1835, and who was duly commissioned for that purpose; and he was accordingly, by the laws of the United States, entitled to receive the same compensation and emoluments, and subject to the same duties in every respect in relation to the lands to be disposed of at his office, as are or may be by law provided in relation to the receivers of public money in other offices established for the sale of public lands, and was by law required to give security in the same manner and sum as other receivers of public moneys for the sale of public lands. 4 Story, 2374, art. 26, June, 1834 (4 Stats. at Large, 686).

§ 192. — *the emoluments of the office are a sufficient consideration for such obligation.*

These emoluments were the considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment. This was so held by this court in the case of *The United States v. Bradley*, 10 Pet., 364 (§§ 183-189, *supra*). The court there say it has been objected that Hall was not entitled to act as paymaster until he had given the bond required by the act of 1816 (3 Stats. at Large, 297), in the form therein prescribed; and that, not having given any such bond, he is not accountable, as paymaster, for any moneys received by him. We are, say the court, of a different opinion. Hall's appointment as a paymaster was complete when his appointment was duly made by the president, and confirmed by the senate. The giving the bond was a mere ministerial act, for the security of the government, and not a condition precedent to his authority to act as a paymaster. Having received the public moneys as paymaster, he must account for such money. According to this doctrine, which is undoubtedly sound, Linn was a receiver *de jure*, as well as *de facto*, when the instrument in question was given. And although the law requiring security was directory to the officers intrusted with taking such security, Linn was under a legal as well as a moral obligation to give the security required by law; and, being entitled to the compensation and emoluments attached to the office, which by his commission was to continue for four years from the 12th of January, 1835, this was a sufficient consideration appearing on the face of the instrument to support the promise. A benefit to the promisor, or damage to the promisee, constitutes a good consideration. 5 Cranch, 150; 2 Pet., 182. If Linn received a sufficient consideration to uphold the promise on his part, it was sufficient to bind the sureties. There was no necessity for any considera-

tion passing directly between the plaintiffs and the sureties. It was one entire and original transaction; and the consideration which supported the contract of Linn supported that of his sureties. If the contract between the plaintiffs and Linn had been executed and perfectly past, before the other defendants became sureties, so that their promise and undertaking could not connect itself with the original contract, it would have required a distinct consideration. But the whole being one entire and original contract, and not collateral on the part of the sureties, the consideration received by Linn was sufficient to support the contract on the part of his sureties. 8 Johns., 37; Cro. Eliz., 137; 3 Bur., 1886.

§ 193. — *such consideration is not past, but continuing.*

2. This was not a past and executed consideration. The mere appointment of Linn, as receiver of public money, was not the consideration of the contract, but the emoluments and benefit resulting from the appointment formed the consideration. It was a continuing consideration, running with his continuance in office, and existed in full force at the time the instrument in question was signed. This appears from the recitals in the contract. The term of office was four years from the 12th of January, 1835.

§ 194. — *such obligation is not void as against public policy.*

3. But it has been very strongly pressed upon the court that it is against the policy of the act of congress to allow security to be taken otherwise than by a bond. It may be well questioned whether this objection comes properly under consideration in the question certified to this court, which is simply whether this instrument is good at common law. This, in strictness, presents the question entirely independent of the statute, and as if no statute had ever been passed on the subject. But we do not wish to confine ourselves to this narrow view of the question. The act of congress under which this instrument was taken (2 Stats. at Large, 75; 1 Story, 786, § 6) directs that a receiver of public moneys shall, before he enters upon the duties of his office, give bond, with approved security, in the sum of \$10,000, for the faithful discharge of his trust. The statute does not profess to give the precise form of the bond. It is only a general direction to give a bond for the faithful discharge of the trust. There are no negative words in the act, or anything by implication or otherwise, to make void a security taken in any other form; nor is there anything in reason or sound principle that should lead to such a conclusion. Had it been deemed by congress of such importance as is now attached to it, it is reasonable to suppose that securities taken otherwise than by bond would have been declared void. The only objection urged against the validity of this instrument is that it has no seals annexed to the names of the signers. In every other respect it is not pretended but that it conforms precisely to the requirements of the statute. And what is the real difference between an instrument under seal and one not under seal? The only material difference is that, in the one case, the seal imports a consideration, and in the other it must be proved. There ought to be some very strong grounds to authorize a court to declare an instrument absolutely void which has been voluntarily made upon a good consideration, and delivered to the party for whose benefit it was intended. There is in this case no principle of public policy or morality violated. But, on the contrary, the object and purpose for which the instrument was given was in furtherance of the provisions of the statute and in compliance with the legal and moral obligations imposed upon the receiver of public moneys. The act of congress directs a bond to be taken in the penalty of \$10,000. Suppose a bond should

be taken in the penalty of \$20,000, would it on that account be void? If it must pursue the precise directions of the act, it certainly would be void. The authority given to the president to increase the amount of the bonds was not passed until the year 1820 (3 Stats. at Large, 582; 3 Story, 1790), and if any departure from the precise form of the security directed by the statute would make void the bond, an increase of the penalty would have had that effect, before the act of 1820. The act directs a bond to be given with approved security. The nature of this security is not prescribed. A mortgage or any other approved security, voluntarily given, would no doubt be valid; and it would be no very forced interpretation of this act to consider this instrument as such security. It will be seen, from the recital, compared with the date of this instrument, that it was given long after the appointment of Linn. Why and under what circumstances it was given does not appear; nor is it important here to inquire. Should that become necessary, the proper time to inquire into that matter will be upon the trial of the cause.

The point now presented to this court is a single and abstract question; whether this instrument is good at common law. It is argued that this instrument is absolutely void, on the ground that it is against the policy of the act to permit security to be taken in any other form than is prescribed by the act. In a certain sense this may be true. It is the duty of all public officers intrusted with the execution of powers delegated to them to pursue the directions of the law conferring the power. But to construe all such laws as a special delegation of authority, to be strictly and literally pursued, and to consider every departure from it as done without authority and absolutely void, would frequently be defeating the very object and purpose for which the law is made, and ought not to receive such a construction, unless the statute itself declares all such acts void. But if the mere omission to put seals to the instrument shall make it void, every other departure from a strict and literal compliance with the direction of the act would make void the security. This has not been the light in which this court have viewed analogous cases. In the case of *The United States v. Bradley*, 10 Pet., 364, already referred to, the court say: "It has been urged that the act of 1816, c. 69, does, by necessary implication, prohibit the taking of any bonds from paymasters other than those in the form prescribed by the sixth section of the act; and, therefore, that bonds taken in any other form are utterly void. We do not think so. The act merely prescribes the form and purport of the bond to be taken of paymasters by the war department. It is in this respect directory to that department; and doubtless it would be illegal for that department to insist upon a bond containing other provisions and conditions, differing from those prescribed or required by law. But the act has nowhere declared that all other bonds, not taken in the prescribed form, shall be utterly void. Nor does such an implication arise from any of the terms contained in the act, or from any principles of public policy which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. It would be a very mischievous interpretation of the act to suppose that, under such circumstances, it was the intendment of the act that the bond should be utterly void. Nothing, we think, but very strong and express language should induce a court of justice to adopt such an interpretation. Where the act speaks out, it would be our duty to follow it. Where it is silent, it is a sufficient compliance with the policy of the act to declare the bond void as to any conditions which are imposed upon a party beyond what the law

requires. This is not only the dictate of the common law, but of common sense."

The act under which the security in that case was taken is substantially the same as the one under which the instrument now in question was taken. 3 Story, 1575. It requires the paymaster to give good and sufficient bond to the United States, fully to account for all moneys and public property which he may receive, in such sums as the secretary of war shall direct. All the reasons urged in favor of the validity of the bond in that case apply with equal force to the one now before the court. The only departure of the instrument from the directions of the act is the want of a seal; and this, as is said in the case against Bradley, may have been omitted by mutual mistake, or accident, and wholly without design. We think that the mere want of seals is not such a departure from the act as to warrant the court upon any supposed principles of public policy to pronounce this instrument utterly void, it being good at common law, and given in furtherance of the great object of the statute, and as security for the faithful discharge of the duties required of the office. We are accordingly of opinion that the second question must be answered in the affirmative.

JUSTICES STORY, M'LEAN and BALDWIN dissented.

UNITED STATES *v.* HODSON.

(10 Wallace, 395-409. 1870.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of Wisconsin. The action was debt upon a penal bond in the sum of \$5,000. The condition was not set out and no breaches were alleged in the declaration. The declaration was framed to recover the penalty. The defendants craved oyer of the condition, and it was given. It is set out in the record, and is substantially as follows: That William Hodson had applied to the collector of internal revenue for the second collection district in the state of Wisconsin for license as a distiller at Turtleville, in that state, and that if the said William Hodson should faithfully conform to all the provisions of an "act to provide internal revenue to support the government, and to pay interest on the public debt, and for other purposes," approved June 30, 1864, and such other acts as now are or may be hereafter in this behalf enacted, then the above obligation to be void, otherwise to remain in full force.

The defendants pleaded performance. The plaintiffs thereupon replied and assigned the following breaches in their replication: (1) That the defendant Hodson did manufacture a large quantity of distilled spirits, to wit, one hundred thousand gallons, and did neglect to make a true entry and report of the same, and did not from day to day make a true entry in a book kept for that purpose of the number of gallons by him distilled, and also of the number of gallons by him placed in warehouse, and of the number of gallons by him sold and removed for consumption and sale, and the proof thereof, and that he did not cause the same to be done. (2) That the said Hodson did not conform to the provisions of said act and acts in this, to wit, that he did sell and remove from his distillery, for consumption and sale, a large quantity of distilled spirits manufactured by him, to wit, fifty thousand gallons, and did neglect to render to the assessor or assistant assessor of the said second collection district, etc., a

true account in duplicate, taken from his books, of the number of gallons of spirits distilled by him, and also of the number of gallons sold and removed for consumption and sale. (3) That the said Hodson did not conform to the laws aforesaid in this, to wit, that he did remove from his distillery a large quantity, to wit, one hundred thousand gallons of spirits, then and there by him manufactured, upon which duties were by law imposed, and which duties he neglected to pay. (4) And that the said Hodson did not conform to the provisions of the laws aforesaid in this, to wit, that he did manufacture a large quantity of spirits, to wit, one hundred thousand gallons, and did remove the same from his distillery for consumption and sale, before the same were inspected, gauged and branded by an inspector appointed to perform such duties, and did neglect to cause the spirits so removed to be inspected, gauged and branded before the same were removed, as aforesaid.

The defendants filed a rejoinder, specially traversing each of the breaches assigned, and concluded to the country. This put the cause at issue. Upon the trial the United States offered in evidence the bond and proof of the several breaches. The defendants objected to the evidence upon the ground that the conditions were not required by, and were not in conformity with, the statutes of the United States. The court sustained the objection and excluded all the evidence. A verdict and judgment were thereupon rendered for the defendants. The United States excepted, and have brought this ruling here for review.

§ 195. *The defendant may, after oyer of the bond sued on, raise the question of its validity at any stage of the trial.*

The only inquiry presented for our consideration is the validity of the bond upon which the suit was founded. It would have been more regular to raise the question by a demurrer after oyer, or by a motion in arrest of judgment. But if the bond were void it was competent for the defendants to raise the objection at any stage of the trial. The court was not bound to proceed further, when it became clear that, whatever the verdict, the plaintiff could not recover. To proceed with the trial under such circumstances would have been idly to waste the time of the court and trifle with the forms of justice.

§ 196. *Conditions required in distillers' bonds.*

The bond was taken under the fifty-third section of the act of June 30, 1864, ch. 173 (13 Stat. at Large, 242). That section required a bond to be given by every licensed distiller, and prescribes its conditions. They are substantially: That if the distiller shall use any additional still he will report the fact to the assessor. That he will from day to day enter in a book to be kept for that purpose, the number of gallons that may be distilled, and the quantity of grain he may use; and that the book shall be open at all times to the inspection of the assessor. That he will render to the assessor, on the 1st, 11th and 21st days of each month, an account in writing of the number of gallons distilled, of the number placed in warehouse, and of the number sold or removed for consumption and sale, and also of the quantity of grain used for the fractional part of a month next preceding the report, and the proof thereof, which report is to be verified by affidavit. That he will not sell, or permit to be removed for consumption and sale, any spirits distilled under his license until they have been inspected, gauged, proved, and entered upon his books, as aforesaid. And that he will at the time of rendering his account to the collector pay the duty imposed by law upon such spirits.

It is not denied that all the breaches are within the requirements of the statute touching the bond, except that part of the first one, which is, that the

licensee did not, from day to day, "make true and exact entry thereof, in a book to be kept for that purpose, of the number of gallons by him placed in warehouse, and the number of gallons by him sold and removed for consumption and sale, and the proof thereof." It is said the statute required him to do this, but did not require him to give a bond that he would do so. The statute required the bond to be conditioned that he would, from day to day, enter in a book to be kept for that purpose, the number of gallons distilled; that the book should be open to the inspection of the assessor; that he would render, at the time specified, "an exact account in writing" of the number of gallons sold, or removed for sale and consumption, and the proof thereof; and that he would not sell, or permit to be sold or removed, for consumption or sale, any spirits distilled by him until the quantity had been "duly entered upon his books, as aforesaid." Considering these provisions together, we think the implication clear that they require such an account to be kept as the breach alleges was not kept, and that if the conditions, as prescribed, had been set out at length in the bond, such would have been their legal effect. The first part of the fifty-seventh section is silent as to the bond, but is explicit as to the account, and strongly supports the conclusion at which we have arrived. The question must be considered in the light of the entire context bearing upon the subject. What is implied in a statute is as much a part of it as what is expressed. *United States v. Babbit*, 1 Black, 55. Revenue statutes are not to be regarded as penal, and therefore to be construed strictly. They are remedial in their character, and to be construed liberally, to carry out the purposes of their enactment. *Cliquot's Champagne*, 3 Wall., 145. We hold this, like all the other breaches, to be within the conditions which the statute enacts the bond shall contain. In one view of the case, this fact is important; in another and perhaps more important one, it is no wise material. Both will be presently considered.

§ 197. *A voluntary bond given to the United States for a lawful purpose, upon a good consideration, is valid, though not required by positive law.*

The record is silent as to any coercion or duress. The bond is, therefore, to be considered a voluntary one. *United States v. Bradley*, 10 Pet., 345 (§§ 183-189, *supra*). A bond in this form is not prohibited by the statute, nor is it contrary to public policy. It was founded upon a sufficient consideration, and was intended to subserve a lawful purpose.

In *The United States v. Tingey*, 5 Pet., 127 (§§ 181, 182, *supra*), the suit was upon the bond of a purser in the navy. The statute declared "that every purser, before entering on the duties of his office, shall give bond, with two or more sufficient sureties, in the penalty of \$2,000, conditioned faithfully to perform all the duties of purser in the navy of the United States." Act of March 30, 1812 (2 Stat. at Large, 699, ch. 47). The court said, "it is obvious that the condition of the present bond is not in the terms prescribed by the act, . . . and it is not limited to the duties or disbursements of Deblois as purser, but creates a liability for all moneys received by him, and for all public property committed to his care, whether officially as purser or otherwise." The bond was held to be valid. The decision was put upon the grounds that the government had the capacity to make the contract, that the United States were a body politic, and that, as incident to its general right of sovereignty, it was competent to enter into any contract not prohibited by law, and found to be expedient in the just exercise of the powers confided to it by the constitution. *Dugan v. The United States*, 3 Wheat., 172, was referred to as sustaining this proposition. It was remarked that a different principle would

involve a denial to the general and the state governments of the ordinary rights of sovereignty. In conclusion it was said, in relation to the bond there in question: "The United States have a political capacity to take it. We see no objection to its validity in a legal or moral view." Tingey, who was a surety, pleaded, among other things, in the court below, that the bond "was under color and pretense of said act of congress, and, under color of office, required and extorted from the said Deblois, and from the defendant, as one of his sureties, against the form and effect of the said statutes, by the then secretary of the navy." The United States demurred. The court overruled the demurrer, and gave judgment for the defendant. The United States prosecuted a writ of error. This court held the plea sufficient and affirmed the judgment.

In the case of *The United States v. Bradley*, 10 Pet., 343, the views of the court expressed in *The United States v. Tingey* were restated, and, upon the fullest consideration, were reaffirmed. *United States v. Linn*, 15 Pet., 290 (§§ 190-194, *supra*), was an action against a receiver of public moneys and his sureties. The statute in that case required that the receiver should "give bond, with approved security, in the sum of \$10,000, for the faithful discharge of his trust." The instrument given was without seal, and was, therefore, not the security required by the statute. The counsel for the defendants insisted that the instrument was void for the reasons, among others, that it was not the form of security required by the statute; that the prescribing of one security was an implied prohibition of all others, and that, if the instrument in question could be sustained, the statute might, in all cases, be disregarded, and a mortgage of realty or personalty or any other imaginable security might be substituted for that which the statute required. The court responded: "If this is a contract, entered into by competent parties and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law." "A mortgage, or any other approved security voluntarily given, would no doubt be valid." These cases are conclusive of the question before us. Their authority has not been shaken by any later adjudication; we think they rest upon the soundest principles, and are in accordance with a wise and salutary policy. We feel no disposition to re-examine the propositions they affirm.

§ 198. *Where a bond contains legal and illegal conditions, and they are severable, the latter may be disregarded.*

A narrower view of the instrument in question may be taken, which will also maintain its validity to the extent of the breaches assigned in the declaration. It is a settled principle of law that where a bond contains conditions, some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced. Applying this principle to the case before us, all which this instrument contains with reference to statutes other than the act of 1864, under which it was taken, may be rejected, and the generality of the reference to that act may be so limited as to include only what is covered by the conditions prescribed by the statute, as if those conditions were incorporated and set out in the bond *in hæc verba*. An authority exactly in point, for this construction, is found in the well-considered case of *Ohio v. Findley*, 10 Ohio, 51. The principal in the bond in that case was a county treasurer. The bond was conditioned that he should perform his official duties according to law. The statute, as in the case before us, was specific in its requirements as to what the bond should contain, and the condition, it was admitted, largely exceeded them. The court said: "That part which is

legal is marked out in the statute book itself, and is therefore as completely severable from the rest as if the two parts were separated in the condition of the bond."

§ 199. *Estoppel; presumed to know the law.*

But we prefer to place our judgment upon the broader ground marked out by the adjudications of this court, to which we have referred. Every one is presumed to know the law. Ignorance standing alone can never be the basis of a legal right. If a bond is liable to the objection taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into, and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors. Judgment reversed, and the cause remanded with an order to issue a *venire de novo*.

UNITED STATES v. HUMASON.

(Circuit Court for Oregon: 5 Sawyer, 537-543. 1879.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—This action is brought against the defendant as the executrix of Orlando Humason, deceased, one of the sureties upon the two bonds given by the late William Logan to the United States as Indian agent for Oregon. The defendant demurs to the complaint, and upon the argument assigned as cause, that the penalty of the bonds in excess of \$2,000 was unauthorized by law, and they are, therefore, so far illegal and void. The following are the material facts stated in the complaint: In 1861, William Logan, being an Indian agent in Oregon, together with Orlando Humason, aforesaid, executed a bond to the plaintiff in the sum of \$25,000, conditioned for the faithful performance of the duties of his office, and failed to account for \$1,006.06 of the public moneys received by him as such agent thereunder. That on July 1, 1862, said Logan being still Indian agent as aforesaid, together with said Humason, executed another bond to the plaintiff in the sum of \$20,000, upon like conditions, and failed to account for \$7,678.66 of the public moneys received by him as such agent thereunder.

At the date of the execution of these bonds it was provided by section 4, act June 5, 1850 (9 Stat., 437), that Indian agents, not exceeding three, might be appointed for Oregon, who shall "give bond as now required by law." The only provision of law then in force in the United States upon the subject of the bonds of Indian agents was contained in sections 4 and 8 of the act of June 30, 1834 (4 Stat., 735), entitled "An act to provide for the organization of the department of Indian affairs," and enacted with reference to twelve agents for Indians east of the Rocky Mountains. By said section 4 it was provided that such agents should give bond "in the penal sum of \$2,000;" and by said section 8 that the president might, "from time to time, require such additional security, and in larger amounts, from all persons charged or trusted, under the laws of the United States, with the disbursement or application of money, goods or effects of any kind on account of the Indian department." Section 2075 of the R. S.

§ 200. *A voluntary bond, given to the United States for the performance of duty, is good, if there be no statute prescribing a different bond.*

So far as appears, these bonds were given by Logan and his sureties voluntarily. They relate to the performance of duties concerning the intercourse with Indian tribes — a subject within the jurisdiction of the United States — and are an appropriate means of regulating the same. In the absence, then, of any statute prescribing a bond with a different penalty or conditions, these bonds would be valid. *United States v. Howell*, 4 Wash., 623; *United States v. Tingey*, 5 Pet., 127 (§§ 181, 182, *supra*); *United States v. Bradley*, 10 id., 357 (§§ 183–189, *supra*). But there was a statute in this case prescribing the penalty of an Indian agent's bond, and so far as the penalties of these bonds vary from this standard they are illegal and void, unless authorized by said section 8. *Dixon v. United States*, 1 Brock, 184; *United States v. Howell*, *supra*; *Farrar v. United States*, 5 Pet., 388 (§§ 489–494, *infra*); *United States v. Bradley*, *supra*, 360; *Armstrong v. United States*, Pet. C. C., 47.

§ 201. *Under the act of 1850, Indian agents were required to give bond in the sum of \$2,000, and being persons "charged and trusted," might be required by the president to give further security.*

Section 4 of the act of June 5, 1850, *supra*, which provides that Indian agents appointed for Oregon should "give bond as now required by law," necessarily referred to the provisions of the act of June 30, 1834, *supra*, upon that subject, and they thereby became, in effect, a part of such act. *United States v. Babbit*, 1 Black, 56. Upon these premises it is contended by counsel for defendant that section 4 of the act of June 30, 1834, prescribes the amount of the penalty of the bond of Indian agents for Oregon at \$2,000, and that the penalty of these bonds in excess of that amount is void. In support of this conclusion, it is insisted that the provisions of section 8 of the act of 1834 are not applicable to these bonds for two reasons: 1. Because it does not appear from the complaint that the president ever made any order, either general or special, requiring these bonds to be given in a greater amount than \$2,000, and therefore they were so given contrary to law, and are *pro tanto* void. 2. That said section 8 does not apply to Indian agents, as they are not "persons charged or trusted" with the disbursement or application of money, goods or effects on account of the Indian department.

Speaking from common knowledge, one would say that an Indian agent in Oregon, at the date of these bonds, was a person largely so "charged or trusted;" and a glance at the provisions of the act of 1834 will show that such charge or trust was contemplated by the law-making power. By section 3 of that act the superintendent, under the direction of the president, has supervision over the official conduct and accounts of agents. Section 7 provides, "it shall be the general duty of Indian agents . . . to manage and superintend the intercourse with the Indians within their respective agencies agreeably to law;" to obey the instructions of the secretary of war, commissioner and superintendent of Indian affairs, and to "carry into effect such regulations as may be prescribed by the president." Section 12 directs the agent to be "present and certify to the delivery of all goods and money required to be paid or delivered to the Indians." Sections 15 and 16 authorize the president, under certain circumstances and independent of any treaty stipulation, to furnish Indians with rations, goods, animals and implements of husbandry; and section 17 authorizes the president to prescribe rules for carrying this or other acts relating to Indian affairs into effect. By these rules an agent may be directly "charged or trusted" as pro-

vided in section 8 of the act of 1834; and it is fair to presume that such was the case with the principal in these bonds, for the condition of them is that he will faithfully account for all public money and property which shall come to his hands, while it appears from the complaint that he actually did receive large sums of public money to be expended and accounted for as Indian agent. But more than this, the act directly provides, as stated, that the agent shall superintend the Indians of his agency and enforce the regulations of the president, which almost necessarily involve the disbursement of money and the application of property for the supervision of an agent's accounts, which necessarily implies disbursements, and for the agent's presence and participation in the delivery of all goods and money to the Indians, which also implies that he is at least "charged or trusted" with the "application" of the same. It is not necessary that this charge or trust should be solely in the agent, but it is sufficient if he is called upon to act in conjunction with others or even as an inspector or witness of the actions of such others.

But there are other acts of congress in force at the date of the execution of these bonds which bear upon this section. Section 8 of the act of 1834 is prospective, and applies whenever, by any subsequent legislation or executive regulation, an Indian agent is required to disburse or apply money or property on account of the Indian department. Section 1 of the act of March 3, 1857 (11 Stat., 169, sec. 2089, R. S.), authorizes the president to direct the payment of money to Indians or Indian tribes by the superintendent, in the presence of the agent as a witness. Section 1 of the act of June 27, 1846 (9 Stat., 20, sec. 2092, R. S.), provides that "no superintendent, Indian agent or other disbursing officer in such service shall have advanced to him on Indian or public account any money to be disbursed in future," until he has settled his accounts for the preceding year and the balances in his hand are ready to be paid over. By this act it is distinctly assumed that Indian agents are disbursing officers in that department or "service," and so they were. Of this there can be no doubt, although their powers and duties in this respect may have been mainly prescribed by executive regulation. As has been suggested in Oregon, for years prior to the date of these bonds, it was a matter of common knowledge that the yearly disbursements of the Indian agents amounted to hundreds of thousands and formed an important item in the circulation and business of the country.

It is also suggested for the defendant that the executive power to require "additional security" from agents does not include the power to prescribe the amount of the original bond. "Additional security" may be either a new or additional bond with the same or other sureties in the same or a greater amount. The security given by an officer for the performance of his duties consists as well in the amount of his bond as the number and character of his bondsmen, and an additional security necessarily implies an additional bond or one in a greater amount or with more responsible sureties. But the power to require "additional security" is not all the power conferred upon the president by section 8 of the act of 1834. He may also require security to be given in "larger amounts" — that is, than the sum of \$2,000, as prescribed in section 4 of said act. If this is not the effect of the clause — "and in larger amounts," it has no signification and is superfluous.

§ 202. *Official acts are presumed, in the absence of proof to the contrary, to be in pursuance of law.*

As to the first of these objections — that it does not appear from the complaint that Logan was required by the president to give bond in an amount

larger than \$2,000,— I am quite clear that the mere giving and taking the bond in such an amount is sufficient to warrant the presumption that he was so required, until the contrary appears. Official duty is presumed to have been regularly performed, and therefore, when the commissioner of Indian affairs or other officer of the Indian department took these bonds from Logan in an amount larger than \$2,000, the law presumes that he did so rightfully rather than otherwise, by the direction, general or special, of the president. The question involving an official act of the executive is triable by the knowledge of the court, and must eventually be determined by it from an examination of the executive records and proceedings. If no such direction was ever given, then there was no authority for giving or taking these bonds in any greater sum than \$2,000, and all in excess of that amount is void. The demurrer is overruled.

UNITED STATES v. MASON.

(Circuit Court for Ohio: 2 Bond, 188-189. 1886.)

Opinion by the Court.

STATEMENT OF FACTS.— This is an action of debt against Columbus B. Mason, on his bond as a deputy postmaster at Circleville, Ohio, and against the other defendants, as the sureties of Mason. The declaration sets out at length the conditions of the bond, one of which is that the said Mason, as a deputy postmaster, "shall faithfully account with the United States, in the manner directed by the postmaster-general, for all moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers and other property and papers which he, as postmaster, or as agent and depository as aforesaid, shall receive for the use and benefit of the said postoffice department." Various breaches of the bond are assigned; and, among others, it is averred that Mason and his sureties did not account for all the postage stamps, envelopes, etc., received by Mason from time to time, as deputy postmaster. For the purpose of a decision of the question now before the court, it is not necessary to notice the other breaches assigned.

The sureties have filed several special pleas, setting up matters of defense to the action on the bond. Among others there is an eighth plea, which is, in substance, that Mason, as deputy postmaster, faithfully accounted for and paid over all moneys for which he was accountable, and which is claimed as due from him, "except such part thereof as may have arisen as proceeds of sales of postage stamps and stamped envelopes, if any such were placed in his hands, or furnished to him by the postmaster-general;" as to which they aver that the plaintiff is not entitled to recover against them as sureties, "because they say the said Columbus B. Mason, in his said capacity of deputy postmaster, or otherwise, was not an assistant treasurer, or a designated depository of the United States, and that it was not lawfully competent for the postmaster-general, or any other officer or agent of the plaintiff, to furnish to him, the said Columbus B. Mason, in his said capacity of deputy postmaster or otherwise, postage stamps or stamped envelopes except upon payment thereof in advance." To this plea there is a general demurrer, and upon that the question before the court arises. It presents the single inquiry whether the sureties in the bond of an assistant postmaster are liable for postage stamps delivered by the postmaster-general to such assistant, for which he has failed to account. It is insisted by the counsel for the sureties that the postmaster-general had no authority, under any law of the United States, to deliver postage stamps or

stamped envelopes to a deputy postmaster but upon prepayment for them, and that the sureties are not responsible for a failure by the assistant postmaster to account for them in his settlement with the postoffice department.

§ 203. *Statute construed.*

The decision of the question depends on the construction to be given to a part of section 3 of the act of March 3, 1851 (9 Stat. at Large, 589), which was in force when the bond was executed. The first clause of that section provides "that it shall be the duty of the postmaster-general to provide and furnish to all deputy postmasters, and to all other persons applying and paying therefor, suitable postage stamps of the denomination of three cents, and of such other denominations as he may think expedient, to facilitate the prepayment of postages provided in this act." Thus the issue is presented whether the sureties are liable for postage stamps delivered to a deputy postmaster, or to any other person, without prepayment on delivery; and whether the postmaster-general is authorized to deliver them to a deputy except on such prepayment. And it is insisted that as the stamps delivered to Mason, the deputy postmaster, were not thus paid for, but charged in his account at the postoffice department, the sureties are not liable for any balance appearing to be due from him, accruing from his failure to pay or account for such stamps.

It may be noticed, in the first place, that the bond given by the deputy postmaster, and executed by his sureties, provides that Mason, as deputy postmaster, "shall faithfully account with the United States, in the manner directed by the postmaster-general, for all moneys, *postage stamps*, . . . which he, as postmaster, or as agent and depository, shall receive for the use and benefit of said postoffice department." Such was the express undertaking of the parties to the bond, as prepared and furnished by the postmaster-general. That officer construed the section of the law referred to as authorizing him to deliver stamps to a deputy postmaster without requiring prepayment. He has, therefore, made special provision in the bond for the liability of the deputy to account for such stamps; and the sureties, by the express condition of the bond, undertake that he shall so account. It seems to the court to be the plain construction of the section of the act of 1851 referred to, that the postmaster-general was authorized to deliver stamps to a deputy postmaster without prepayment, and that the requirement to prepay has reference to persons not deputy postmasters who may apply for stamps. This is the grammatical construction of the words of the section; and there are strong reasons for the conclusion that such was the intention of congress. The provision referred to evidently presupposes that under the security afforded by the official bond of a deputy postmaster, he may be intrusted with stamps, at the discretion of the postmaster-general, without requiring payment upon delivery. But as to others not officially connected with the postoffice department, and who, for their interest or convenience, apply for stamps, they should be required to pay for them on delivery. It would be inconvenient and unsafe for the government to give credit to and open accounts with every individual to whom stamps were delivered; but this objection does not apply to those delivered to deputy postmasters, acting under the obligation of an official oath and an official bond, and with whom accounts were necessarily opened by the postoffice department.

§ 204. *The sureties of a postmaster are responsible for stamps furnished him by the department.*

This view is fortified by reference to section 11 of the act of March 3, 1847. 9 Stat. at Large, 201. It authorized the postmaster-general to prepare stamps

to be attached to letters in prepayment of postage, and provided as follows: "Which said stamps the postmaster-general may deliver to any deputy postmaster who may apply for the same, the deputy postmaster *paying or becoming accountable* for the amount of the stamps so received by him." Under this provision no stamps could be delivered to any other person than a deputy postmaster, who might pay for the same, or give security for the payment therefor, as prescribed by the postmaster-general. It was doubtless found, as the operations of the department were enlarged, that it would be promotive of the public convenience, and increase the efficiency of the department, that persons not postmasters should be authorized, at the discretion of the postmaster-general, to receive stamps, but only on the condition of prepayment; and that, as to postmasters, they should be relieved from any obligation to pay as delivered, and that stamps received by them should be charged in their account current. That this was the reason of the change in the law, as made by the act of 1851, seems most obvious. The court has, therefore, no hesitancy in holding that, under the last-named act, the sureties of Mason are liable as well for postage stamps received by him as for moneys received for postages. I am unable to perceive that there is any hardship on the sureties from this construction of the statute, as they expressly agreed in the bond to be liable for postage stamps received by their principal.

§ 205. *The sureties of a postmaster are liable for stamps upon the bond considered as a common law bond.*

But if this construction of the statute is erroneous, are not the parties to this bond liable upon it as an instrument at common law? They agree by the terms of the bond that the postmaster shall faithfully account for postage stamps received by him. Is it not an agreement or stipulation that may be enforced by the government irrespective of the statute? I am not aware that this precise point has been adjudicated by the supreme court. Yet it seems clear that, by analogy to the principle decided by the supreme court in the case of *The United States v. Linn*, 15 Pet., 290 (§§ 190-194, *supra*), the doctrine indicated may be sustained. That was a suit against Linn and the sureties in his bond as a receiver of public moneys in Illinois, alleging a defalcation in not accounting for moneys received by him as such. The sureties, among other matters of defense, filed a plea of *non est factum*. It was based on the fact that no seals were affixed to the signatures of the sureties to the bond when executed by them. It was insisted by the counsel for the sureties that the bond, not being executed according to the requirement of the act of congress, was a nullity as to them. The statute required receivers of public moneys to give bond for the faithful discharge of their duties, with *approved security*. The question as to the validity of the bond was elaborately argued in the supreme court. It was admitted in the case that, as to the sureties, the bond being signed without their seals, was not technically a bond according to the common law definition of that instrument; and it was insisted that, not being a bond, as required by the statute, it did not bind the sureties. But the court held that, although the bond was not strictly a bond without the seals of the parties to it, and not, therefore, within the letter of the statute, yet, as the statute did not declare a bond not executed in strict pursuance of the statute to be void, it created a legal obligation on the part of the sureties. The court very distinctly held that, though the statute required a bond with approved security, "a mortgage, or any other approved security, voluntarily given, would, no doubt, be valid, and it would be no very forced interpretation of this act to

consider the instrument as such security." Without quoting further from the opinion of the court, the point under consideration is briefly stated in the syllabus of the report as follows: "If the contract signed by the defendants was entered into for a lawful purpose, not prohibited by law, and is founded on a sufficient consideration, it is a valid contract at common law." And the court remark, in their opinion: "There ought to be some very strong grounds to authorize a court to declare a contract absolutely void, which has been voluntarily made, upon a good consideration, and delivered to the party for whose benefit it was intended."

The court can perceive no reason why the bond of the postmaster, Mason, signed by his sureties, is not valid as to all the parties within the doctrine settled by the supreme court in the case referred to. The sureties voluntarily undertook, by the very terms of the bond, that their principal should faithfully account for postage stamps received by him. Upon the theory that the statute did not authorize, in terms, the delivery of postage stamps to a deputy postmaster without prepayment, yet, as this bond, stipulating for the liability of the sureties, was founded upon a good consideration, was executed in good faith, and was not prohibited by law, it is, within the scope of the decision of the supreme court, a valid bond. And the demurrer to the eighth plea must be sustained.

§ 206. Voluntary bonds.—A bond, voluntarily given to the United States to secure the performance of any lawful act, or the discharge of any public, official or private duty, is valid and binding, if the United States in their political and corporate capacity have a legal pecuniary interest in the performance of the condition of such bond, although such bond is not required by any act of congress. *United States v. Garlinghouse*,* 4 Ben., 194.

§ 207. So where the laws of New York enabled a married woman to carry on the business of a distiller, a bond executed by her to the United States, as a keeper of a bonded warehouse, was valid. *Ibid.* See § 219.

§ 208. A statutory bond must substantially conform to the requirements of the law, and it is void so far as it exceeds them. *Armstrong v. United States*,* Pet. C. C., 46.

§ 209. A bond required by law must substantially comply with the law; but the officers of the government may legally take bonds for debts due to the United States, although no act of congress authorizes their being taken in the particular case. *United States v. Howell*,* 4 Wash., 620.

§ 210. It seems that where an official bond is broader in its terms than is prescribed by statute, it is still valid as to the part thereof required by statute. *United States v. Humason*,* 7 Saw., 252.

§ 211. A bond, to be good as a statutory bond, must contain all the conditions required by law. Surplusage may be rejected. *United States v. —**, 1 Marsh., 195.

§ 212. Where a statute prescribes that the official bond of the clerk of a federal court shall be conditioned "to faithfully discharge the duties of his office," the fact that the additional condition is inserted, that he "shall properly account for all moneys that may come into his possession as required by law," will not render the bond invalid. The extra clause is but a statement of one of the things required of him in faithfully performing the duties of his office, and does not, therefore, affect the validity of the bond. *United States v. Ambrose*,* 2 Fed. R., 552.

§ 213. The bond of a clerk of a court provided, in addition to the statutory requirements, that his deputies also should faithfully perform the duties of the office. At the time of the execution of the bond, the statute provided that the court might require a bond of the deputy clerks, and that the security thus taken should not affect the liability of the clerk himself. *Held*, that the words of the bond relating to deputy clerks were mere surplusage and did not affect the validity of the bond. *Ibid.*

§ 214. The postmaster-general may take a bond from a deputy postmaster, though none is expressly required by law. *Postmaster-General v. Rice*,* Gilp., 554.

§ 215. The postmaster-general is authorized to take a bond from a postmaster for the payment of the moneys received by him in his official capacity, although such a bond is not expressly directed by law. The power to take such a bond is recognized by congress in the

acts of 1790 and 1810, relating to the collection of moneys due the general postoffice. *Postmaster-General v. Early*,* 12 Wheat., 196.

§ 216. It seems that if a statute render a bond void which is taken for a particular object, and a bond is taken with a condition in part for this illegal object, and in part for other objects not illegal, it is clear law that the illegal part vitiates the whole instrument. *Dixon v. United States*, 1 Marsh., 184.

§ 217. A United States marshal being required to give the bond required by the twenty-seventh section of the judiciary act of the 24th of September, 1789, before he could enter on the duties of his office, it is held that a bond executed by him to Andrew Jackson, president of the United States, instead of "The United States," as required by the act, without sureties living within the district, as required by the act, approved by the president as a temporary bond, and not by the district judge, as required by the act, not including his deputies, as required by the act, and not correctly describing the office to which the obligor was appointed, is not in compliance with that act. Such a bond is not valid as a voluntary bond, because the president had no authority to take it, the district judge being the only person authorized to approve the bond on behalf of the United States. If it could be considered valid as a common law bond, there has been no breach, since the marshal never qualified to enter upon the duties of his office, the bond not being according to the act. *United States v. Simonton*, 4 Cr. C. C., 255.

§ 218. A voluntary bond that A. will pay any sum that B. may recover against C., in a suit then pending, on the agreement that C. shall be discharged from his imprisonment in this suit, is good as a common law bond, although not authorized by statute. It is no objection that the obligation of the bond is greater than that required by law, and that the statute provided for the release of the defendant upon bail, with the undertaking that the defendant shall not remove his property out of the state until the plaintiff's judgment, if one is recovered, shall be discharged. *Greathouse v. Dunlop*, 3 McL., 203.

§ 219. A distiller gives his bond to conform to all the provisions of the act of congress which requires such bond and prescribes its conditions, also to conform to the provisions of any other act or acts as are now, or may hereafter be, in this behalf, enacted. *Held*, (1) that the bond is not void because it does not state the required conditions, but refers to the act containing them; (2) that the obligation to conform to the provisions of other acts than the act requiring the bond, not being required by law, so much of the bond as is required by law is not for this reason invalid. (Hall, J., dissenting from this opinion, the case was certified to the supreme court, and the views here expressed affirmed.) *United States v. Mynderse*,* 11 Blatch., 1. See § 207.

§ 220. It seems that if a bond is given on the enrollment of a ship, which is not required by law, no action is maintainable thereon. *United States v. Hipkin*,* 2 Hall's L. J., 80.

§ 221. Official bonds exacted by a superior officer *colore officii*, and which contain conditions not required by statute, are void. By *colore officii*, however, must be understood some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given. If all parties voluntarily consent to enter into the bond, and the departure from the precise requisitions of the statute is made by mistake, or accident, and without any design to compel the obligee to enter into an undertaking not required by law, the bond is not invalid simply because it contains something which the statute does not authorize. *United States v. Humason*,* 6 Saw., 199.

§ 222. Bond for release of goods.—On the seizure and libel of certain articles of merchandise in the district court, a bond was given to the United States, in a certain penalty, for the release of the goods, and with the condition that it should be void if either of the obligors should pay into the district court the value of the goods, already appraised by consent, in case the goods should, by sentence and decree in the district court, be adjudged to be forfeited or condemned to the use of the United States. The seizure was made on the navigable waters and the proceedings carried on according to the course in admiralty. The district attorney was appointed district judge, and on that account the cause was transferred to the circuit court. The libel was then so amended as to make it an information *in rem*, and the goods condemned. *Held*, that the circuit court could enforce compliance with the stipulations in the bond by attachment, and this although the bond was not authorized by act of congress, as supposed, the bond being good as a voluntary bond. It is immaterial that the condemnation was in the circuit court instead of the district court. *United States v. Four Part Pieces of Cloth*, 1 Paine, 485.

III. OFFICIAL BONDS.

1. *Execution.*

SUMMARY—*Failure to describe collector's district*, § 223.—*Seal; lex loci*, § 224.—*Condition good in part*, § 225.—*Retrospective condition*, § 226.

§ 223. A United States collector's bond is not void because it fails to state or describe the particular district for which the collector was appointed. But a declaration on such a bond against the collector and his sureties is bad if it fails to state the district, and a demurrer to it will be sustained. *United States v. Jackson*, §§ 227-229.

§ 224. An official bond of a "receiver of public moneys," in which a scrawl is used as a seal and acknowledged by the party bound to be his seal, is sufficient. The execution of such a bond is not governed by the law of the state in which it was executed. *United States v. Stephenson*, §§ 230-233. See §§ 53, 176.

§ 225. The rule of the common law, that if a bond be taken with conditions good in part and bad in part a recovery may be had on it for a breach of the good part, applies also to statutory official bonds, provided the statute requiring them does not prescribe they shall be void if varying from the prescribed form, in which case it seems that the bond would be absolutely void, no matter how lawful its purpose. *United States v. Brown*, §§ 234-237.

§ 226. A retrospective condition in an official bond, which is required by statute to be prospective merely, is absolutely void. *Ibid.*

[NOTES.—See §§ 238, 239.]

UNITED STATES *v.* JACKSON.

(14 Otto, 41-44. 1881.)

ERROR to U. S. Circuit Court, Eastern District of Virginia.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The action in this case was brought by the United States against Jackson and the other defendants, on a bond in which he was principal, and they were his sureties. Judgment was rendered for the defendants on a demurrer to the declaration, which sets out the substance of the obligatory part of the bond, namely, the acknowledgment of an indebtedness to the United States in the sum of \$50,000; to which, it adds, there was annexed the following condition: "Whereas, the president of the United States hath, pursuant to law, appointed the said George W. Jackson collector of taxes, under an act entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes:'"

"Now, therefore, if the said George W. Jackson shall truly and faithfully execute and discharge all the duties of the said office, according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the regulations of the secretary of the treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the above obligation to be void and of no effect; otherwise it shall remain and abide in full force and virtue."

§ 227. *The court will take judicial notice of collection districts for internal revenue, etc.*

The circuit court was of opinion that the bond was absolutely void, because it did not state for what particular collection district Jackson was collector of taxes, and for the proper discharge of the duties of which the defendants undertook to be responsible. It is a matter of which this court will

take judicial notice, that, by law, the country is divided into collection districts for internal revenue purposes, and in some states there are several of these districts with defined geographical boundaries. A collector is appointed for each district, and his duties relate to the collection of internal revenue within it. Because, therefore, the bond did not bind the parties on its face for Jackson's performance of the duties of any particular district, the circuit court was of opinion that it was void.

§ 228. *A collector's bond is not rendered invalid by failing to describe his district.*

But it does bind the signers for the faithful performance of the duties of collector of taxes by George W. Jackson, according to law, and it avers that he had been duly appointed collector of taxes under the internal revenue act. The duties for the performance of which these parties bound themselves were well defined. The person who was to perform them, and for whose default they consented to become liable, was named in the obligation, and the only matter of importance omitted was the place or district within which those duties were to be performed. He was collector for but one district. It is fairly to be presumed that the obligors knew for what district he had been appointed, since they say he had already been appointed by the president when they signed the bond. This appointment was a matter of public record. The evidence of it was the commission of Jackson, signed by the president, and duly sealed. The district, therefore, for which he was appointed was known to the obligors, and was a matter of public record, and we do not see how such a bond can be held to be void. In any issue that could arise as to the district for which Jackson was appointed, and for the duties of which they became liable, it could be made certain by the production of his commission or the record of it in the proper department. It would not depend on any parol proof. The production of the bond and commission makes complete the obligation of the defendants. That is certain in law which can be rendered certain.

§ 229. *Where a declaration on an official bond of a collector (which does not state the district) fails to allege the district of which the party is collector, such declaration is bad on demurrer.*

If, therefore, there had been an averment in the declaration of the district for which Jackson was appointed, we do not see why the declaration and the bond, taken together, would not have been good, when it was further averred that, in regard to the duties of that district, he had been guilty of a default covered by the terms of the bond. If to such a declaration *non est factum* or *nil debet* had been pleaded, the production of the bond and commission would have been a sufficient answer, because the commission would have shown by matter of record that Jackson had been appointed internal revenue collector for that district, and the undertaking of the defendants in his behalf would have been held to apply to his duties under that commission. But there is no averment in the declaration anywhere that he was or had ever been appointed collector of any particular district. There is, therefore, no foundation for proof of that fact by the production of the commission or by any other evidence. On a judgment by default no such commission could be introduced, nor proof of non-performance in any district. No issue could be taken on the declaration as to his appointment or his obligation to perform the duties of any district, because there is no averment of any such obligation. The declaration affords no opportunity to render more specific the obligation of defendants by

introducing the commission. It does not aver that this obligation for Jackson as revenue collector related to the duties of any particular district, so as to enable the court to apply the covenant of the defendants to those duties. We are of opinion, therefore, that, regarding the demurrer (as we must) as referring to the declaration and to the bond set out on oyer, it was well decided that they were insufficient to sustain the action.

Judgment affirmed.

UNITED STATES v. STEPHENSON.

(Circuit Court for Illinois: 1 McLean, 462-466. 1839.)

Opinion by the COURT.

STATEMENT OF FACTS.—This action is brought for a bond given by Stephenson in his life-time as a receiver of public moneys, and the plaintiffs seek to recover of his representatives and his sureties a balance of moneys received by him, but not paid over to the government. The defense set up is that the act of congress requires a bond to be given, and that the instrument declared on is not a bond at common law, it not having been sealed. This question is raised by special demurrer. The acts of congress establishing the several land offices require the "receivers of public moneys for lands to give bonds with approved securities."

§ 230. *At common law a sealed instrument must be sealed with wax or a like substance.*

The bond in question has scrawl seals, but there is no act of congress declaring that a scrawl may be substituted for a seal, and it is contended that the common law rule applies. And there is no question that at common law a bond is a sealed instrument, and that the seal must be formed of wax or some tenacious substance that will receive and retain an impression. 2 Leigh, N. P., 730. The supreme court of New York have decided, 5 Johns., 244, that an instrument executed in Virginia with a scrawl seal, which by the statute of that state was a seal, but which instrument was to be carried into effect in the state of New York, could not be considered a sealed instrument. The common law rule on this subject prevails in New York. Seals were invented and were in common use long before the art of writing was in general use. The seal was known by the impress it bore, and the act of sealing was a deliberate and solemn act, which gave greater dignity to sealed than unsealed instruments. This distinction, which originated in a rude and barbarous age, has become one of the axioms of the law, and is still rigidly adhered to. The reason on which this distinction was founded is far less forcible now than it formerly was, but it is still regarded as a settled principle.

§ 231. *A scrawl has in most of the states been substituted for a seal.*

With few exceptions, the legislatures of the different states have, by special acts, provided that a scrawl should constitute a seal. This has been done in Illinois, where the bond was executed, and it is insisted that the local law must govern the instrument in this case. The bond was executed with the condition that the receiver should faithfully discharge his duties, and account and pay over to the government all moneys received by him. He is to account to the proper department at Washington city, and pay the money to the treasurer of the United States at that place, or at such other place as should be directed.

§ 232. *A bond taken under an act of congress is not governed by local law. It is presumed to have been executed at the seat of government.*

In contemplation of law the bond was executed at the seat of government, as that is the place where the chief officers of the executive reside, and to whom the receiver was amenable for the faithful discharge of his duties. The local law, therefore, does not govern the bond either as to its character or effect. It is an instrument given under an act of congress, and must be construed with regard to such act, and the general principles of law which are applicable. 6 Pet., 173, 203 (§§ 401-404, *infra*); 7 Pet., 435 (§§ 505-510, *infra*).

§ 233. *A bond with a scrawl seal taken under an act of congress is good.*

The argument is not without force that where a term is used in legislation which has a technical and well defined meaning at common law, the term is supposed to be used with reference to such meaning. And it is contended that the word bond is well understood at common law, and that this rule must govern the instrument under the act. This inference may be admitted where there are no counteracting circumstances. The case in 1 Bos. & Pul., 360, was where a bond with a scrawl seal had been given in Jamaica, where the scrawl was recognized as a seal, and a suit was brought on it in England. The pleadings raised the question whether such an instrument could be declared on as a bond; and the court inclined to think it could not be, there being no proof of the usage in Jamaica. The case, however, was compromised on the debt being paid by the defendant, and the plaintiff paid the costs. From the reference to the usage in this case by the court, it would seem that such usage, if proved, would be recognized as the law of the contract. But however this may be, the question for the court to determine is, whether in the act of congress the word bond must be defined by a reference to the common law, or to the usage, founded on local legislation, which obtains generally in the different states. The fact that the states have legislated on this subject proves the inveteracy of the common law rule; but this does not operate against the inference we are about to draw. There is no common law as exclusively applicable to the federal authority. In the exercise of its judicial functions it adopts the common law of the state within which the case arises. But there is no general principle that pervades the Union as a rule of right or of action, which is independent of the common law recognized in the states respectively. This, however, is not a question of local law, either statutory or common, but of construction and definition. What did the legislature mean by the word bond as used? That they intended to include an instrument, which at common law was denominated a bond, is admitted; but did they intend to include under the designation of bond an instrument having a scrawl seal? This can best be determined by the general use and application of the term in this country. It would be a dangerous precedent to go out of the country for the meaning of terms used in a statute, which, by common usage, have a definite meaning. The policy of a law is influenced not more by local considerations than are the words used in the enactment of it. And words thus adopted are not to receive a technical and strained meaning against the popular sense. The principle may be fully and forcibly illustrated in the case under consideration.

Congress is composed of representatives from the different states, and in those states, with the exception of some two or three, an instrument sealed with a scrawl is as much a bond in its character and effect as if it were sealed by wax or wafer, or any other tenacious substance. By a law of congress, certain officers are required to give bond; now, must this bond be sealed with

wax, etc., or will a scrawl seal be sufficient? A scrawl equally with wax, by general usage, constitutes a seal. Is this general usage to be rejected and the common law definition of a bond only to be adhered to? On the contrary, is it not manifest that the legislature, constituted as has been stated, legislate under the influence of general usage and popular definition? When the term bond is used, may it not, and, indeed, must it not, be presumed to be used in reference to the generally understood signification, as well in legal proceedings as in popular language? There is no rule of construction which is believed to conflict with this. It affords the only safe standard by which to judge of the language of a popular and representative body. To reject this safe and reasonable rule, for one however venerable for its antiquity, which has been exploded by almost all the states, would be to reject the lights of experience and modern advancement for the maxim of a barbarous and unenlightened age. The general legislation and usage of the states on this subject may be said to give, in this case, the common law to the federal government. At least that it affords the only safe rule by which the terms used by congress are to be defined and understood. Where a state has adopted the common law, as in New York, and has not legislated on the subject, it is admitted that the common law definition of a bond would, in such state, be the correct rule. The parties to the bond under consideration, as appears from its language, have treated the scrawls as seals, and have acknowledged them to be their seals. And shall that which a party calls a seal, and has acknowledged to be his seal, be rejected as such, under a general usage which makes it a seal. We think not. On the contrary, we think in reason and on established principles of construction, the instrument under consideration must be considered a bond within the requirement of the act of congress, and, as such, binding on those who signed it. Judgment for the plaintiffs, with costs.

UNITED STATES *v.* BROWN.

(District Court for Pennsylvania: Gilpin, 155-188. 1890.)

Opinion by HOPKINSON, J.

STATEMENT OF FACTS.—In the month of January, 1814, Nicholas Kern of Northampton county, in the state of Pennsylvania, was appointed, by the president of the United States, collector of direct taxes and internal duties for the eighth collection district of Pennsylvania; and on the 13th of the same month he gave bond to the United States in the sum of \$27,560, with the condition that "the aforesaid Nicholas Kern has truly and faithfully discharged, and shall continue truly and faithfully to discharge the duties of said office, according to law, and shall, particularly, faithfully collect and pay, according to law, all moneys assessed upon such district." The sureties, bound with Kern in this bond, were Jacob Weygandt and Christian Bixler. This bond was taken under the act of congress of 22d July, 1813. The form of the bond to be given by a collector is prescribed by the eighteenth section, and the condition is to be "for the true and faithful discharge of the duties of his office, according to law." The bond given, as above stated, is retrospective, and the condition is, that Kern "has discharged and shall continue to discharge" his duties. His appointment is said to have been made on the 5th January; but, as he was bound to give the security before he received any list for collection, and, of course, before he could perform any of the duties of his office, I cannot perceive for what object or reason the retrospective words were introduced; if,

even by law, they could have been added to the condition prescribed by the act of congress. It may be remarked that the bond is printed with the condition I have recited, and was probably prepared in the treasury department, and distributed to all the collectors appointed under the act.

On the 17th October, 1816, Nicholas Kern gave another bond, in the same form and with the same condition as the first, but with a change of the sureties. Robert Brown and Jacob Driesbach are joined with him in the second bond. An inspection of these bonds, and comparison as to paper and type, will show that the same blank form was used for both, there being no difference between them but in the dates, the amount of the penalty, and the names of the sureties. It is on the second bond that the present suit is brought against the administrator of Robert Brown, one of the sureties. This bond was taken under the directions of an act of congress, passed on the 9th January, 1815. The second section of this act repeals the former, "except so far as the same respects the collection districts, therein and thereby established and defined, so far as the same respects internal duties, and so far as the same respects the appointment and qualifications of the collectors, and principal assessors, therein and thereby authorized and required, in all which respects so excepted, as aforesaid, the said act shall be and continue in force for the purposes of this act." By the twenty-third section of this act, it is provided "that each collector, before receiving any list, as aforesaid, for collection, shall give bond with one or more good and sufficient sureties to be approved by the comptroller of the treasury, in the amount of the taxes assessed in the collection district for which he has been or may be appointed, which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office according to law, and particularly for the due collection and payment of all moneys assessed upon such district." There is also a provision that nothing contained in this act "shall be deemed to annul or impair the obligation of the bond heretofore given by any collector." On a settlement of Nicholas Kern's accounts, a balance appears to be due from him to the United States of \$18,939.86, for the recovery of which suit is now brought.

The declaration in the first count claims the penalty of the bond, to wit, \$45,000, as forfeited to the United States, and sets out that Robert Brown, on the 17th of October, in the year 1816, by his certain writing obligatory, granted himself to be held and firmly bound in the said sum "to be paid to the United States, whenever he, the said defendant, shall be thereunto afterwards required." A second count in the declaration recites the bond, and adds, "which said writing obligatory was and is subject to a certain condition," and the condition is recited; the declaration then proceeds, "and the said United States in fact say, that the said Nicholas Kern, collector as foresaid, did not, while such collector, and after the execution of the said writing obligatory, truly and faithfully discharge the duties of the said office according to law, nor particularly, faithfully collect and pay, according to law, all moneys assessed upon such district, but made default therein, and neglected and refused so to do, contrary to the duties of his said office, and the acts of congress; particularly in not paying to the proper officers of the treasury of the United States the sum of \$51.99, cash by him received as such collector, and after the execution of the said writing obligatory, and so due from him from and on the 31st December, 1821; and further, in not collecting and paying, according to law, the further sum of \$18,887.87, due by uncollected bonds taken by the said Nicholas Kern, as such collector." The death of Robert Brown, the obligor, is then averred, and the

granting of letters of administration to William Brown, the present defendant. The bond is a joint and several obligation.

The defendant craves oyer of the bond, and of the condition, and they are read to him, and set out "*in hæc verba.*" 1. In plea to the first count in the declaration he then says, "that the said writing obligatory is not the deed of the said Robert Brown," and of this he puts himself on the country. 2. And for further plea to the first count he says, "that he has fully administered," and prays judgment. 3. For further plea to the first count he says "that the said Nicholas Kern did continue truly and faithfully to discharge the duties of his said office," which he is ready to verify, and therefore he prays judgment. 4. And for further plea to the first and second counts of the declaration, he recites in his plea the appointment of Nicholas Kern, and his commission dated on the 5th January, 1814, as collector, under the act of congress passed on the 22d July, 1813; that the said Kern entered upon the exercise of his office, and continued therein "up to the day of the sealing and delivery of the said supposed writing obligatory." The plea then refers to the act of congress above mentioned, passed on the 9th January, 1815, and particularly recites the form of the bond, with the condition directed to be taken by that act. It further avers that "the supposed writing obligatory, on the day of the date thereof, and after the said Kern had been a long time in the exercise of his said office, was required by the said United States to be sealed and delivered by the said Kern, and by the said Robert Brown as surety of the said Kern, and was by the said United States taken from the said Kern, and from the said Robert Brown as surety of the said Kern, on the day and at the place in the said declaration mentioned, under color of the said act of congress of the United States and contrary thereto." The plea then avers that the condition of the supposed writing obligatory "does not and did not conform to the said act of congress," and that the bond and condition were and are contrary thereto and in violation of the same, "inasmuch as by the said condition of the said supposed writing obligatory, it is provided that the said Nicholas Kern had, before the sealing and delivery of the said supposed writing obligatory, truly and faithfully discharged the duties of his said office according to law, and the said supposed obligation was thereby declared to abide and remain in full force and virtue, in case the said Nicholas Kern had not, before the sealing and delivery thereof, truly and faithfully discharged the duties of his said office according to law. And so the said defendant saith, that the said writing so brought into court is void in law." 5. As a further plea to the second count of the declaration the defendant says, "that the writing obligatory therein mentioned is not the deed of the said Robert Brown." 6. There is also a plea of "fully administered" to the second count. 7. As to the first breach assigned, in not paying to the treasury of the United the sum of \$51.99, the defendant says that they "were not received by the said Nicholas Kern, as such collector, after the execution of the said writing obligatory." 8. As to the second breach assigned, he says that the matters contained in it "are not sufficient in law for the United States to have or maintain their action," and that he is not bound to answer them.

The defendant then states and shows the following causes of demurrer to the said second assignment of breach: 1. That the said assignment of breach does not state and set forth the nature and circumstances of the said uncollected bonds, nor by whom, to whom, at what time, nor for what amount or consideration given, nor when or to whom payable. 2. That the said assignment of

breach does not state and set forth that the said uncollected bonds were taken by the said Nicholas Kern after the said execution and delivery of the said writing obligatory. 3. That the said assignment of breach does not state and set forth that the said sum of \$18,887.87 became and was due by the said Nicholas Kern after the execution and delivery of the said writing obligatory. 4. That the said assignment of breach does not set forth and state that the default of the said Nicholas Kern, in not collecting and paying the said sum of money, took place after the execution and delivery of the said writing obligatory, and not previously thereto.

To these pleas the United States have replied severally. As to the first, fifth and seventh, that is, those of the general issue, they also put themselves upon the country. On the second and sixth, which are pleas of "fully administered," they deny the allegation and take issue. As to the third plea they reply: 1. That after the execution of the said writing obligatory, the said Nicholas Kern did not continue truly and faithfully to discharge the duties of his said office according to law, and did not, particularly, faithfully collect and pay according to law all moneys assessed upon the said district, because they say that the said Nicholas Kern continued in his said office as collector from the day of the execution of the said writing obligatory until and after the 1st day of July, 1825; and that during the said time that he, the said Nicholas Kern, so continued in his said office as such collector aforesaid, to wit, the said last mentioned day and year, and on divers other days and times after the day of the execution of the said writing obligatory, he, the said Nicholas Kern, in his said office and as such collector aforesaid, had and received, for and on account of the said plaintiffs, divers sums of money, amounting in the whole to the sum of \$18,553.33. 2. That after the execution of the said writing obligatory, and whilst the said Nicholas Kern continued in his said office and as collector aforesaid, he did not faithfully collect and pay, according to law, certain large sums of money assessed upon the said eighth collection district of Pennsylvania, amounting in the whole to the sum of \$17,248.56, but faithfully to collect and pay the same he has hitherto wholly failed and made default. As to the fourth plea they reply, that the same and the matters therein contained are not sufficient in law to bar and preclude them from having or maintaining their aforesaid action thereof, against the said defendant. As to the second breach in the second count of the declaration assigned, they say that the matters therein contained, in manner and form, are sufficient in law for them to have and maintain their aforesaid action against the said defendant. On these pleadings two general questions have been raised and argued at the bar; one having relation to the declaration, or the manner and form in which the plaintiffs have set out their demand; and the other denying the whole ground of the action, and alleging that the bond or writing obligatory, on which it is founded, is wholly void in law, and that no recovery can be had upon it in this or any other form of action.

§ 234. *Though the condition of a statutory bond contains more than is required, it will not therefore invalidate the bond, if the good can be eliminated from the bad.*

The second question is the most important and will be first considered. It is not the first time it has come before the courts of the United States, but, so far as we may judge from the reports of the cases, it has not, until now, been examined with any considerable diligence or care. The question briefly stated is, whether, if the condition of a statutory bond contains more than is required

by the statute, the bond is wholly void. Before we enter upon the examination of this question, I will state the difference which exists in this case between the bond actually taken and that authorized to be required by the act of congress. The condition of the bond of a collector, prescribed by the statute, is directed to be "for the true and faithful discharge of the duties of his office, according to law, and particularly for the due collection and payment of all moneys assessed upon such district."

§ 235. *A retrospective condition in a statutory bond is void.*

The condition of the bond in question is, "that the said Nicholas Kern has truly discharged, and shall continue truly and faithfully to discharge the duties of his said office." The substantial difference is, that the bond taken, and on which this suit is brought, has a retrospective operation; but the bond directed by the statute has no such operation, but is altogether prospective. The question to be decided is not whether we can give to the bond this retrospective effect; that is not pretended on the part of the plaintiffs; but whether, by this departure from the statute, the obligation is entirely void and null, so that no recovery can be had upon it even for defaults or breaches of the condition, which, in truth, were made after the execution and delivery of the writing obligatory.

The argument against the legal validity of this bond is substantially this: that the officers of the United States, by whom this bond was required and taken from Nicholas Kern, and without which he could not receive his appointment as collector, or enter upon the duties of his office, were the agents of the United States, acting by and under a special authority delegated to them in precise terms by the United States; that these agents were confined strictly, or at least in matters of substance, to the terms and limits of their authority; and that if they exceeded their authority, and demanded from a collector a bond differing from that required and authorized by the law, imposing obligations upon him not imposed or warranted by the law, the whole execution of the authority was void. It is further argued, that one of the reasons of this strictness is, to preserve those who are called upon to give such bonds from injustice and oppression by the officers who are appointed to take them; and this important object cannot be effected if the bond, having in it an illegal or unauthorized condition, shall, nevertheless, stand good for so much as is according to law; that the only remedy and protection against such oppression, under color of office, is to declare the whole to be an illegal and void execution of the authority. The moral theory of this argument is good, but we must look further for the policy and utility of its practical application to the business of the world and the purposes of justice. It is the duty of a court of law to pursue this inquiry into the proceedings of the courts, and to abide by their decisions upon it. It is so purely a question of law that I shall look to the cases in which it has been agitated or decided for my judgment upon it. The books seem to have been thoroughly examined, and we have probably all the judicial light that can be brought upon the subject. Is a statutory bond, the condition of which contains more than is required or authorized by the statute, altogether void; or may it be a good and valid obligation for so much as is according to the statute, and void only as to that part which is not according to the statute? I shall take up the cases as they were read at the bar.

§ 236. — *authorities reviewed.*

Much reliance has been placed on the case of *Purple v. Purple*, 5 Pick., 226. It was briefly this: A replevin bond was given to the officer who executed the

writ; the statute required that it should be given to the defendant; the bond was adjudged to be void. It is obvious that this case does not meet the question we are discussing. It was not the case of a bond good in part and bad, in part; of a bond with a divisible condition. No attempt, indeed, was, or could, be made to support it on that ground. It was at once given up as a statutory bond; as such an obligation or instrument as could be supported by and under the statute, in whole or in part; and the effort made was to maintain it as a good bond at common law. The court, in deciding against it, say, "the bond could, in no sense, be taken to be according to the statute." And again they say, "it stands as a bond given to one who had no lawful authority to take it; and the purpose and effect of it were to aid and abet him in a trespass upon the attaching officer; it is, therefore, illegal and void." The case of *Johnstons v. Meriwether*, 3 Call, 523, is also a case of a statutory bond given to a wrong person; to one not authorized by law to take it, and not divisible. It must necessarily be wholly good or wholly bad. On the service of an execution, an obligation called a "forthcoming bond" was given to the coroner instead of the plaintiff in the action. The court give no reason, but it is said briefly, that, if such a bond be not good as a statutory bond, it may be good at common law.

In the case of *Newman v. Newman*, 4 Maule & S., 70, part of the condition of the bond was for the payment of money, and part for the presentation of the obligee's son to the next avoidance of a church. It was there held that, if the latter part of the condition was simoniacal, yet the bond was good for the payment of the money. Lord Ellenborough says: "Admitting the condition of this bond to be ill as to one part of it, it seems that it may be well as to the other parts, for you may separate at the common law the bad from the good." From this case we learn that there is no principle of the common law which forbids us to separate the good from the bad part of the condition of a bond, where they are of a nature to be severable; and the difference between a bond at common law and one executed under the directions of a statute seems to be only that, in the latter case, the bond is required and given under an authority derived from the statute, and it is therefore asserted that the authority must be strictly pursued, and that, if it be exceeded, the whole execution is null and void. This principle will be attended to. The case of *Warner v. Racey*, 20 Johns., 74, was also one of a bond given to a wrong party. It was made payable to "the people of Niagara county," instead of "to the people of the state of New York." The court very shortly say: "The bond is not according to the statute; and, if it were, there is no evidence of any breach." The case of *The United States v. Sawyer*, 1 Gall., 99, decides some questions in pleading which belong to another part of our case. As to the part we are now inquiring into, there is no direct opinion given, for the learned judge thought the bond was taken substantially according to the act of congress. The objections, however, made to that bond were essentially the same with those urged here, on the part of the defendant. That to every contract there must be two parties. That the United States can contract only according to the regulations and authorities of statutes. That the assent of the United States can be declared only through their authorized agents; and these agents cannot effectually assent, unless they are clothed with the authority by law. An assent, therefore, in a manner different from that prescribed by the law is not valid, and consequently does not bind at all. The judge, as I have said, was of opinion that, on a fair construction, the bond was conformable to the

law. He, however, puts as a question, on which he gives no decision, whether a bond taken by a collector, under a general authority to take bonds in revenue cases, would be void on account of any irregularity or mistake in the condition; whether such a bond, where the condition is partly conformable to and partly variant from the provisions of the statute, be void in whole, or good as to that part of the condition which is conformable to law. The judge significantly adds "that the principles, on which such bonds are adjudged to be wholly void, will encounter much opposition from the authority of decided cases." This was in the year 1812.

Pigot's Case, 11 Coke, 27, was one of debt on a bond, and plea *non est factum*. The bond was given originally to the plaintiff, Benedict Winchcombe, in £60. After the execution and delivery of the bond, the words "sheriff of the county of Oxford" were inserted after the name of Benedict Winchcombe, and before the words "in sixty pounds," the obligee being, in fact, sheriff of Oxford, and the bond an official bond. The interlineation was made without the privity of the obligee. The case turns upon the effect of this interlineation in the bond. It is said it was moved at the bar, when a deed shall be good in part and void in part; and, as to this, Lord Coke says, "I conceive there is a difference when a deed is void *ab initio*, and when it becomes void by misfeasance, *ex post facto*; also, when the deed which is void *ab initio* doth consist upon the entirety, and when upon divers several causes; and in these, also, there is a difference. when the several clauses are absolute and distinct, and when they are several, and yet the one has dependency upon the other." The report goes on to state "that it was unanimously agreed in 14 Hen. VIII., 25, 26, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond, are against law, and some good and lawful, that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good." In this reference to the unanimous judgment in 14 Hen. VIII., no distinction is noted between a common law and a statutory bond; but we must observe that the case in which it is cited by Lord Coke was one of an official statutory bond. It is further said in this case "that if there are two absolute and distinct clauses in a deed, and the one is read to the party not lettered, and the other not, that the deed is good for the clause which was read, and, *ab initio*, void for the residue."

Buller (N. P., 171) cites the case we have just referred to, and thus expresses himself: "If part of the condition be bad by common law, and part good, the deed will be good for that part of the condition which is good; *aliter*, where part is made bad by statute." No such distinction is found in Pigot's Case. Besides, the words "part is made bad by statute" import something much stronger than the mere addition of a condition, not authorized by the statute, to one that is. The case of Norton v. Simmes, Hob., 13, was a decision upon the words of the statute of 23 Hen. VI. It is said "the difference was taken between a bond made void by statute, and by common law; for if, upon the statute of 23 Hen. VI., a sheriff take a bond for a point against that law, and also for a debt due, the whole bond is void; for the letter of the statute is so." This statute prescribes the form of the bond or security which a sheriff shall take; and we thus understand what is intended in Hobart, by the expression of a bond "made void by the statute," and "taken for a point against that law." In the case of the United States v. Smith, 2 Hall's L. J., 456, this statute and the decisions upon it are noticed. It was an action on a bond executed by the defendant to the United States, and delivered to the collector of the port of

New York, taken under the second section of the embargo act, of 22d December, 1807 (2 Story's Laws, 1071). It was contended to be a void bond, because not made in conformity with the act, which required the security "to be given to the collector of the district," and this was made payable to the United States. The condition, also, was to reland the goods at the said port of St. Mary's, or at some other port of the United States. The words of the act were that they should be relanded "in some port of the United States." Judge Talmadge said that the law prescribed no form of bond, nor avoided any that might be adopted. He thought "the bond, as taken, embraced the substance, and was, within the spirit and authority of the act, a voluntary bond and valid." He observes that the English authorities cited were decisions upon the particular words of the statute of 23 Hen. VI., authorizing and requiring bail bonds, "which statute prescribes the form of the security and declares all others to be void."

The doctrines of this decision receive a strong confirmation in the case of *Morse v. Hodsdon*, 5 Mass., 314, where it is laid down that, if the officer to whom a writ of replevin is directed and delivered, take from the plaintiff a bond not conformed to the requisition of the statute, which is voluntarily executed by the plaintiff, he shall not avoid it on that account. How was this a voluntary bond more than that we have to deal with? The officer of the law appointed to take the bond and execute the writ required it, and the plaintiff could not get his goods without executing it. The officer, too, acted by the authority of the statute in requiring and in taking the bond. The variance was a very important one. By the condition of the bond taken, the penalty was declared to be forfeited if the plaintiff, in the replevin, did not prosecute this suit to judgment and recover; whereas it should have been to return the goods and pay damages and costs. Chief Justice Parsons says, "If a plaintiff execute an informal bond voluntarily and to obtain possession of his goods, and the officer thereupon deliver him the goods, the defendant in replevin may, if he please, accept the bond, and pursue a remedy at law upon it against the obligor, unless the bond be void by the common law or by statute." As to a bond void by statute, the chief justice says: "If it be void, it must be so in consequence of the statute directing the form of the writ of replevin. True it is, that the condition in this case is variant from the form there directed; but that statute does not prohibit the taking a bond of any other form, or declare a bond of any other form void." The chief justice considers this bond to be a voluntary bond. He observes, "they were not obliged to give this bond, and, if a formal bond had been tendered to the officer, he must have executed the writ;" and concludes, "the bond must be good, unless it be declared void by the common or statute law; we know of no law by which it is made void."

The case of *Clapp v. Guild*, 8 Mass., 153, was a replevin for goods valued at \$150. The officer was directed to execute the precept if the plaintiff first gave bond in \$300. He took a bond for \$800. It was objected that "the bond was not taken according to the command of the writ, nor pursuant to the directions of the statute." The objection was overruled. In 1811, the case of *Armstrong v. United States*, Pet. C. C., 46, was decided in this circuit. It was on the equity side of the court. The material circumstances were these: In June, 1796, one Smith was appointed to collect the internal revenue of a district in New Jersey, and gave bond with one Willis as his surety; he was afterwards required to give additional security, and in January, 1799, he, with the complainants as his sureties, executed a new bond, with condition that he had faithfully

executed the duties of a collector, and would thereafter faithfully execute the same. Smith, the principal, was then indebted to the United States for collections previously made, and became further indebted during the year 1799. Suit was brought by the United States on the last bond, to recover the whole. The plaintiff offered to pay the amount which became due since January, 1799. On this case Judge Washington decided, "that the substantial form of the bond required by the act of congress was prospective only; and that when a statutory bond is taken, it ought to conform, in substance at least, to the requisitions of the statute; and if it go beyond the law it is void, at least so far as it does exceed those requisitions. That this was an official bond, which the supervisor had a right to demand, and Smith was obliged to give, if he meant to continue in office." The result of this case was, that the whole bond was not declared to be void; nor did the complainants ask it; but an injunction was granted, except as to the sum liquidated and stated as having been due since January, 1799, with interest. We must remark here, that the judge recognizes the principle that the good and the bad parts of the bond might be separated, and the condition be affirmed and executed as to the one and rejected as to the other. It is something, too, that Mr. Stockton, whose ability and attention to the rights of his clients were not surpassed, did not ask an exemption from the responsibilities of this obligation, except as to that part of it which was not authorized by the law. I should not, perhaps, omit further to remark, on this case, that Judge Washington seems to me to express himself inaccurately when he says, or is reported to say, that this was an official bond which the supervisor had a right to demand, and Smith was obliged to give. I should rather say, with Chief Justice Parsons, that Smith might have refused to execute this bond, and should have tendered one made in conformity with the act of congress, and the supervisor would have insisted on his own form at his peril. Fifteen years afterwards the same judge expressed the same opinion upon the point we are examining. In the case of *The United States v. Howell*, 4 Wash., 620, he says: "It has been made a point whether a bond, not being required to be taken by any act of congress, is a valid one. My opinion on this point is, that where a statute requires an official bond, and prescribes substantially the terms of it, it must conform to the requisitions of the statute, and if it go beyond them it is void, so far at least as it exceeds those requisitions."

The case of *Dive v. Manningham*, Plow., 60, cited by the defendant's counsel, was a decision upon the statute of 23 Hen. VI., which, as we have already seen, expressly declares all bonds, taken under the statute, to be void which are not made in the manner prescribed by the statute; it was the case of a bail bond given to the sheriff under that statute. The judgment of Chief Justice Montague is principally given on questions of pleading, and on the construction of the statute. As to one point he says, "and it seems to me that the obligation here is void by the letter of the statute;" which avoids "obligations taken in any other manner than the statute limits;" and a reason is given for this strictness, which has a peculiar application to the bonds provided for by that statute, and the abuses intended to be prevented by it. The case referred to by the chief justice in 7 Ed. IV. was also decided on the words of the statute: "the court there, also, held that if the obligation has not the conditions expressed in the statute, it is not the deed of the party." The chief justice still continuing his remarks upon this statute, does say, "I apprehend that if the obligation had been conditioned according to the statute, and had another thing also in the same condition, that the obligation, by reason of this condition, would be utterly

void." And why? He has told us before, by the express letter of the statute. This, however, is the *dictum* of one of the judges, on a point not in the case decided. There is nothing in *Townsend's Case*, Plow., 111, that has any judicial authority or bearing upon the question we are considering. *Lee v. Coleshill*, Cro. Eliz., 529, was an action of debt on an obligation made to one Smith by the defendant, with a condition for the performance of covenants between Smith and Coleshill, whereby Coleshill, being a customer of London, made Smith his deputy in the said office, and covenanted to surrender these letters patent before a certain day, and to procure new ones to himself and Smith; as also, that Coleshill should pay the executors of Smith three hundred pounds. The defendant showed that by the statute of 5 Ed. VI., all promises, bargains and contracts, for the buying of divers offices, whereof this was one, were void. The plaintiff argued that he should have judgment, "for there be many covenants within the indenture, whereof some are good and lawful, and for these, doubtless, the obligation remains good." The defendant's counsel replied that "all parts here of this indenture concern the exercising of the office; and, if any of the covenants concerning other matters should be accounted good, yet the obligation is void in all, for the statute saith, the bond to that purpose shall be void, and then it is not possible it should be void to this intent and good for another." The argument of the defendant, here, was on the words of the statute expressly declaring the bond to be void, and also on the allegation that all parts of the indenture concerned the exercising of the office. We do not know on what ground it was decided. The reporter merely says, "wherefore the court here did not deliver any great opinion, but, *absente* Walmsley, *adjournatur*." And it was afterwards adjudged that the obligation was void in every part, being against law.

§ 237. *A bond, to be valid under a statute, must be taken in the manner and form prescribed, if such latter is made an express condition of its validity.*

A distinction, and it is a natural one, seems to run through these cases. It is this: Where a statute authorizes a bond to be taken in a prescribed manner or for certain expressed purposes, and declares that if it be not so taken the bond shall be void, then it may not stand good for any purpose, however lawful in itself, if it be not conformable to the statute; but where the statute only directs the condition of the bond, and does not avoid it, if it should not conform to the directions, and something more than that condition is added to it, the bond may be allowed to cover the authorized part of the condition, and so much may be recovered under it, and no more. The case of *The United States v. Morgan*, 3 Wash., 10, has been greatly relied upon by the defendant, and calls for a particular attention. It was an action on an embargo bond, tried in this district at April sessions, 1811. The plea, to which there was a demurrer, presented three objections to the bond. 1. That the collector and not the United States should have been the obligee. 2. That the condition of the bond omits to insert the words "dangers of the sea excepted." 3. That it binds the defendant to deliver to the collector at Philadelphia, where the bond was taken, the certificate of relanding in the United States, within three months from the date of the bond. None of the arguments of counsel are given, and the opinion of the court is very brief. Judge Washington says: "The bond is a statutory instrument; the officer had no authority to take it, but in virtue of a power conferred on him by the government of the United States; the power should have been at least substantially pursued. The embargo law prescribes the material parts of the bond to be taken. It is to be in

a sum of double the value of the vessel and cargo, with the condition that the goods shall be relanded, dangers of the sea excepted." We see, then, that the bond in that case stipulated for a relanding absolutely, when the law allowed an essential exception, and required the relanding accordingly. The bond was declared to be void by the judge. 1. Because the condition required the obligors to reland the cargo in the United States, although they might have been prevented by a peril of the sea. 2. Because the condition requires the obligors to return the certificate of relanding to the collector at Philadelphia, within a limited time; whereas the law did not impose upon the obligors the necessity of returning the certificate to that officer at all, much less to do it within a prescribed period. In comparing this case with that under our consideration, an important difference at once strikes us. The condition of that bond was not, as ours is, in its nature or terms divisible. There was not in it a part which was bad, and a part which was good, and so set forth that they might be separated from each other; that the one might be retained and the other rejected; that the obligation might stand good for the one and not for the other; that the United States might say, on the record, we ask for a judgment only on so much of this condition and its forfeiture as is according to law. It is impossible to make the bond in Morgan's case conform to the law by taking away any part of it. You must make altogether a new and a different condition; you must add an important qualification or exception given by the act of congress, and not given by the bond; and you must essentially change, indeed expunge, another part of the condition which was not warranted by the law. In short, you must make a new contract between the parties. It was a very plain case, and this may account for the little attention that was given to the argument. Three or four cases appear to have been cited for the defendants, and not one by the United States. We may say that the ground was abandoned by the plaintiffs, and very properly.

I ought not to omit some general remarks or principles which fell from the judge. He says that if the bond "bind the obligors to do more than the law requires, it is not the bond which the officer was authorized to take, and all is void." Now this is true as applied to such a case as he had in his view; where an absolute relanding was required instead of a conditional one; and where a certificate was required to be delivered to a certain officer, and at a certain time, neither of which was warranted by the law. But that the judge did not mean to say that in all cases, in which the bond binds the obligor to do more than the law requires, all is void, may be inferred from his expressions in the cases already cited; one of them, that of *Armstrong v. The United States*, being decided six months after Morgan's case; and the other, that of *The United States v. Howell*, fifteen years later. In both of these he qualifies the principle by adding "at least so far as it exceeds the requisitions of the law." The case of *The United States v. Hipkin*, 2 Hall's L. J., 80, was decided in the district court at Norfolk. No opinion was given by the court, nor was any necessary. The objection to the bond was that the condition was contrary to the express provisions of the law. It was not a case of a condition with several stipulations, divisible from each other, some according to law, and others not so. The district attorney admitted that no recovery could be had for the breach of a condition that was not authorized by the law which required the bond.

The cases of *Rex v. Croke*, Cowp., 29, and *Thatcher v. Powell*, 6 Wheat., 119, sustain the general principle that powers given by statutes to public officers must be strictly pursued. These cases have no particular analogy to this.

In the case of *Bolton v. Robinson*, 13 Serg. & R., 193, Judge Duncan gives the opinion of the court and says, "This obligation is a statutory one, with an entire unwarranted condition; so far from conforming to the requisitions of the act, it is in direct contradiction." He then quotes the opinion of Judge Washington, not for his general expressions in *Morgan's case*, but with their qualifications in that of *The United States v. Armstrong*, "that a statutory obligation ought to conform at least in substance to the requisition of the statute, and if it go beyond the law it is void, at least so far as it exceeds the requisition." The judge says, "The act required bail in the nature of special bail; the bail taken was absolute for payment of the debt. The whole was excess, and the condition was therefore against law. It did not consist of several parts, some of which were good and some bad, and therefore the whole was void." The case of *Norton v. Syms, Moore* (folio), 856, so far as it bears upon our point, refers to *Coleshill's case*, which we have already considered. From this examination of the cases we may consider it to be settled, that if a bond be taken at the common law, with a condition, in part good and in part bad, a recovery may be had on it for a breach of the good part. This being the general common law principle, it is incumbent upon the defendant to show that a different rule is established in regard to a statutory obligation on a bond authorized and required to be taken by a statute. An able and laborious endeavor has been made to sustain this distinction by the cases and arguments drawn from them to which I have referred with a careful examination. In my opinion the distinction is not supported, as applicable to a case like the present, in which there is nothing in the statute declaring that bonds that vary from the prescribed form shall be altogether void, and in which the good part of the condition may be easily separated from the bad. Nothing is required to be added to the contract, and nothing to be taken from it but what is favorable to the obligor by diminishing the extent of his responsibility.

§ 238. In general.— Where an official bond is accepted by the government and is returned to the principal for the purpose of having additional sureties added thereto, but no change is actually made in it, its validity is not affected. *Postmaster-General v. Norvell*, * Gilp., 106.

§ 239. An official bond to be a valid and binding obligation must be accepted and approved by the proper officer of the government. Such acceptance need not be express, but may be implied from circumstances; and the mere fact that the bond was returned by the government after it had been retained by it for some time is not conclusive of its non-acceptance. *Ibid.*

2. Breach.

SUMMARY — *Clerk of court receiving insufficient bond*, § 240.— *Neglect of register to pay over surplus*, § 241.— *Failure of collector to pay over*, § 242.— *Bond covering conduct under new appointment*, § 243.— *Liability of collector for uncollected duty bonds*, § 244.— *Liability of receiver of public money*, §§ 245-250.

§ 240. In a suit on the bond of a clerk of a court for taking an insufficient bond in the course of his official duties, it is a defense to such action that the obligees in such bond received from the sureties a sum of money in satisfaction of the same. *Bevins v. Ramsey*, §§ 251, 252.

§ 241. The neglect and refusal of the register of the land office to pay over to the United States the surplus remaining after deducting his compensation from the fees received from the locators of military bounty land warrants is a breach of the condition of his bond both as respects himself and his sureties, and the United States is not obliged to proceed against the register for money had and received. *United States v. Babbitt*, §§ 253, 254.

§ 242. In an action on the official bond of a collector, where the breach assigned is that he did not faithfully perform the duties of collector, but received as such a certain sum which

he failed to account for or pay over to the United States, judgment cannot be given for a greater amount than that actually collected and not paid over. Failure to collect cannot be set up at the trial to sustain judgment for the amount alleged in the declaration. *United States v. Glenn*, § 255.

§ 243. A. is a deputy postmaster, holding under an appointment to expire at the end of the next session of the senate. Before this time expires, he is again appointed to the same office by the president, and confirmed by the senate, and his commission signed. Before his new commission reaches him, he executes his official bond, whose condition recites that "whereas, A. is deputy postmaster at Mobile," etc. This bond is accepted and approved by the postmaster-general after A. receives his new commission and is sworn into office. *Held*, that the bond takes effect at the date of its acceptance and approval by the postmaster-general; that the above recital must have reference to that date, and that the bond secures the conduct of the deputy postmaster under his new appointment. It was also held that parol evidence would be inadmissible to prove that the bond was in fact intended by the parties to apply to the first appointment. *United States v. Le Baron*, §§ 256-261.

§ 244. A revenue collector is not liable, on his official bond, for the amount of uncollected duties and duty bonds, which have been placed in suit by him or his predecessor by direction of the proper officers. His liability is limited to the use of ordinary care in collecting and paying over the amounts, and he is only chargeable therewith when something is collected. *United States v. Snyder*, § 263.

§ 245. A receiver of public money is not an ordinary bailee, but is bound by the terms of his bond; by giving bond, to account for money coming into his hands, he becomes an insurer. *Boyden v. United States*, §§ 263-265. See § 299.

§ 246. And it is held no defense that the receiver was attacked in his office and the money taken from him by force. *Ibid*.

§ 247. Though the statute requires the receiver to pay over when required, etc., a declaration alleging a request is sufficient after verdict. *Ibid*.

§ 248. Overruling necessity is a sufficient answer for the loss of public property by an officer where his bond is not considered. *United States v. Thomas*, §§ 266-273. See § 299.

§ 249. As to the liability of an officer for public property in his custody, it is held that the basis of the common law rule is founded on the doctrine of bailment. The officer is a bailee, and the rules which grow out of that relation are held to govern the case. *Ibid*.

§ 250. And although the officer's bond requires him to keep the public money safely, he is discharged if the money is lost through overruling necessity. *Ibid*.

[NOTES.— See §§ 274-303.]

BEVINS v. RAMSEY.

(15 Howard, 179-183. 1853.)

ERROR to U. S. Circuit Court, Eastern District of Tennessee.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—The defendant, William B. A. Ramsey, and his sureties were sued on an official bond given by Ramsey as clerk of the chancery court held at Knoxville, Tennessee. The condition of the bond declares that the clerk shall "truly and honestly keep the records of said court and discharge the duties of said office according to law;" and the declaration alleges that said Ramsey did not truly and lawfully discharge the duties of his office, in this: that Bevins, Earle & Co. filed their bill in equity in the chancery court at Knoxville against Chase and Bowen, and that certain goods of theirs were attached and put into the hands of said Ramsey, as receiver; and that by an order of court the injunction was dissolved, and the receiver, Ramsey, was directed to surrender the goods to Chase and Bowen, "upon their entering into bond with security to abide by and perform the judgment and decree of the court upon final hearing of the cause, if made against them;" and that by virtue of the order it became the duty of Ramsey, as clerk and master of said court, to take a bond as above prescribed. Nevertheless he did not take from Chase and Bowen their bond, with sufficient sureties thereto, but, on the contrary, he took certain sureties (five in number) who were wholly insufficient to

perform the decree of the court, and on said insufficient bond and security surrendered the goods to Chase and Bowen; and that afterwards, on a final hearing, a decree was rendered against Chase and Bowen in favor of Bevins, Earle & Co. for the sum of \$6,303.64, with interest thereon, which remained unpaid.

The second and third breaches aver that Ramsey surrendered the goods without taking any bond, "with good and sufficient sureties," from Chase and Bowen; and the fourth breach avers that no bond whatever was taken from Chase and Bowen on the delivery of the goods to them. The defendant relied on several pleas in defense, only two of which, the fourth and sixth, it is deemed necessary to notice. The fourth plea sets out the order dissolving the injunction and the bond taken by Ramsey from Chase and Bowen and their five sureties, and avers that, after the final decree was made against Chase and Bowen, the bond was, on the application of Bevins, Earle & Co., by order of the court, surrendered to them by the clerk and master, and was accepted by them; and under and by virtue of said bond Bevins, Earle & Co. have demanded and brought suit against and received of the sureties in said bond large sums of money, to wit, \$2,000, part and parcel of the penalty and condition of said bond, and which was demanded, and received on, and in discharge of said bond. The sixth plea avers that the bond taken by Ramsey, as clerk and master, was for \$10,000, and was in due form; and that in judging as to the sufficiency of the sureties, and in surrendering the property, said Ramsey acted *bona fide*, and in the exercise of his best judgment.

§ 251. *Whether a declaration upon the bond of a clerk of court for taking insufficient security is sufficient without alleging that he acted in bad faith.*

To this plea the plaintiffs replied, reaffirming that said Ramsey had not taken bond with good and sufficient security, as was his duty; and to the replication there was a demurrer.

As the declaration did not charge the clerk with bad faith, and the presumption of good faith being *prima facie* in his favor, from the face of the bond taken by him, neither the plea nor replication could be of any force, because in their legal effect they are the same as that of the declaration; and so the court below held, and, going back to the declaration, declared it bad; and, secondly, overruled the demurrer to the defendant's fourth plea. The plaintiffs were offered the liberty to amend their declaration and pleadings, but this they declined doing, and final judgment was rendered against them. Whether it was necessary to aver in the declaration that insufficient security was taken wittingly and knowingly, and consequently in bad faith, we do not propose to discuss, as it is a question more appropriately belonging to the state courts than to this court. But as judgment was given against the plaintiffs on the fourth plea, and as that judgment is conclusive, if the plea is good, we will consider that plea. The demurrer admits that Bevins, Earle & Co. obtained the bond of Chase and Bowen and their sureties; that they sued the sureties on it, and received of them \$2,000, part of the penalty; and which sum was received in discharge of the bond; whether the money was obtained by judgment or compromise does not appear, nor is it material.

§ 252. — *if the obligee in such bond receives a sum of money from the obligors in discharge thereof, the clerk will be relieved from liability for neglect in taking it.*

Chase and Bowen were principals to Ramsey, if he was in default for neglect of official duty; and so were the sureties to the bond responsible to him should he be compelled to pay in their stead. The clerk was the last and most favored

surety, and if forced to pay the debt, he was entitled to all the securities Bevins, Earle & Co. had, to remunerate his loss; and, in such event, he would have been entitled to the bond on Chase and Bowen and their sureties. And in the next place, it is manifest that Ramsey cannot be in a worse situation than if he had been a party to the bond, in common with the other sureties; and in such case, it must be admitted that he would stand discharged. We concur with the circuit court that the fourth plea was a good defense, and order the judgment to be affirmed.

UNITED STATES *v.* BABBITT.

(5 Otto, 384-386. 1877.)

ERROR to U. S. Circuit Court, District of Iowa.

STATEMENT OF FACTS.—Babbitt gave a bond to the United States, in 1853, for the faithful discharge of his duties as register of the land office. This action was brought to recover an amount received by him as fees, in the location of military bounty-land warrants, in excess of the compensation allowed him by law. The sureties pleaded that it was not a part of the duty of the principal to receive the fees, and Babbitt set up the same defense. Demurrer to the pleas overruled, and judgment for defendants.

Opinion by MR. JUSTICE SWAYNE.

This case comes before us upon a certificate of a division of opinion of the judges by whom the case was tried in the circuit court.

The questions certified are: 1. Whether it was the duty of the defendant Babbitt, as register of the land office, to receive the register's fees from the locators of military bounty-land warrants, upon their being located on the public lands, subject to private entry by such warrants, under the acts of February 11, 1847, September 28, 1850, March 22, 1852, and March 3, 1855. 2. Whether, if such fees were charged and received by Babbitt, as such register, his neglect and refusal to account for and pay over to the United States the surplus, over and above the maximum compensation authorized to be by him received, as determined in this case by the supreme court of the United States, in *United States v. Babbitt*, 1 Black, 55, constitutes a breach of the conditions of the official bond of Babbitt, as register, as respects himself alone, and also as respects the sureties in the bond, and whether, in such case, the remedy is not by an action against Babbitt for money had and received.

§ 253. *It is the duty of the register of the land office to receive fees from locators of military bounty-land warrants.*

The reported case, to which reference is made, contains a careful analysis of the acts of congress mentioned in the first question, and of several others relating to the subject. It is unnecessary to go over the same ground again, or to reproduce anything there said. It was held in that case that \$3,000 per annum was the maximum compensation allowed to the register by law, and that he was not entitled to hold, in addition, the fees in question in his own right. The act of March 3, 1853, requires that "the surplus which shall remain" of such fees, beyond the compensation to which the register is entitled, "shall be paid into the treasury of the United States as other moneys." There could be no paying without previous receiving. The latter duty is explicitly declared. The prior one is as clearly to be inferred. Both would be alike implied in the absence of the provision as to paying over. What is implied in a statute, will, deed or contract, is as much a part of it as what is expressed. *United*

States v. Babbit, supra. The first question certified must, therefore, be answered in the affirmative.

§ 254. *The sureties on the official bond of the register of the land office are bound for the surplus of fees over his official compensation.*

To the second it must be answered, that, if the register received such fees, the neglect and refusal to pay over to the United States the surplus beyond the compensation to which he was entitled by law was a breach of the condition of his official bond, both as respects himself and the sureties in the bond, and that the United States is under no necessity to proceed against the principal in the bond by an action on the case for money had and received. The judgment will be reversed, and the cause remanded for further proceedings in conformity to this opinion; and it is so ordered.

UNITED STATES v. GLENN.

(Circuit Court for Texas: 1 Woods, 400, 401. 1872.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—This is an action of debt on the official bond of Frank W. Glenn, as collector of internal revenue for this district. The breaches assigned are, that Glenn did not faithfully perform his duties as collector, but received as such the sum of \$64,000, which he never accounted for or paid to the United States. To the declaration was attached a copy of the bond, and a particular statement of Glenn's accounts at the treasury department showing the balance claimed against him. But it was not pretended, on the trial, that he had actually collected all the items contained on the debit side of the account, but that, under the thirty-fourth section of the act of 1864 (13 Stat., 223), he had been charged with the whole amount of the assessor's list of taxes returned to him, together with the amount of unpaid taxes turned over to him by his predecessor, and it was contended that, if he had not collected them, it was dereliction of duty on his part unless he showed a sufficient excuse.

§ 255. *In a suit on an official bond, the breach assigned being failure to account and pay over, failure to collect will not sustain the declaration.*

We are of opinion that, under the breach set forth in the declaration, dereliction of duty in not making collections cannot be set up at the trial. It is not the same thing as collecting and failing to pay over. At common law, it is true, any failure of duty, to any amount, involved the forfeiture of the bond and the payment of the penalty. And considerable sums were shown to have been collected by Glenn. This evidence was competent, and would have been sufficient, under the rules of the common law which once prevailed, to make him liable for the whole amount. But the courts have long since adopted a more just rule, and give judgment only for the amount actually due. And, as a very large amount was embraced in the verdict which did not consist of moneys collected and unpaid, we think that the verdict must be set aside, but with leave to the district attorney to amend the declaration.

Ordered accordingly.

UNITED STATES v. LE BARON.

(19 Howard, 73-79. 1856.)

ERROR to U. S. Circuit Court, Southern District of Alabama

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the southern district of Alabama, in an action of debt,

founded on an official bond of Oliver S. Beers, as deputy postmaster at Mobile, the defendant being one of his sureties. It appeared, on the trial in the circuit court, that Beers was appointed to that office by the president of the United States, during the recess of the senate, and received a commission, bearing date in April, 1849, to continue in force until the end of the next session of the senate, which terminated on the 30th day of September, 1850. It also appeared that in April, 1850, Beers was nominated by the president to the senate, as deputy postmaster at Mobile; and the nomination having been duly confirmed, a commission was made out and signed by President Taylor, bearing date on the 22d day of April, 1850; but it had not been transmitted to Beers on the 1st day of July, 1850, when the bond declared on bears date. Beers took charge of the postoffice at Mobile before his second appointment, and continued to act, without intermission, until he was removed from office in February, 1853. The default, assigned as a breach of the bond, was admitted to have occurred under his second appointment; and the principal question upon this writ of error is, whether the bond declared on secures the faithful performance of the duties of the office under the first or under the second appointment. The condition of the bond recites: "Whereas the said Oliver S. Beers is deputy postmaster at Mobile aforesaid," etc.

§ 256. *Recitals in a postmaster's bond relate to the time of its reaching the postmaster-general and its acceptance by him.*

The first inquiry is, to what date is this recital to be referred? The district judge, who presided at the trial, ruled that it referred to the office held by Beers when the bond was signed. The delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day; and when a delivery on some subsequent day is shown, the deed speaks on that subsequent day and not on the day of its date. In Clayton's Case, 5 Coke, 1, a lease, bearing date on the 26th of May, to hold for three years "from henceforth," was delivered on the 20th of June. It was resolved that "from henceforth" should be accounted from the day of delivery of the indentures and not from the day of their date; for the words of an indenture are not of any effect until delivery — *traditio loqui facit chartam*. So in Ozkey v. Hicks, Cro. Jac., 263, by a charter-party, under seal, bearing date on the 8th of September, it was agreed that the defendant should pay for a moiety of the corn which then was, or afterwards should be, laden on board a certain vessel. The defendant pleaded that the deed was not delivered until the 28th of October, and that on and after that day there was no corn on board; and, on demurrer, it was held a good plea, because the word *then* was to be referred to the time of the delivery of the deed and not to its date. And the modern case of Steele v. Mart, 4 Barn. & Cress., 272, is to the same point. A lease purported on its face to have been made on the 25th of March, 1783, *habendum* from the 25th of March *now* last past. It was proved that the delivery was made after the day of the date, and the court of king's bench held that the word *now* referred to the time of delivery and not to the date of the indenture.

At the trial in the circuit court, it appeared that on the day after the date of the bond, Beers, in obedience to instructions from the postmaster-general, deposited it, together with a certificate of his oath of office under his last appointment, in the mail, addressed to the postmaster-general at Washington. In Broome v. United States, 15 How., 143 (§§ 552-555, *infra*), it was held that a collector's bond might be deemed to be delivered when it was put in a course

of transmission to the comptroller of the treasury, whose duty it is to examine and approve or reject such bonds. But this decision proceeded upon the ground that the act of congress requiring these bonds, and their approval, had allowed the collector to exercise his office for three months without a bond; and that consequently the approval and delivery were not necessarily simultaneous acts, nor need the approval precede the delivery; and the distinction between bonds of collectors and those of postmasters is there adverted to. The former may take and hold office for three months without a bond. The latter must give bond, with approved security, on their appointment; and there is no time allowed them, after entering on their offices, to comply with this requirement. The bond must therefore be accepted by the postmaster-general, as sufficient in point of amount and security, before it can have any effect as a contract. Otherwise, the postmaster might enter on the office merely on giving a bond, which, on its presentation, the postmaster-general might reject as insufficient. In other words, the person appointed might act without any operative bond, which, we think, was not intended by congress. It is like the case of *Bruce v. State of Maryland*, 11 Gill & J., 382, where it was held that the bond of a sheriff took effect only when approved by the county court; because it was only on such approval that the sheriff was authorized to act.

§ 257. *A postmaster's bond speaks from time of approval by postmaster-general.*

The purpose of the obligee was to become security for one legally authorized to exercise the office; not for one who enters on it unlawfully, because he failed to comply with the requirement to furnish an approved bond; and this purpose can be accomplished only by holding that the appointee cannot act, and the bond cannot take effect until it is approved. Our opinion is, therefore, that this bond speaks only from the time when it reached the postmaster-general and was accepted by him; that until that time it was only an offer, or proposal of an obligation, which became complete and effectual by acceptance; and that, unlike the case of a collector's bond, which is not a condition precedent to his taking office, and which may be intended to have a retrospective operation, the bond of a postmaster, given on his appointment, cannot be intended to relate back to any earlier date than the time of its acceptance, because it is only after its acceptance that there can be any such holding of the office as the bond was meant to apply to. Now, at the time when this bond was accepted by the postmaster-general, Beers had been nominated and confirmed as deputy postmaster; he had given bond in such a penalty, and with such security, as was satisfactory to the postmaster-general; he had taken the oath of office, and there was evidence that a certificate thereof had been filed in the general post-office. Upon this state of facts, we are of opinion that at that time his holding under the first appointment had been superseded by his holding under the second appointment; and when the bond says, "is now postmaster," it refers to such holding under the second appointment, and is a security for the faithful discharge of his duties under the second appointment.

§ 258. *A judgment will not be sustained, on review, upon a fact not determined below.*

It was suggested at the argument that this bond was not, in point of fact, taken in reference to the new appointment, but was a new bond, called for by the postmaster-general under the authority conferred on him by the act of July 2, 1836. 5 Stats. at Large, 88, sec. 37. To this there are several answers. No such ground appears to have been taken at the trial, and the rulings of the

court, which were excepted to by the plaintiffs in error, precluded any such inquiry. These rulings were, that the holding to which the bond referred was a holding on the first day of July, and that Beers was in office on that day under the first appointment, and not under the second. This put an end to the claim, and rendered a verdict for the defendant inevitable.

§ 259. *Parol evidence is not admissible to explain an instrument which is unambiguous.*

But if this were otherwise, parol or extraneous evidence that the bond was not intended to apply to the holding under the second appointment, because it was a new bond taken to supersede an old one, would be open to the objections which the defendants in error have so strenuously urged. There is no ambiguity in the bond. It refers to a holding at some particular date. The law determines that date to be the time when the bond took effect. Nothing remains but to determine, upon the facts, under which appointment Beers then held; this also the law settles, and when it has thus been ascertained that he held under the second appointment, evidence to show that the bond was not intended to apply to that appointment would directly contradict the bond, for it would show it was not intended to apply to the appointment which Beers then held, while the bond declares it was so intended. The defendant in error further insists that Beers was not in office, under the second appointment, at the time this bond took effect, because the commission sent to him was signed by President Taylor, and was not transmitted until after his death.

§ 260. *Appointment to office under United States is complete when commission is signed by president.*

When a person has been nominated to an office by the president, confirmed by the senate, and his commission has been signed by the president, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the executive; all that the executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete.

§ 261. *The officer may be invested with the office without the transmission of his commission to him.*

The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody. It is but evidence of those acts of appointment and qualification which constitute his title, and which may be proved by other evidence, where the rule of law requiring the best evidence does not prevent.

It follows from these premises, that when the commission of a postmaster has been signed and sealed, and placed in the hands of the postmaster-general to be transmitted to the officer, so far as the execution is concerned, it is a completed act. The officer has then been commissioned by the president pursuant to the constitution; and the subsequent death of the president, by whom nothing remained to be done, can have no effect on that completed act. It is of no importance that the person commissioned must give a bond and take an oath, before he possesses the office under the commission; nor that it is the

duty of the postmaster-general to transmit the commission to the officer when he shall have done so. These are acts of third persons. The president has previously acted to the full extent which he is required or enabled by the constitution and laws to act in appointing and commissioning the officer; and to the benefit of that complete action the officer is entitled, when he fulfils the conditions on his part, imposed by law. We are of opinion, therefore, that Beers was duly commissioned under his second appointment. For these reasons, we hold the judgment of the circuit court to have been erroneous, and it must be reversed, and the cause remanded with directions to award a *venire facias de novo*.

UNITED STATES v. SNYDER.

(Circuit Court for Pennsylvania: 4 Washington, 559-561. 1825.)

Opinion by the COURT.

STATEMENT OF FACTS.—This was an action of debt brought in the district court upon the official bond given by the defendant, conditioned for the faithful discharge of the duties of his office as collector of the internal taxes and duties in the twelfth district of Pennsylvania, and for collecting and paying over the said taxes and duties. The demand was founded on a statement from the treasury department of certain uncollected bonds and duties due within this district. These bonds, or most of them, had been placed in the hands of an attorney for collection and suit by a preceding collector, with the approbation of the commissioner of the revenue, by whom his compensation was fixed. Whether the collection of any of the uncollected bonds and duties, and if any, to what amount, was intrusted to that attorney by the defendant, does not distinctly appear. By the instructions of the commissioner of the revenue to the different collectors, bearing date the — day of June, 1814, they are directed to commence prosecutions in the state courts, where the district court of the United States is beyond a certain distance, and if the attorney of the district be too remote and has appointed no deputy to act for him, then, and then only, the collectors are authorized to employ any other respectable attorney, who is to receive a reasonable compensation for his professional services. It is then added, "it may be advisable to employ an attorney, with the understanding that he shall have all the business of the collector." The subsequent instructions of the 8th of April, 1815, after referring to the act of congress of the 3d of March, 1815, say that this act will, after the district attorney has appointed his deputies, supersede the employment of other counsel, except where they may be specially employed by the treasury department. "In pending suits," they add, "it will be proper not to disturb the course that may have been pursued."

§ 262. *Liability of collector of internal revenue for bonds for duties not collected, etc.*

The judge of the district court, in his charge to the jury, stated that the collector, by his bond and the duties it guaranteed, was not charged with the uncollected bonds and duties as a debtor, but merely with the collection of them upon the same principles as other agents, acting with ordinary care and diligence. That the collecting officers were put under the superintendence of the commissioners of the revenue, who had power to make suitable regulations, as they did make. That the defendant, when he went into office, found that his predecessor had employed an attorney to sue the uncollected bonds, and this by the direction of the commissioner of the revenue. He then concludes by

saying that if the jury were satisfied of the facts, and that a special agent or attorney was employed by direction of the treasury officer, the defendant was not responsible for more than ordinary care and diligence in superintending the collection of the debts, and urging on such attorney; and that under any circumstances he was not to be debited with the debts at all events, except such as were received by him; and that upon the facts above stated, if found by the jury, the verdict ought to be for the defendant. The first point of law decided in this charge was, that the bonds debited by the treasury department to the defendant did not thereby constitute the latter a debtor, at all events, to the United States to their amount, but that he was placed thereby, and by his own bond and the duties of his office, in the predicament of an agent, who is bound to use ordinary care and diligence in collecting their amount, and when collected to pay them over. In this decision I entirely concur. The practice of charging the collectors of these taxes and duties with the whole amount due by their respective districts, is, I presume, a mere treasury arrangement, as I understand the twenty-seventh section of the act of the 22d of July, 1813, to be confined to the *internal taxes*; and I can find no similar provision in any other act of congress in relation to the collectors of the *internal duties*, or to those officers generally. If that section applied to the collection of the tax on stills, the subject of the present controversy, it would support the *principles* of law laid down by the district judge, but then the relief provided by it for the collector could only be afforded by the *comptroller*. The principle, then, being a reasonable and just one, and consistent with the general rules of law in relation to agents, and the above section not applying to the internal duties, I can perceive no objection to this part of the opinion of the district court.

But be this as it may, the material part of the charge was, that if the jury were satisfied that when the defendant went into office he found that a certain attorney had been employed by his predecessor to put in suit these bonds (meaning the bonds for the amount of which the suit was brought), by direction of the commissioner of the revenue, then the defendant was not responsible for more than ordinary care and diligence in superintending the collection; and I think it must be agreed by all, that to make the collector responsible in such a case for the amount of those bonds, would be to outrage every principle of justice, which no court could sanction, unless compelled to do so by some positive statute. By the act of July, 1813, it is declared that there shall be an officer in the treasury department, to be denominated "commissioner of the revenue," for superintending the collection of the direct tax and internal duties, who shall be charged, under the direction of the head of that department, with certain specific duties, and amongst them, with that of superintending generally all the officers employed in assessing and collecting the said taxes and duties. In the execution of the powers thus conferred on that officer, he issued to all the collectors under his control the instructions which have before been adverted to; whereby they were authorized, in case the district attorney resided too remotely from their respective collection districts, and had appointed no deputy to act for him, to employ any other attorney to sue for the taxes and duties which have become due; and to do this, with an understanding that he should have all the business of such collector. It is admitted, in this case, that the district attorney lived too remote from the twelfth collection district to attend to the business of the collection of it, and that he had appointed no deputy to represent him. In consequence of these circumstances, the predecessor of the present collector employed an attorney to sue the bonds which had been

taken, which attorney was approved of, and his compensation fixed upon, by the commissioner of the revenue. That this officer had a power to give these instructions and to authorize the acts done by the collector alluded to, is unquestionable; and if this be so, upon what principle is it that the present collector can be made responsible for the amount of the bonds which, with the approbation of an authorized officer of the government, had been placed in the hands of an attorney for suit and collection, previous to his coming into the office? He could not withdraw the bonds from the hands of the attorney without a violation of the engagement made with him, "that he should have all the business of the collector." And, if they were in suit, which is highly probable, he would, by doing so, have acted in opposition to that part of the instructions of the 8th of April, 1815, which states that, "in pending suits, it will be proper not to disturb the course that may have been pursued." The creation of a commissioner of the revenue, for the purpose of superintending the collection of those portions of the public revenue, and of the officers employed in their collection, was, no doubt, done for wise and useful purposes; and, in obeying his instructions, the collectors acted as duty required, and can upon no just or legal principle be responsible for the consequences of those acts. The judgment must be affirmed.

BOYDEN v. UNITED STATES.

(18 Wallace, 17-25. 1871.)

ERROR to U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—Boyden gave a bond for the faithful discharge of the duties of his office as receiver of public money. In a suit on the bond the breach alleged was his failure to pay over a sum of money, although often requested, etc. He set up the defense that the money was taken from him by force, and without his fault. Evidence in support of this defense was excluded.

§ 263. *A common bailee is liable only for ordinary care, and is not responsible for losses caused by irresistible force.*

Opinion by MR. JUSTICE STRONG.

Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more except in the case of common carriers, and the duty of a receiver *virtute officii* is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer.

§ 264. — *but an officer who gives bond to pay over moneys received without exception becomes an insurer.*

He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contract-

ing party, and not within his control, he will not be excused. *Metcalf on Contr.*, 213; *The Harriman*, 9 Wall., 161. The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part. It is true that in the case of *The Supervisors of Albany v. Dorr*, 25 Wend., 440, in the supreme court of New York, it was decided in a suit on a bond of a county treasurer, conditioned for the payment of all money that should come into his hands as treasurer, that he was not responsible for the public money feloniously stolen from his office without any negligence, want of due care, or other blame or fault whatever on his part; and this decision was affirmed in the court of appeals of that state, only, however, by an equal division. 7 Hill, 583. It was rested upon the supposed liability of the officer, *virtute officii*, which it was thought his bond did not increase, and it was supposed to be sustained by *Lane v. Cotton*, 1 Ld. Raym., 646, and *Whitfield v. Le De Spencer, Cowp.*, 754. It is quite plain, however, that those cases do not sustain it. They were actions upon the case against the postmaster-general, brought not by the government, but by private individuals, to recover damages for the negligent failure to deliver letters, and the defendants were held not liable for money stolen, even by their subordinates in office. At most the postmaster-general was a mere bailee, and no question was raised respecting the effect of a bond to secure the performance of his duties. But whatever may have been the ruling in the case of *The Supervisors of Albany v. Dorr*, it is no longer authority, even in the state of New York. *Muzzy v. Shattuck*, 1 Denio, 233, subsequently decided and affirmed unanimously in the court of appeals, is utterly irreconcilable with it, and it has settled the law otherwise in that state. So in *Pennsylvania, in Commonwealth v. Comly*, 3 Penn. St., 372, it was ruled that the responsibility of a public receiver depends on his contract, when there is one, and not on the law of bailments. There the condition of the bond was to account and pay over, and it was held no defense by the surety of the receiver that the money was stolen, though it was kept as a prudent man would keep his own funds. It was said by Chief Justice Gibson, in delivering the judgment of the court, after referring to the fact that a lessee is not relieved from payment of rent by destruction of the demised premises by fire: "A loss by a visitation of Providence, which no vigilance could prevent, would present a more meritorious claim for relief, one would think, than a loss by robbery, which is always preceded by a greater or less degree of negligence. A receiver or his surety would come before a chancellor with an ill grace on that ground, even if there was a power to relieve him. The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case; and his discretion, were he at liberty to use it, would be influenced by considerations of general policy." *State v. Harper*, 6 Ohio St., 607, is to the same effect. This is precisely the ground which this court has taken. In *The United States v. Prescott*, 3 How., 578, it was decided that the felonious taking, stealing and carrying away the public money in the hands of a receiver of public money, without any fault or negligence on his part, does not discharge him or his sureties, and that it cannot be set up as a defense to an action on his official bond. The condition of the receiver's bond in that case, it is true, was that

the receiver should pay promptly when orders for payment should be received, while the bond in the case before us is conditioned that Boyden, the receiver, had truly executed and discharged, and should continue truly and faithfully to execute and discharge all the duties of said office according to law. But the acts of congress respecting receivers made it their duty to pay the public money received by them when ordered by the treasury department, and that department, by its general orders of 1854, required payment to be made before this suit was brought. No exception was made, no contingency was contemplated. The bond, therefore, was an absolute obligation to pay the money, and differing not at all, in legal effect, from the bond in Prescott's case. A similar ruling was made in *United States v. Dashiell*, 4 Wall., 182. What the condition of the bond on which suit was brought in that case was does not appear in the report, but it was for the discharge of the paymaster's official duty. The doctrine of Prescott's case was also recognized in *United States v. Keebler*, 9 Wall., 83, and it must be considered as settled law. Applying it to the case now at hand, it makes it clear that the evidence offered by the defendants tending to prove that the receiver had been robbed of the public money received by him was rightly rejected as constituting no defense to the suit on the receiver's bond. It is true that in Prescott's case the defense set up was that the money had been stolen, while the defense set up here is robbery. But that can make no difference, unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it.

§ 265. *Pleading; declaration good after verdict.*

There is nothing in the second error assigned. Though, under the acts of congress of August 6, 1846 (9 Stats. at Large, 59, § 6), and the amendatory act of March 3, 1857 (11 Stats. at Large, 249), receivers are required to pay, when required by the secretary of the treasury, there were general orders made for all receivers requiring payments to be made at stated times, which were in existence when this receiver's bond was given. The declaration avers a request, and this is enough after verdict.

Judgment affirmed.

UNITED STATES v. THOMAS.

(15 Wallace, 337-355. 1872.)

ERROR to U. S. Circuit Court, Middle District of Tennessee.

STATEMENT OF FACTS.—Thomas gave bond, with sureties, for the faithful discharge of his duties as surveyor of customs and depository of public moneys. The bond was conditioned that he should keep safely, etc., all public money collected by him or otherwise placed in his custody. It was alleged, as a breach of the bond, that Thomas had paid out certain public money to persons not entitled, etc., and that he had failed to transfer and pay it out as ordered. The defense was that the money was seized by rebel authorities by force.

Opinion by Mr. JUSTICE BRADLEY.

This case brings up squarely the question whether the forcible seizure by the rebel authorities, of public moneys in the hands of loyal government agents, against their will and without their fault or negligence, is or is not a sufficient discharge from the obligations of their official bonds. This precise question has not as yet been decided by this court. As the rebellion has been held to have been a public war, the question may be stated in a more general form, as

follows: Is the act of a public enemy in forcibly seizing or destroying property of the government in the hands of a public officer, against his will and without his fault, a discharge of his obligation to keep such property safely, and of his official bond given to secure the faithful performance of that duty, and to have the property forthcoming when required? The question is thus stated in its double aspect, namely: First, in regard to the obligation arising from official duty; and secondly, in regard to that arising from the bond, because the condition of the latter is twofold — that the principal shall faithfully discharge his official duties, and that he shall pay the moneys of the government that may come into his hands as and when it shall be demanded of him. It is contended that the latter branch of the condition has a more stringent effect than the former, and creates an obligation to pay, at all events, all public money received.

§ 266. *Aside from his bond, the overruling force arising from inevitable necessity or the act of a public enemy is a sufficient answer for the loss of public property in the custody of a public officer.*

That overruling force arising from inevitable necessity or the act of a public enemy is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and aside from such a bond as exists in this case, seems almost self-evident. If it is not, then every military commander who ever lost a battle or was obliged to surrender his ship or fort or other public property, added a civil obligation to his military misfortune. And as it regards this question it is difficult to perceive any distinction between the loss of one kind of property and another. If the property belongs to the government the loss falls on the government; if it belongs to individuals it falls on them. The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulation. The ordinary rule will be found illustrated by a number of analogous cases.

§ 267. — *authorities reviewed.*

It is laid down by Justice Story, that officers of courts having the custody of property of suitors are bailees, and liable only for the exercise of good faith and reasonable diligence, and not responsible for loss occurring without their fault or negligence. Story on Bailm., § 620. Trustees are only bound to exercise the same care and solicitude with regard to the trust property which they would exercise with regard to their own. Equity will not exact more of them. *Id.*; Lewin on Trusts, 332, 3d ed. They are not liable for a loss by theft without their fault. *Id.* But this exemption ceases when they mix the trust money with their own, whereby it loses its identity, and they become mere debtors. *Id.*, and 2 Story's Eq. Juris., § 1270, and see §§ 1268, 1269; also 2 Spence's Eq. Juris., 917, 921, 933, 937; *Wren v. Kirton*, 11 Ves. Jr., 381; *Utica Ins. Co. v. Lynch*, 11 Paige, 520. Receivers, appointed by the court, though held to a stricter accountability than trustees, on account of their compensation, are nevertheless not liable for a loss without their fault; and they are entitled to manage the property and transact the business in their

hands in the usual and accustomed way. *Knight v. Ld. Plymouth*, 3 Atk., 480; *Rowth v. Howell*, 3 Ves. Jr., 566; *Lewin on Trusts*, 332, 3d ed.; *Edwards on Receivers*, 573-599; *White v. Baugh*, 3 Clark & Fin., 44. A marshal appointed by a court of admiralty to take care of a ship and cargo is responsible only for a prudent and honest execution of his commission. *The Rendsberg*, 6 Rob., 142. "Every man," says Sir William Scott, "who undertakes a commission incurs all the responsibility that belongs to a prudent and honest execution of that commission. Then the question comes, What is a prudent and honest execution of that commission? The fair performance of the duties that belong to it. . . . He must provide a competent number of persons to guard the property; having so done he has discharged his responsibility, unless he can be affected with fraud, or negligence amounting in legal understanding to fraud." 6 Rob., 154. See, also, *Burke v. Trevitt*, 1 Mason, 96, 100. A postmaster is bound to exercise due diligence, and nothing more, in the care of matter deposited in the postoffice. He is not liable for a loss happening without his fault or negligence. Soon after the organization of the government post it was attempted to charge the postmaster-general to the same extent as the common carriers who had previously carried the mails; and the question was elaborately argued in the great case of *Lane v. Cotton*, 1 Ld. Raym., 646, and Lord Chief Justice Holt strenuously contended for that view. But it was decided that the postmaster was only liable for his own negligence; and this case was followed by Lord Mansfield and the whole court, three-quarters of a century later, in the case of *Whitfield v. Le Despencer*, Cowp., 754. See *Story on Bailm.*, § 463; *Dunlop v. Munroe*, 7 Cranch, 242. In certain cases, it is true, a more stringent accountability is exacted; as in the case of a sheriff, in reference to prisoners held by him in custody, where the law puts the whole power of the county at his disposal, and makes him liable for an escape in all cases, *except* where it is caused by an act of God or the public enemy. 33 Hen. VI., p. 1; *Brooke's Abridg.*, tit. Dette, 22; *Dalton's Sheriff*, 485; *Watson on Sheriffs*, 140. The exception which thus qualifies the severest exaction of official responsibility known at the common law is worthy of particular notice. The reason for applying so severe a rule in cases of escape is probably founded in motives of public safety. Chief Justice Gibson, in *Wheeler v. Hambright*, 9 Serg. & R., 396, says: "The strictness of the law in this respect arises from public policy." Lord Chief Justice Holt, in his dissenting opinion in *Lane v. Cotton*, also held that the sheriff was responsible in the same strict manner for goods seized in execution; but he cited no authority for the opinion, and the general rule of responsibility is certainly much short of that.

§ 268. — *at common law an officer is a bailee of property in his official custody.*

The basis of the common law rule is founded on the doctrine of bailment. A public officer having property in his custody in his official capacity is a bailee, and the rules which grow out of that relation are held to govern the case. But the legislature can undoubtedly, at its pleasure, change the common law rule of responsibility. And with regard to the public moneys, as they often accumulate in large sums in the hands of collectors, receivers and depositaries, and as they are susceptible of being embezzled and privately used without detection, and are often difficult of identification, legislation is frequently adopted for the purpose of holding such officers to a very strict accountability. And in some cases they are spoken of as though they were absolute debtors for,

and not simply custodians of, the money in their hands. In New York, in the case of *Muzzy v. Shattuck*, 1 Denio, 233, the court, after a careful examination of the statutory provisions respecting the duties and liabilities of a town collector, came to the conclusion (contrary to its previous decision in *The Supervisors v. Dorr*, 25 Wend., 440) that he was liable as a *debtor*, and not merely as a *bailee*, for the moneys collected by him, and consequently that he could not excuse himself, in an action on his bond, by showing that, without his fault, the money had been stolen from his office. Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute the rule of responsibility in the discharge of those duties, or a legal excuse for the non-performance of them, or a discharge from their obligation. The common law, which is common reason, prescribes that; and statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law. Bacon's Abridg., tit. Statute, I, 4.

§ 269. *Stringent accountability of receivers, collectors and depositaries of public moneys under the acts of congress.*

The acts of congress with respect to the duties of collectors, receivers and depositaries of public moneys, it must be conceded, manifest great anxiety for the due and faithful discharge by these officers of their responsible duties, and for the safety and payment of the moneys which may come to their hands. They are expressly required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or in their possession or custody, till ordered by the proper department or officer to be transferred or paid out; and where such orders for transfer or payment are received, faithfully and promptly to make the same as directed. 9 Stat. at Large, 61, § 9. To obviate all excuse for casual losses, it is provided that they shall be allowed, under the direction of the secretary of the treasury, all necessary additional expenses for clerks, fire-proof chests, or vaults, or other necessary expenses of safe keeping, transferring and disbursing said moneys. Id., 62, § 13. And it is expressly made embezzlement and a felony for an officer charged with the safe keeping, transfer and disbursement of the public moneys, to convert them to his own use, or to use them in any way whatever, or to loan them, deposit them in bank, or to exchange them for other funds except as ordered by the proper department or officer. Id., 63, § 16. Every receiver of public money is required to render his accounts quarter-yearly to the proper accounting officers of the treasury, with the vouchers necessary to the prompt settlement thereof, within three months after the expiration of each quarter, subject, however, to the control of the proper department. 3 id., 723, § 2. Besides this, all such officers are required to give bonds with sufficient sureties for the due discharge of all these duties. 1 id., 705; 2 id., 75; 9 id., 60, 61, etc. And upon making default and being sued, prompt judgment is directed to be given, and no claim for a credit is to be allowed unless it has been first presented to the accounting officers of the treasury for examination and disallowed, or unless it be shown that the vouchers could not be procured for that purpose, by reason of absence from the country, or some unavoidable accident. 1 id., 514, §§ 3, 4.

These provisions show that it is the manifest policy of the law to hold all

collectors, receivers and depositaries of the public money to a very strict accountability. The legislative anxiety on the subject culminates in requiring them to enter into bond with sufficient sureties for the performance of their duties, and in imposing criminal sanctions for the unauthorized use of the moneys. Whatever duty can be inferred from this course of legislation is justly exacted from the officers. No ordinary excuse can be allowed for the non-production of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same. In the leading case of *The United States v. Prescott*, 3 How., 587 (which was an action on a similar bond to that now under consideration), the court say: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and the principles which are founded on public policy." After reciting the condition of the bond the court adds, with a greater degree of generality, we think, than the case before it required, "The obligation to keep safely the public money is absolute without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond."

§ 270. *Public officers are not responsible upon their official bonds for the loss of property in their official custody, in cases of overruling necessity, without their fault.*

This broad language would seem to indicate an opinion that the bond made the receiver and his sureties liable at all events, as now contended for by the government. But that case was one in which the defense set up was that the money was stolen, and a much more limited responsibility than that indicated by the above language would have sufficed to render that defense nugatory. And as the money in the hands of a receiver is not his, as he is only custodian of it, it would seem to be going very far to say that his engagement to have it forthcoming was so absolute as to be qualified by no condition whatever, not even a condition implied in law. Suppose an earthquake should swallow up the building and safe containing the money, is there no condition implied in the law by which to exonerate the receiver from responsibility? We do not question the doctrine so strongly urged by the counsel for the government that performance of an express contract is not excused by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and though beyond his control — with the qualification, however, that the thing to be done does not become physically impossible; as to cultivate an island which has sunk in the sea. It was thus decided in the leading case of *Paradine v. Jane*, Aleyn, 26; *Metcalf on Contr.*, 212. The law on this subject is well stated by Sergeant Williams, 2 Saund., 422 (a), note, where he says: "When the law creates a duty, and the party is disabled to perform it without any default of him, and he has no remedy over, the law will excuse him; as in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused; so in escape, if a prison be destroyed by tempest or enemies, the gaoler is excused. But where the party by his own contract creates a duty or charge upon himself,

he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

It is contended that the bond in this case has the effect of such a special contract, and several cases of actions on official bonds have been cited to support the proposition. Those principally relied on are the cases of *United States v. Prescott*, just cited; *Muzzy v. Shattuck*, 1 Denio, 233; *Commonwealth v. Comly*, 3 Barr, 372; *The State v. Harper*, 6 Ohio St., 607, and the recent cases of *Dashiel*, *Keebler* and *Boyden* in this court. It must be conceded that the language used by the court, not only in the case already referred to, but in some of the other cases cited, seems to favor the rule contended for. But in none of them was the defense of overruling necessity interposed. They were all cases of alleged theft, or robbery, or some other cause of loss, which would have been insufficient to exonerate a common carrier from liability. They all concur in establishing one point, however, of much importance, that a bond with an unqualified condition to account for and pay over public moneys enlarges the implied obligation of the receiving officer, and deprives him of defenses which are available to an ordinary bailee; but they do not go the length of deciding that he thereby becomes liable at all events, although expressions looking in that direction, but not called for by the judgment, may have been used. The case of *United States v. Prescott* has already been sufficiently adverted to. The next, in order of time, was that of *Muzzy v. Shattuck*, which was decided the same year, 1845, and in which the supreme court of New York construed the statutes of that state as making the town collector a *debtor* for the amount of taxes to be collected by him, and held him liable on his bond notwithstanding the money was stolen. Here, again, the result arrived at was correct; but the reasoning by which it was attained may be fairly questioned. The statutes of the state, however, may have justified the view which was taken in that case. The next case is that of *The Commonwealth v. Comly*, decided in 1846. That was an action on the bond of a collector of tolls, and the same defense (of theft) was interposed. Chief Justice Gibson refers to the case of *United States v. Prescott*, and remarks that "the responsibility of a public receiver is determined not by the law of bailment, which is called in to supply the place of a special agreement where there is none, but by the condition of his bond." So, in the case of *The State v. Harper*, which was an action on the official bond of a county treasurer, conditioned for the payment of all moneys that should come to his hands for state, county or township purposes; and, larceny of the money being pleaded, the court say: "By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do these acts;" and the defense of larceny was overruled.

It is unnecessary to examine the cases further in detail. It appears from them all (except, perhaps, the New York case) that the official bond is regarded as laying the foundation of a more stringent responsibility upon collectors and receivers of public moneys. It is referred to as a special contract, by which they assume additional obligations with regard to the safe-keeping and payment of those moneys, and as an indication of the policy of the law with regard to the nature of their responsibility. But, as before remarked, the decisions themselves do not go the length of making them liable in cases of overruling necessity. On the contrary, in the last reported case on the subject, that of *Bevans v. United States*, 13 Wall., 56, Mr. Justice Strong, deliver-

ing the opinion of this court, says: "It may be a grave question whether the forcible taking of money belonging to the United States from the possession of one of her officers or agents lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a state, would not work a discharge of such officers or agents, if they were entirely free from fault, though they had given bond to pay the money to the United States." These observations show that the particular question raised in this case has been reserved by the court after its most mature consideration of the subject. So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such an instrument. The learned judges, in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a receiving officer, and especially of his sureties, by virtue of his bond, have evidently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing and a condition to do the same thing, inserted in a bond. In the latter case the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case. The following extract from Coke on Littleton expresses the law on this subject, which is repeated by Blackstone and other modern authorities: "In all cases," says Lord Coke, "where a condition of a bond, recognizance, etc., is possible at the time of making of the condition, and, before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, etc., there the obligation, etc., is saved. But if the condition of a bond, etc., be impossible at the time of the making of the condition, the obligation, etc., is single." Co. Litt., 206 (a); 2 Thomas' Co. Litt., 22; Shepherd's Touchstone, 372; 2 Bl. Com., 340, 341; Bacon's Abridg., tit. Condition (N), (Q); Comyn's Dig., tit. Condition (D), 1.

§ 271. — *distinction between conditions in bonds of the same nature as the penalty and such as are merely collateral to it.*

Of course the above rule does not apply to a money bond given for a debt, where the condition is simply for the payment of a less sum of money than the penalty; for there, as the books say, the condition is of the same nature as the obligation itself, and not collateral to it. 1 Rolle's Abridg., 448; Viner's Abridg., "Condition" (D, e); Panel v. Nevel, Dyer, 150 (a). The bond in suit is not such a money bond. The condition of an official bond is collateral to the obligation or penalty; it is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default be made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes. In the case of Farrar v. United States, 5 Pet., 373 (§§ 489-494, *infra*), the question being whether sureties were liable for defaults made prior to the giving of the bond, the court say: "For any sums paid to Rector (the principal) prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is the assumption that he still

held the money in bank or otherwise. If still in his hands, he was, up to that time, *bailee of the government*; but on the contrary hypothesis, he had become a *debtor or defaulter* to the government, and his offense was already consummated." That is, as custodian of the money he is bailee of the government — not a debtor. What makes him a debtor or defaulter is the very question at issue. When he becomes such, then he and his sureties are liable until the amount is paid, as we held in the late case of *Bevans*, before referred to. Until then, neither he nor they are liable on the bond. We think that the case is within the law as laid down by Lord Coke, and that the receiver, and especially his sureties, are entitled to the benefit of it; and that no rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy, without any fault or neglect on his part.

Judgment affirmed.

§ 272. *A public officer and his sureties are liable for money in his official custody which is taken from him by theft or robbery without his fault.*

Dissenting opinion by MR. JUSTICE MILLER, JUSTICES SWAYNE and STRONG concurring.

The case of *United States v. Prescott*, 3 How., 578, arose on a certificate of division of opinion of the circuit judges on the question whether "the felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharged him and his sureties, and may be set up as a defense to an action on his official bond." This question the court, without dissent, answered in the negative. The ruling was based, in the opinion of the court, on two grounds, clearly stated:

1. That the receiver, or other depositary of public funds in such cases, could not avail himself of the ordinary circumstances which would discharge a bailee for hire, by reason of an imperative principle of public policy. This policy was founded in the danger of collusive defenses which the depositary could easily manage so as to make a strong case, and which the government could have no means of rebutting, however false or simulated it might be. And it was thought better to hold the party to the absolute payment or delivery of the money than to open the door to such frauds. 2. That the depositary and his sureties, having given a bond, the condition of which was an express contract to pay or deliver, they were bound by that contract, according to the rigid terms which the law annexes to such covenants or promises.

In the subsequent case of *United States v. Morgan*, 11 How., 154, the same question is decided on precisely the same grounds. The case of *United States v. Dashiell*, 4 Wall., 182, was decided with merely a reference to the doctrine of the two cases just cited. The case of *United States v. Keebler*, 9 id., 83, asserts the same doctrine and applies it to an action on a postmaster's bond, who had paid the money to an agent of the Confederate States on an order made by the insurrectionary government directing him to do so. When the case of *United States v. Dashiell* came before the court I was not satisfied with the doctrine of the former cases. I do not believe now that on sound principle the bond should be construed to extend the obligation of the depositary beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver, if no bond had been given; the object of taking the bond being to obtain sureties for the per-

formance of that obligation. Nor do I believe that prior to these decisions there was any principle of public policy recognized by the courts, or imposed by the law, which made a depositary of the public money liable for it, when it had been lost or destroyed without any fault of negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe keeping. Such were my opinions when, as a member of the court, I took part in the decision of *United States v. Dashiell*. But either no other judge shared those opinions, or if any one did, he felt bound by the two previous decisions. I therefore acquiesced.

§ 273. *No distinction should be made in the responsibility of public officers for public money when lost by theft or robbery, and when taken by a rebel force.*

I understand the opinion in the present case to be directed to two points: 1. Mainly to undermining the ground on which the prior decisions on this subject rest. And, 2d. To establishing a distinction between this case and those. As regards the first point. If the opinion or judgment of the court were based upon a frank overruling of those cases, and an abandonment of the doctrines on which they rest, I should acquiesce in that, though I did not in conference approve the judgment. But if the opinion of the court is to be construed as permitting those cases to stand as law while the principles on which alone they can be defended are weakened by its argument, I must express my dissent from that view of the case. And still more strongly do I dissent from the distinction attempted to be drawn between this case and those. If a theft or a robbery in time of profound peace can be so easily simulated, and the collusion can be so successful, that public policy requires that no such defense be listened to, I leave it to any ordinary understanding to say how much more easily the pretense of force by the rebels can be arranged and proved by consenting parties, and how much more difficult for the government to disprove such collusive arrangements than in the other case mentioned.

The congress of the United States, recognizing the law as laid down in the former decisions of this court, provided by the act of March 3, 1865, for such cases of hardship as it thought worthy of relief. Unless, therefore, the doctrine be reviewed and placed on such basis of sound principle as would do justice in all cases, I see no reason to make exceptions in favor of persons who, like the present defendant, holding by virtue of his office the money of the United States, delivered it into the hands of its enemies, without the application of the slightest personal violence, or a moment's imprisonment, or any attempt to seize his person or property, on the ground that they were able to do these things and threatened to do them. Such excuse, easily made, easily proved, hard to be confuted, is, in my judgment, much weaker than that of theft admitted to be without fault or fraud on the part of the depositary.

§ 274. *In general.*—In an action on an official bond the burden of proof is on the government to show a breach of its condition. *United States v. Bell*,* *Gilp.*, 41.

§ 275. It is proper to strike out a notice of special matter to be given in evidence under a plea of *nil debet* to a declaration on a collector's official bond, because the evidence would be admissible under the plea without the notice. *United States v. Stone*, 16 *Otto*, 525.

§ 276. The act of 1817, ch. 197, required every person then in service, "instead of the bond required by the act to which this is a supplement," to enter into bond with specified conditions. *Held*, that the new bond was intended as a substitute for the former bond, and that the former bond became *functus officio* as to future responsibility for future advances. *United States v. Wardell*, 5 *Mason*, 82.

§ 277. The act of congress of March 3, 1797, providing for judgment against the defendant at the first return term on motion, unless the defendant makes oath that he is entitled to credits which have been presented and rejected at the treasury, specifying each particular

claim, does not apply to actions against the sureties in an official bond where the principal obligor is dead. *United States v. Lyon*, 2 McL., 249.

§ 278. The official bond of an officer was conditioned that he should "faithfully expend all public moneys, and honestly account for all public property," etc. *Held*, that the principal under the bond is not merely to expend the money faithfully but to account for it as well. *United States v. Lent*,* 1 Paine, 417.

§ 279. The term "law," as used in an official bond, conditioned that the principal "shall truly and faithfully discharge the duties of his office, according to law," means any law that is on the statute book at the time, or that may thereafter be passed during the continuance of the principal in office. Otherwise every increase in the amount of moneys to be collected, or change in rendering accounts or paying out public money, would discharge all official bonds. *United States v. Gausson*,* 2 Woods, 92.

§ 280. Amount of recovery.—In an action on an official bond, a judgment for an amount greater than asked in the petition is erroneous. *Cox v. United States*, 6 Pet., 172 (§§ 401-404). See § 93.

§ 281. In an action on an official bond the measure of recovery is the penalty of the bond plus the interest thereon from the time of making the demand, or from the time of bringing suit, if no demand was made before. *United States v. Meeker*,* 9 Phil., 470.

§ 282. Paymaster.—It is not competent to show the general conduct of a paymaster in the army in the discharge of his official duties, or his pecuniary circumstances and mode of life, in an action by the United States on his official bond. *United States v. Wood*, 13 Blatch., 252. See § 175.

§ 283. There being no evidence to the contrary, it is presumed that the defalcations of a United States paymaster occurred within the limits of his district. *Duncan v. United States*, 7 Pet., 435 (§§ 503-510).

§ 284. The sheriff is not liable on his bond for damages resulting to a citizen from the neglect of the sheriff in his public duty to conserve the peace. So where one sued the sheriff on his bond, alleging that, while he was about his lawful business, certain persons came to him and threatened his life, and with force of arms demanded of him a large sum of money, and imprisoned him until he paid it, and the sheriff being present, the plaintiff applied to him for protection and to keep the peace, and the sheriff refused, he was held not entitled to recover. *South v. State of Maryland*, 18 How., 396.

§ 285. A sheriff did not by refusing, after assignment of the bond, to receive a prisoner in custody, when offered to be surrendered by his surety, make himself responsible for an escape. *United States v. Noah*, 1 Paine, 368.

§ 286. A constable and his sureties execute their bond that he will well and faithfully execute the duties of his office in all things appertaining to said office, and account for all moneys, etc. He and his sureties are sued on the bond, the declaration alleging as a breach that he, the plaintiff, was the highest bidder at an execution sale of certain property, and became entitled to a deed for said property, but the constable sold and conveyed it to another. The court (Morsell, J. dissenting) is of the opinion that this action will not lie upon the bond. It is further held that the declaration will not sustain a recovery, as it does not state that the *feri facias* was levied on this property, as it states merely that the interest of one J. was advertised for sale, as it does not describe the property with sufficient certainty, as it describes the plaintiff as the equitable owner of the property, and as it alleges as a breach that the constable refused to convey the whole property to plaintiff. *Hazel v. Waters*, 3 Cr. C. C., 420.

§ 287. In a suit on a penal bond, conditioned for the performance of the duties of an office, the judgment should be for the full amount of the penalty, to be discharged by the payment of such damages as plaintiff has sustained by reason of the breaches assigned. *Campbell v. Pope*,* Hemp., 271.

§ 288. In a suit on a constable's bond for failure to make the money on an execution, parol evidence is admissible to show the value of the goods levied on where it is not shown by the return. This is one way of arriving at the amount of damages that ought to be recovered against the officer; and it is error for the court to charge the jury that a failure to return the value of the property levied on was conclusive against the officer of sufficient value. *Ibid*.

§ 289. Collector's bond.—In an action on a collector's official bond a copy may be received in evidence if authenticated under the seal of the treasury department. *Chadwick v. United States*,* 3 Fed. R., 750. See § 223.

§ 290. In addition to the conditions required by law in a collector's bond, the condition was inserted that the obligors should not be liable if each and every deputy should faithfully execute his duty. In an action on the bond it was held that as the deputies are appointed and paid by the collector, and they are his agents, he is responsible for their acts, whether the bond so provides or not, and that the addition of the condition mentioned does not impair the

validity of the bond; and that even if it was void as a statutory bond it was good as a common law contract. *Ibid.*

§ 291. A collector of customs was appointed by the president to fill a vacancy occurring during a recess of the senate. He gave a bond, the condition of which expressly applied as well to his past as to his future acts. So far as related to his duties as collector, this form was authorized; but so far as his duties as a depository of the public moneys and a fiscal agent of the United States were concerned, the statute only contemplated security for the future. Subsequently he was appointed by the president and confirmed by the senate, for a full term. *Held*, in an action on said bond, that it did not cover defaults occurring after his acceptance of the new appointment; that it embraced his acts as collector after his first appointment and prior to the execution of the bond; and that so far as it exceeded the requirements of the statute in relation to his duties as a depository of public moneys, etc., it was without obligatory force. *United States v. Ellis*, 4 Saw., 590.

§ 292. A collector of customs received treasury notes in payment for duties, which he canceled, but they were afterwards lost or stolen. Two of the notes having been altered, were presented to him in payment for other duties, and he received them as genuine. *Held*, that he was responsible upon his official bond absolutely for the amount of the two notes, and that he was likewise responsible for the actual damage suffered by the government by reason of his not returning the notes to the department as was his duty under his lawful instructions. *United States v. Morgan*, 11 How., 154.

§ 293. A collector is liable on his bond for all collections made by him between the date of the bond and the date of his resignation, although such collections consisted of arrearages of taxes due in former years, it being his duty to collect such arrearages. He is not liable on his bond for collections made before its execution. *Corporation of Washington v. Walker*, 2 Cr. C. C., 293.

§ 294. Postmaster.—The obligors in a postmaster's bond are not liable for any defalcation made before the date of the bond. *Lawrence v. United States*,* 2 McL., 581. See §§ 214, 215.

§ 295. Judgment, in a suit on a postmaster's bond, cannot be given for interest on the penalty, if the recovery would on that account exceed the penalty. *Ibid.*

§ 296. The postmaster-general has the authority to take bonds running to himself from postmasters. Such bonds are valid, and suit thereon may be maintained in the courts of the United States. *Postmaster-General v. Reeder*,* 4 Wash., 678.

§ 297. The bond given by a postmaster to the postmaster-general for the faithful performance of his duties is not a private bond taken by the postmaster-general for his own protection and benefit, but is a public bond taken for the benefit of the United States. *Locke v. Postmaster-General*,* 3 Mason, 446.

§ 298. Where a postmaster of the United States paid over public moneys in his custody to the postmaster-general of the Confederate government, at the time in absolute control of the territory in which he was resident, *held*, that he was not responsible on his official bond for the moneys so paid, if the payment was made without collusion or connivance on his part, and in compliance with a demand which he had no power to resist, and which, if refused, the usurping government would have promptly enforced. *United States v. Huger*, 1 Hughes, 397; 2 Am. L. Rev., 782.

§ 299. Receiver of public money.—It is held to be no defense to a suit on the bond of a receiver of public money, that the money was stolen from him without his fault. *United States v. Prescott*,* 3 How., 578; *United States v. Dashiell*,* 4 Wall., 182. Or that the money was taken from him by force, he being in default at the time. *Bevans v. United States*,* 13 Wall., 56; *Halliburton v. United States*,* 13 Wall., 63. Or that the money was lost by shipwreck, while being lawfully transported from one place to another. *United States v. Humason*,* 6 Saw., 199. In *United States v. Freeman*, 1 Woodb. & M., 45, money was advanced to Freeman, an officer of the marine corps, to be used in the Florida war, and deposited by him in bank, and lost through the insolvency of the bank. He had no orders where to make his deposits, but it was contended in defense that he deposited in a bank selected by the government for its collecting and disbursing officers. *Held*, on the authority of *United States v. Prescott*, *supra*, that he was liable. See §§ 245-250.

§ 300. In a suit on the bond of a federal officer, it is no defense that he voluntarily paid money held by him to a creditor of the government; nor can such payment be pleaded as an equitable set-off. *United States v. Keebler*,* 9 Wall., 88.

§ 301. Nor is it any defense that the money was paid pursuant to an order of the Confederate government, where it is not shown that he yielded to superior force. In actions on the bonds of receivers of public moneys, the right of the government does not rest on the implied contract of bailment, but on the express contract found in the bond to pay over the funds. *Ibid.*

§ 302. And the acts of congress of April 29, 1864, and March 3, 1865, are the only exceptions to the above rule. *Ibid.*

§ 303. The fact that a receiver of public moneys has given an official bond does not extinguish his simple contract liability for moneys received by him. He is individually liable therefor. *Walton v. United States*, 9 Wheat., 655.

3. *Marshal's Bond.*

SUMMARY — *Liable for act of deputy*, § 304. — *Jurisdiction*, § 305. — *Judgment on remains as security*, § 306. — *Damages for failure to serve writ*, § 307. — *Not liable for money received by deputy*, § 308.

§ 304. A marshal is liable on his official bond for the act of his deputy in erasing the name of the principal in a replevin bond, thereby releasing the sureties. But if the deputy acts under the directions of the attorney of the plaintiff in the replevin suit, the marshal is not liable. *Rogers v. The Marshal*, §§ 309-313. See § 324.

§ 305. In all cases where the courts of the United States have original jurisdiction, there may be a procedure against the marshal and his sureties, so far as such procedure may be incident to the original suit. Hence where suit is brought on a marshal's bond, on the ground that he permitted a vessel, in his custody by legal process, to go on a voyage by which she was lost, and the plaintiff failed on that account to recover his claim against the vessel which had been attached at his instance, it is held that the circuit court has jurisdiction independent of the citizenship of the parties. *Wetmore v. Rice*, §§ 314-316. See § 321.

§ 306. By the act of 1806, relating to marshal's bonds, a judgment thereon may remain open as security for others who may be injured by the acts of the marshal. *Ibid.*

§ 307. The measure of damages, in an action against a United States marshal on his official bond, for failure to serve a writ of *capias ad respondendum*, is the injury produced thereby. *United States v. Moore*, §§ 317-319.

§ 308. A marshal is not liable on his bond for money received by his deputy from debtors of the United States for whose arrest he held writs of *capias ad respondendum*. The act of receiving the money was not within the official duty of the deputy, and the marshal is liable only for the injury sustained by the United States, on account of the breach of duty by the deputy in not executing the mandate of the writ. *Ibid.*

[NOTES.— See §§ 319-327.]

ROGERS v. THE MARSHAL.

(1 Wallace, 644-654. 1868.)

ERROR to U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.— The plaintiff in this suit was the plaintiff in a replevin suit against one Remington. The deputy marshal took a bond in the replevin suit, and in a suit on such bond it was declared to be void. The evidence was to the effect that the deputy marshal brought a bond to plaintiff's attorney with Remington's name on it, and was told by the attorney that he would not have Remington on the bond, but that he would take a bond with a certain other person's name on it. Remington, on being informed of this, took the bond and erased his name in the presence of the deputy. In this suit on the marshal's bond the court instructed the jury that the plaintiff could not recover if the name was erased through the interference of plaintiff's attorney in the replevin suit.

§ 309. *A marshal is responsible for the misconduct of his deputy.*

Opinion by MR. JUSTICE DAVIS.

1. It is unquestionably true that a marshal is answerable for the misconduct of his deputy. If Fuller, the deputy, who served the writ of replevin in the case of *Rogers v. Remington & Martin*, and took the statutory bond, erased the name of the principal, without the direction of some one having authority,

he violated a plain duty, and his principal can justly be held liable. The officers of the law, in the execution of process, are obliged to know the requirements of the law, and if they mistake them, whether through ignorance or design, and any one is harmed by their error, they must respond in damages. But this case involves the extent of the power of an attorney to control and direct the execution of process, and the liability of the marshal where the default of his deputy has been induced by the conduct of the attorney.

§ 310. *Authority of attorney to direct the officer and excuse him from duty.*

The attorney is the agent of his client to conduct his suit to judgment, and to superintend the execution of final process. It is true that he cannot discharge the defendant from execution without the money is paid to him (*Jackson v. Bartlett*, 8 Johns., 361); but his authority is complete to control the remedy which the law gives him to secure or collect the debt of his client. *Jenney v. Delesdernier*, 20 Me., 183; *Kimball v. Perry*, 15 Vt., 414. And if the client suffers by the ignorance or indiscretion of the attorney, the officer shall not be prejudiced, for the attorney may give such directions to the officer as will excuse him from his general duty. *Walters v. Sykes*, 22 Wend., 568. The attorney can give such general instructions to the officer as he may deem best calculated to advance the interests of his client, and if followed (erroneous though they be) they will bind his client and exonerate the officer. *Crowder v. Long*, 8 Barn. & Cress., 605; *Gorham v. Gale*, 7 Cow., 739.

§ 311. *Directions of attorney to deputy marshal calculated to mislead excuse him from liability.*

But it is said that Hopkins, the attorney, never instructed Fuller to erase Remington's name after the execution of the bond; which, being done without the knowledge and consent of the sureties, discharged them. It is clear that no direct and positive instructions were given; for if there had been, in view of the power of the attorney to make the officer his agent, no controversy could have arisen. But the true question is this: Did Hopkins give such directions to Fuller as were calculated to mislead him, and must have induced the taking of the defective bonds? If he did, the marshal is not chargeable. After Fuller had taken the property in the replevin case he went to Hopkins with a bond signed by Remington, the principal, and Martin or Keefe as sureties. Fuller swears that Hopkins said "he would not have Remington on the bond at all;" while the testimony of Hopkins is, that he "did not want" Remington's name on the bond. The two statements are not essentially different. Each would clearly enough convey the idea that Remington's name must not be on the bond. Hopkins excepted to the sufficiency of the surety, and told Fuller that if he would procure Proudfit's name in addition to the name already on it, he would be satisfied. Remington was present at the interview, and took the bond away, and the following morning brought it to Fuller with Proudfit's name. Fuller told Remington that he could not receive the bond, because his name was on it. Remington said that he would take his name off, and Fuller replied that if he did so it would be in accordance with the instructions received from Hopkins. Remington's name was then erased. Now it is true that Hopkins did not direct Fuller to erase Remington's name from the bond, after it was executed, without the knowledge and consent of the sureties. But it should be remembered that Fuller was a ministerial officer and unacquainted with the rules which discharged sureties from their obligations, while Hopkins was supposed to be familiar with them. Fuller knew that Hopkins objected to the retention of Remington's name, while he was satisfied with

Proudfit's in addition to that of Keefe, and, as the bond complied with the wishes of Hopkins, he had a reasonable right to infer that it was satisfactory. That Fuller acted under this belief is evident from the fact that he did not, until some length of time, say anything further to Hopkins; and there is nothing in the record to question the *bona fides* of either Fuller or Remington.

Hopkins had the right to refuse to direct Fuller at all in relation to the manner in which the bond should be executed, but he had no right to say anything which would necessarily tend to mislead him. If he had told Fuller, I will give you no instructions or advice; you are the officer, and must determine for yourself all questions that arise in the performance of your duty, *then* Fuller, having been properly cautioned, could have no right to complain. And it is fair to infer that he would at once have sought legal advice, and thereby avoided the difficulties that occurred. But Hopkins chose another course, and what he said was well calculated to mislead Fuller. Any officer of common mind, and unacquainted with legal proceedings, would have concluded, from the conversation, that the bond would be satisfactory, if the additional surety was obtained and Remington's name left off; and it is clear, from Fuller's testimony, that Hopkins mistook the requirements of the Wisconsin code. Hopkins thought the New York and Wisconsin codes were alike, but afterwards ascertained his error, and that the Wisconsin code required the name of the principal on the bond, while the New York code did not. This admission relieves the case of all difficulty. It explains the reason of Hopkins in refusing the bond with the name of Remington on it, and accounts for the erasure which was made under the direction of the officer. If Hopkins chose to direct at all about the manner in which the bond should be executed, it was his duty, both to his client and the officer, to have taken the entire supervision of it. Having thought proper, as an attorney, to exercise his right to direct what names should go on the bond, he cannot, nor can his client, complain that the officer, in literally fulfilling his wishes in that regard, mistook the law and destroyed the efficacy of the instrument. When Fuller produced the bond with Remington's name on it, and Hopkins told him that he must have another surety, and would not have Remington's name on the bond, why did he not also inform him that the validity of the bond required that no erasures should be made after it was signed? This principle of law he doubtless well knew, and it is reasonable to infer that Fuller was in ignorance of it. The direction which Hopkins did give, and his failure to direct further, caused the loss which followed, and his client should suffer and not the marshal. These views are decisive of this case. The court charged the jury that it was their province to determine whether the erasure was made "in consequence of the interference of Hopkins, the attorney," and the charge was right. It would have been better to have used the words "direction" or "instruction" instead of "interference," but applying the evidence in the case, it is manifest that the jury rightfully interpreted the charge. A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious, and cannot mislead the jury.

§ 312. *Exceptions to instructions must be specific and not to the mass.*

2. But it is said that if the court is right in one proposition, it erred in submitting others to the jury. This is true, but the plaintiffs in error cannot avail themselves of their exception, which was general and not specific. In *Johnston v. Jones*, 1 Black, 220, this court say, "It is well settled that if a series of propositions be embodied in instructions, and the instructions are ex-

cepted to in mass, if any one of the propositions be correct, the exception must be overruled."

§ 313. *Attorney may assent after the fact to irregular method of executing process; as, to the erasure of the name of the principal on a bond, thereby discharging sureties.*

3. It is urged that the court was in error in permitting the defendants to ask the witness (Fuller) what Hopkins said about the bond after Fuller had accepted it and given an order for the lumber. The exception is to the question, and not the answer. The question was pertinent and proper. If Fuller had deviated from the strict line of his duty, yet if Hopkins adopted what was done, his client cannot hold the marshal responsible. *Corning v. Southland*, 3 Hill, 552. And if Hopkins, after being informed of the circumstances under which Fuller took the bond, assented to it, his client is concluded. *Stuart v. Whitaker*, 2 Carr. & P., 100; *Beynon v. Garrat*, 1 id., 154. It was surely important, then, to ascertain whether that assent was given. The answer to the question, even if improper testimony, cannot be complained of here, because no exception was taken to it in the court below. The answer, however, could not have affected the verdict, and it is not necessary to discuss its pertinency. On the whole we find no error in the record, and are not disposed to disturb the finding of the jury.

Judgment affirmed, with costs.

WETMORE v. RICE.

(Circuit Court for Michigan: 1 Bissell, 237-242. 1858.)

STATEMENT OF FACTS.—Action on a marshal's bond. The cause of complaint was that the marshal permitted a vessel in his custody to go a voyage, and that she was lost in a storm, and that plaintiff had failed to make his claim against her. One ground of demurrer assigned was a want of jurisdiction.

§ 314. *The circuit courts have jurisdiction of actions by a private party upon marshals' bonds, irrespective of the citizenship of the parties.*

Opinion by McLEAN, J.

As the plaintiff and defendants are citizens of Michigan, there is no ground for jurisdiction from the citizenship of the parties. But it is contended that the jurisdiction may be maintained from the character of the case and the act of congress, on the same principle as suits under the patent laws and in admiralty. Jurisdiction is given exclusively in the district courts of the United States in all cases of admiralty, and express provision is made by law for the exercise of jurisdiction in patent cases. But there is no such provision in regard to suits on marshal's bonds. In the second section of the act of 1806, "relating to marshal's bonds for the faithful performance of his duties" (2 U. S. Stats., at Large, 372), it is provided that any one injured by a breach of the condition of the bond may institute a suit upon it in the name and for the sole use of such party; and thereupon to recover such damages as shall be legally assessed, with costs of suit, etc. And the third section declares that said bond, after a judgment, shall remain as a security for the benefit of any one injured by the misconduct of the marshal, and the same proceedings shall be had as above stated. Such suits are required to be commenced within six years after the right of action shall have accrued. The question of jurisdiction as raised in this case seems never to have been made or decided in the supreme court or

in any of the circuit courts. The case of *Bispham v. Taylor*, 2 McL., 355, was founded upon a marshal's bond, but the question of jurisdiction was not made, and, of course, in the report of the case, no reference was made to it. The inference that, as the citizenship of the parties was not noticed by the court, it was deemed unnecessary to be alleged, is not sustained, as it appears in the declaration there was an averment of the citizenship of the plaintiff which gave jurisdiction. And the same remark applies to the case of *Sperring v. Taylor*, 2 McL., 362, referred to in the same volume. Neither of these cases brought before the court the question of jurisdiction.

In the case of *The Postmaster-General v. Early*, 12 Wheat., 136, there was no point ruled which has a direct bearing on the question before us. In that case the court says, "the postmaster-general cannot sue in the federal courts under that part of the constitution which gives jurisdiction to those courts, in consequence of the character of the party, nor is he authorized to sue by the judiciary act. He comes into the courts of the United States under the authority of an act of congress, the constitutionality of which rests upon the admission that his suit is a case arising under a law of the United States." The act referred to is that of the 30th April, 1810, which authorizes the postmaster-general to bring suit. The case of *Gwin v. Breedlove*, 2 How., 29, was a writ of error to revise the proceedings of the circuit court of the United States, in the state of Mississippi, against Gwin, as marshal of that state, under a statute of the state authorizing a procedure against sheriffs and their sureties, which had been adopted by the circuit court. The court sustained the summary proceedings, as incidental to the suit of *Breedlove v. Gwin*, in which a judgment had been rendered. But the point did not come up in that case whether a suit on the bond could have been sustained as an independent action by parties living within the state in which suit was brought. In a dissenting opinion, Mr. Justice Daniel said that the marshal would also be liable upon his official bond, because the judiciary act confers a right of action thereon, without restriction as to citizenship, on all persons who may be injured by a breach of the condition of that bond. But he remarks, if a further or different recourse is sought against the marshal, one which may be supposed to arise either from the inherent power of the court over its officer or its judgments, then it is presumed that those who seek such recourse must show their right as arising out of the character to sue in the federal courts; they must show themselves by regular averment to be citizens of a state other than that of him whom they seek to implead.

So far as regards any procedure against the marshal as an officer of the court for a failure in the performance of his duty, whether under a rule of court or by attachment, there can be no doubt of the power of the court. But the proceeding under examination is by an action on the marshal's bond, with the view of making his sureties responsible. This action is founded, not on any default of the marshal, under process issued by this court, but by a proceeding in admiralty in the district court. It does not, then, arise as an incident to any action in this court. It is an independent action in this court between citizens of the same state. The argument *ab inconvenienti* is a strong one, but on such ground the jurisdiction of this court has never been exercised. It has often been held that the consent of parties cannot confer it, as it is a matter of law. The sureties who are sought to be made liable are strangers to the proceedings in admiralty, out of which this case has arisen. They have a right to be heard in their defense untrammelled by any previous proceeding, except the matters

of record which show the delinquency of the marshal. He being the principal and a party to such proceeding, it is binding on his sureties.

§ 315. *The jurisdiction of the federal courts in suits upon marshal's bonds is exclusive, except in certain exceptional cases.*

The act of 1806 (2 U. S. Stat. at Large, 372), in relation to marshal's bonds, provides that suit may be brought thereon, and that the judgment shall remain as a security for others who may be injured by the acts of the marshal. From these and other provisions in the act, it is argued that on a marshal's bond suit may be brought without reference to the citizenship of the parties, as on a patent right or in admiralty. The jurisdiction is expressly given in both these cases under express provisions, whilst in regard to marshal's bonds there is no such provision. It may be assumed that in all cases where the courts of the United States have original jurisdiction, whether from the character of the claim or the citizenship of the parties, there may be a procedure against the marshal and his sureties, so far as such procedure may be incident to the original suit. And as this view brings the marshal's bond generally within the jurisdiction of the court, the cases where such jurisdiction may not be exercised form an exception to the general rule, and for which no special provision is made.

§ 316. *Under the act of 1806, the whole penalty is recovered in a suit upon a marshal's bond, which stands as security to all thereafter injured by his default.*

I am inclined to believe that all cases may be brought under the provision of the third section of the act of 1806, which provides that the bond, after judgment, shall remain as a security for others who shall be injured by breach of its condition, until the whole penalty shall have been recovered. Beyond this the sureties are not responsible, but the marshal is bound on common law principles. A judgment having been rendered for the amount of the penalty, it stands as a security to all who may be injured by the default of the marshal. Complaints may be made subsequent to the judgment in proper form, and the amounts being ascertained on issues made to the court or jury, executions may be ordered until the penalty shall be exhausted. In this form every case may be legally embraced, with little expense, and speedily.

UNITED STATES v. MOORE.

(Circuit Court for Virginia: 2 Marshall, 817-824. 1828.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is an action of debt brought upon the official bond of the marshal of this district, the intestate of the defendant, upon which the jury have found a verdict which assesses contingent damages, dependent on a case stated by the parties. This case is so stated as to require the court to take into view the instructions which would have been given to the jury at the trial, had instructions been asked.

The first breach assigned in the replication is, that the moneys were received by the deputy of the marshal for the United States, on executions placed in his hands, which money has never been paid over. On this breach no controversy arises. The second breach assigned is, that two writs of *capias ad respondendum* were issued against debtors of the United States, which were placed in the hands of the same deputy, who neglected them or either of them, or to return them or either of them,—“whereby the United States were prevented from recovering judgment against each of the said debtors, and each of them have

been and are totally lost to the said United States." Damages are assessed to the amount of these two debts.

The case stated is that two writs of *capias ad respondendum*, against two several debtors of the United States, were placed in the hands of the deputy, who, instead of executing them, received the sums due from the several defendants, and made return thereof on the writs, after which the suits were dismissed. The United States have never received this money, and they now claim it from the estate of the marshal. In this second assignment of breaches, the receipt of the money is not brought into view. The neglect of duty in not serving the process is the fault alleged to have been committed by the officer; and for this neglect his principal is unquestionably liable. But what is the extent of his liability?

§ 317. *Measure of damages in an action against a United States marshal upon his official bond for failure to serve process.*

But one general answer can be given to the question. As in all other instances of neglect, he is liable to the extent of the injury produced thereby. This is to be ascertained by jury. The replication alleges that the debt has been lost thereby; and if this fact be as alleged, the amount of the debt is the measure of damages. But this is a subject for the consideration of the jury. It was not submitted to the jury, and has been transferred to the court. If the loss of the debt was the direct and legal consequence of this neglect, the verdict ought to stand; but if this be a subject on which the judgment of the jury, under the instruction of the court, ought to be exercised, then it would be improper in the court to decide upon it until that judgment is exercised. It is too obvious to require discussion, that the loss of a debt is not the necessary consequence of neglecting to serve the first process which comes to the hands of the officer. The law provides for new process; and the question, whether that new process may not be as available to the plaintiff as the original process, depends on circumstances, of which the jury must judge. If, in this case, the plaintiff has been prevented from issuing new process by the act of the officer, that is not alleged in this part of the replication. If it may be given in evidence on this real assignment, then we must look in the act which is alleged to have arrested further proceedings. That act is the receipt of the money due to the United States. If the officer was not authorized to receive this money, his receipt of it could not bind the United States, nor prevent further proceedings according to law. If he was authorized to receive it, the defendant will admit that the plaintiff could proceed no farther; and that the loss of the debt is the consequence of not serving the process, and receiving the money. This question will be properly considered under the third breach assigned in the replication.

§ 318. *An action on a marshal's bond will not lie for money received by his deputy extra-officially.*

3. The third breach is, that the officer did arrest the said debtors, as commanded by the said process, who thereupon respectively paid to the said deputy the full amounts of their respective debts aforesaid, and in consideration thereof, the said deputy did then and there discharge the said debtors from the arrests aforesaid, and wilfully failed to make due return of the said arrests, or either of them, or to account for and pay the amounts so received from said debtors, or any part thereof, to the said United States, whereby the said United States was prevented from obtaining judgments against their said debtors for their said debts, and the said debts were, and are, wholly lost to the said United States.

To support this breach it would be necessary to show, in the first place, that the debtors were arrested. This is not proved, but may, and perhaps ought to be, assumed by the jury, from the facts admitted in the case. The material inquiry, then, presents itself: Was the receipt of the money an official act? Was it authorized by the mandate of the writ? We are decidedly of opinion that it was not. The mandate of the writ was to take the person of the defendants mentioned therein, and to have them before the court to answer the United States in a plea of debt, etc. A controversy exists between the parties, which is to be adjusted, not by the officer, but by the court. His duty is ministerial, not judicial. It is to bring the debtor into court to receive its judgment, not to render that judgment. The sum actually due is, generally, less than that demanded in the writ, and in these cases it was considerably less. The officer does not know officially the real amount of the debt, and, consequently, cannot adjust it and receive the money. If he is not authorized to ascertain the sum due, and to receive that sum, neither is he authorized to receive the whole sum mentioned in the writ, and to discharge the persons arrested. His duty is prescribed by the words of the writ; he is to obey its mandate. It would be time misapplied to enter into a consideration of the consequences of permitting the officer to depart from the mandate of the writ, and to make himself accountable to the United States when not authorized by law so to do. It is enough to say that the writ did not authorize him to receive the money, and that its receipt was not an official act. Since the money was not received by virtue of the writ, with the authority of which the deputy was intrusted, his principal cannot be chargeable by the legal force of that receipt; if he is chargeable, it is in consequence of the official acts performed or omitted by his deputy. The act performed is making his return, which is "debt and cost satisfied." The charge in the replication is, that upon receiving the money he discharged the debtors.

That this proceeding is a misfeasance in office, which subjects the principal to the action of the United States, is not controverted; but on this breach, as on the second, the amount of damages depends on the amount of injury. The return of the officer did not prevent the United States from taking such farther steps as is authorized by law; if the return shows service of the process, the plaintiffs might proceed against the defendants and the marshal for want of bail; if it does not show service, or if it shows a discharge, the plaintiffs might sue out a new process. The return that the debt was satisfied did not bind the United States. The amount of injury, therefore, depends on all the circumstances, and those circumstances must be weighed by a jury. The counsel for the United States insists that the money received by the deputy is the measure of damage sustained by the United States, that the deputy is responsible for the sum so received, and, as he received it by color of his office, the principal is also responsible to the same extent. But if the receipt of this money did not stop the United States, if it was not an official act authorized by the process or by law, the loss of the debt does not appear to be a necessary consequence from the return on the writ, or the neglect to take bail.

§ 819. In general.—A United States marshal for the District of Columbia and his sureties are liable on his bond for money advanced to him by order of the secretary of the treasury, the act of the secretary being presumed to have been done under special direction of the president. They are liable on his bond for all common law fines and forfeitures received by him, whether upon execution or without execution. They are not liable on his bond for writs of *fi. fa.* paid into his hands, against persons who have goods, etc., sufficient, etc., and for writs

of *ca. sa.* against persons able to pay; the executions not having been returned. They are not liable on his bond for escape of persons taken in custody on *ca. sa.* for fines, etc., whether prayed in commitment in execution or not. *United States v. Williams*,* 5 Cr. C. C., 619.

§ 820. The United States marshal for the District of Columbia and his sureties are not liable on his bond for his failure to return a *feri facias*, unless he has been called upon by the court to return it, and has refused. *Ibid.*

§ 821. Jurisdiction.—The federal courts have jurisdiction of suits by individuals upon a marshal's bond, when all the parties to the suit are citizens of the same state. The act of congress which authorizes such suit by individuals did not take away the jurisdiction which existed before the act, when the suit had to be in the name of the United States. *Adler v. Newcomb*, 2 Dill., 45; 16 Int. Rev. Rec., 142. See § 805.

§ 822. Invalid.—The bond of a marshal, which runs to the president of the United States and his successors in office, instead of to the United States, which has not "two good and sufficient sureties, inhabitants and freeholders of the district" for which the marshal was appointed, which was not "approved by the district judge," which does not purport to be "for the faithful performance of the duties of his office by himself and his deputies," and which does not correctly describe the office to which the principal was appointed, is void, as not being a compliance with the law, and cannot be sustained as a voluntary obligation, not having been delivered to, and approved and accepted by, the proper officer. *Jackson v. Simon-ton*,* 4 Cr. C. C., 250.

§ 823. Paying money contrary to instructions.—Though a marshal pays over money contrary to the instructions of the comptroller, yet if the comptroller authorizes or assents to a payment thereof to another officer, the amount so paid cannot be recovered against the marshal in a suit on his bond. *United States v. Giles*,* 9 Cr., 212.

§ 824. Taking insufficient bond.—A declaration on a marshal's bond, charging that the sureties he took were not sufficient freehold securities, the statute requiring him to take sufficient freehold securities, is good without an averment that the marshal had notice of the insufficiency of the sureties. *Bispham v. Taylor*, 2 McL., 355. See § 304.

§ 825. A statute of Indiana allowed the person against whom an execution issued to replevy the same on giving bond with sufficient sureties conditioned for the payment of the full amount demanded by the execution. This bond was required to be recorded and was declared to have the force and effect of a judgment. In an action on a marshal's bond for taking insufficient sureties on a replevy bond under said statute, *held*, that the fact that the defendant was insolvent afforded no defense. *Bispham v. Taylor*, 2 McL., 408.

§ 826. In an action on a marshal's bond for taking insufficient sureties on a replevin bond the marshal pleaded that he had levied on property sufficient to satisfy the demand of the plaintiff, and that the same was undisposed of. *Held*, that such a levy was a bar to an action on the bond. *Sedam v. Taylor*, 3 McL., 548.

§ 827. Failure to make money.—In every action founded upon the non-feasance or misfeasance of a public officer, the declaration must show the right of the plaintiff and the liability of the defendant. Thus by a statute of Indiana the defendant in an execution might replevy the goods levied on by tendering to the officer having the execution a bond with sureties, etc. A declaration upon the official bond of the marshal of the district of Indiana, for not making the money on an execution directed to him, which did not allege that no replevy bond was given, was held to be insufficient. *Bispham v. Taylor*, 2 McL., 355.

4. Accounts and Set-offs.

SUMMARY — Certified transcripts in evidence, §§ 828, 831. — Claims must be presented and disallowed, §§ 829, 830, 833. — Evidence, § 832. — Claim for office rent, clerk hire, etc., § 833. — Application of payments, § 834.

§ 828. In an action upon a marshal's official bond, a duly certified transcript of the adjustment of his accounts by the accounting officers of the treasury, showing a balance due by him, makes a *prima facie* case for the government. Notice to the marshal of the adjustment of his accounts is not necessary. *Watkins v. United States*, §§ 336-340.

§ 829. In an action upon a marshal's official bond, no evidence to prove a claim for services and expenses on the part of the marshal can be admitted, unless such claim is shown to have been legally presented to the accounting officers of the treasury for their examination, and to have been by them disallowed. *Ibid.*

§ 830. A United States collector, having made application to the commissioner of internal revenue for credit on his account for a list of uncollected taxes turned over to his successor,

and his claim having been rejected, he may reassert such claim in defense to an action on his bond for failure to account for money received. His successor's receipt for such uncollected list is evidence in the cause, although unaccompanied by a certificate from the treasury department that the collector had used due diligence. *United States v. Kimball*, §§ 341, 342.

§ 331. In an action on an official bond a certified treasury transcript of the accounts of the officer is *prima facie* evidence of the indebtedness which it certifies, unless on the face of the account it necessarily appears otherwise. *United States v. Hunt*, §§ 343-345.

§ 332. In an action on the bond of a collector under the internal revenue act, receipts signed by him for the aggregate amount of the alphabetical lists, which show in detail the names of the persons assessed and the amounts due from each, are admissible and competent, and not secondary evidence. So, too, statements signed by him of amounts collected and abated as uncollectible at different periods are admissible against him. *Ibid.*

§ 333. In an action on a postmaster's bond, the defendant may set up a counterclaim if it is averred in the answer that the items of such claim have been duly presented to the proper department for allowance and rejected. The defendant cannot maintain his claim for office rent, clerk hire, gas, fuel and stationery, under the act of 1854, since that act makes the allowance of certain expenses to postmasters at *distributing* and *separating* offices discretionary with the postmaster-general; and defendant's answer does not show that his office was either a *distributing* or *separating* office. Nor can he maintain such a claim under the act of 1864, which recites that the postmaster-general *shall* allow such expenses in *whole or in part* at offices of the first and second class, since this act leaves the matter in the discretion of the postmaster general; and it is not alleged in the answer that the office in question is one of the first or second class. The act of March 3, 1865, also leaves the matter in the postmaster-general's discretion. *United States v. Davis*, §§ 346-349.

§ 334. If a public officer is in default at the time of rendering his quarterly account, and subsequently remits quarterly payments without any direction how they are to be applied, they are to be successively applied to extinguish the balances existing from the previous quarter; and if by such appropriation all balances existing prior to two years before the commencement of an action on the official bond, the statute limiting actions against sureties to two years after the time a default occurs has no application. *Jones v. United States*, §§ 350, 351.

[NOTES.— See §§ 352-376.]

WATKINS v. UNITED STATES.

(9 Wallace, 759-766. 1869.)

ERROR to U. S. Circuit Court, District of Maryland.

§ 335. *Liability for failure to account; procedure.*

Opinion by MR. JUSTICE CLIFFORD.

Persons accountable for public money, if they neglect or refuse to pay the sum or balance reported to be due to the United States, upon the adjustment of their accounts, are liable for the amount, and it is made the duty of the comptroller to institute suit for the recovery of the same, adding to the sum stated to be due the commissions of the delinquent and interest at the rate of six per cent. per annum from the time the officer received the money until it shall be repaid. 1 Stats. at Large, 512. Transcripts from the books and proceedings of the treasury, certified by the register and authenticated under the seal of the department, are expressly declared to be competent evidence in every such case of delinquency, and all copies of bonds, contracts or other papers relating to or connected with the settlement of any such account, when certified by the register to be true copies of the original on file and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court. *Id.*, 513. Judgment is required to be rendered in such cases at the return term, unless the defendant shall, in open court, make oath that he is equitably entitled to credits which had been submitted to the consideration of the accounting officers of the treasury and been rejected previous to the commencement of the suit, specifying each particular claim so rejected in the affidavit, and stating to the effect that he cannot

safely go to trial without that evidence. Such an affidavit being filed, the court may grant a continuance to the next term, but not otherwise; and the fourth section of the act provides that, *in suits between the United States and individuals, no claim for a credit* shall be admitted upon trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and which have been by them disallowed in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in the possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident. 1 Stat. at Large, 515.

STATEMENT OF FACTS.—Pursuant to law the first-named defendant was, on the 28th of March, 1857, commissioned as marshal of the United States for the district of Maryland, to hold the office for the term of four years from the 1st day of April following, unless sooner removed by the president. On the 7th of April of that year he gave his official bond for the faithful performance of all the duties of his office, and the other two defendants named in the declaration were the sureties in that bond. The present suit is an action of debt upon that bond, and the breaches assigned are as follows: (1) That the marshal did not make true returns of all public moneys which came to his hands during the term of his office. (2) That he did not render his accounts quarter-yearly to the proper accounting officers of the treasury, with the vouchers necessary to a correct and prompt settlement thereof, within three months after each successive quarter. (3) That he did not pay into the treasury all the sums and balances of the public moneys reported to be due upon the adjustment of his accounts at the treasury department. (4) That he did not pay into the treasury, or deposit to the credit thereof, all the surplus and emoluments of his office, which his half-yearly returns showed to exist, beyond the allowances which he was authorized to retain. Verdict and judgment were for the plaintiffs, and the defendants excepted to two of the rulings of the court, which give rise to the only questions of any considerable importance presented for decision in the record.

§ 336. *Pleading over to a declaration held good on demurrer is a waiver of the demurrer.*

Apart from those questions, however, it is insisted by the defendants that the court erred in overruling their demurrer to the declaration. They demurred specially to the several assignments of breaches in the condition of the bond, and the court overruled the demurrer as to the first three breaches, and sustained it as to the fourth, and both parties acquiesced in the ruling and decision of the court. Subsequently the defendants pleaded performance, concluding with a verification, and the plaintiffs replied, tendering an issue which was joined, and upon that issue the parties went to trial. Pleading over to a declaration adjudged good on demurrer, without any reservation, is a waiver of the demurrer, as held by the repeated decisions of this court. *Aurora City v. West*, 7 Wall., 92; *United States v. Boyd*, 5 How., 29; *Clearwater v. Meredith*, 1 Wall., 42; *Jones v. Thompson*, 6 Hill, 621.

§ 337. *In a suit upon a marshal's bond treasury transcripts of his accounts showing a balance owing by him make a prima facie case for the government. Notice to him is not required.*

II. Evidence was then introduced by the plaintiffs to show that there was a balance due from the marshal under his official bond, and the amount of the

same, which evidence consisted of the duly certified transcript of the adjustment of his accounts by the accounting officers of the treasury. Having introduced that proof the plaintiffs rested, and the defendants moved the court to instruct the jury that the plaintiffs were not entitled to recover upon that evidence, because it is not averred or proved that the marshal had any notice of the adjustment of his accounts, nor of the balance found against him in the certified transcript; but the court refused to instruct the jury as requested, and the defendants then and there excepted to the ruling of the court. Officers and agents of the United States who receive public money, which they are not authorized to retain as salary, pay or emolument, are required by law to send their accounts quarter-yearly to the proper accounting officers of the treasury, with the vouchers necessary to the correct and prompt settlement thereof, within three months at least after the expiration of each successive quarter, if resident within the United States, or within six months if resident within a foreign country. 3 Stat. at Large, 723. Provision is also made that every officer or agent who shall offend against that enactment shall be promptly reported to the president, and that he shall be dismissed from the public service. Notice to the person required to account is not necessary, as the whole subject is regulated by law. Such officers and agents are required to render their accounts quarter-yearly, and when they do so they are charged with what they have received, and credited with what they have lawfully paid out or disbursed. Regulated as the whole matter is by law, they are presumed to have, and in general actually do have, full knowledge of the proceedings and of the result, and it is believed that no case of hardship arising from any surprise has ever occurred in the history of the department. *Walton v. United States*, 9 Wheat., 651; *Smith v. United States*, 5 Pet., 292.

§ 338. *In a suit on a marshal's bond a claim for services and expenses under an order of the secretary of the interior, not presented at the treasury, cannot be set off.*

III. By the evidence set forth in the second exception, it appears that the defendants claimed at the trial that a credit should be allowed, in the adjustment exhibited by the plaintiffs of the marshal's accounts, of \$4,375.70, for advances alleged to have been made by him in payment for work done and expenses incurred by him in taking the census, in pursuance of orders from the secretary of the interior. They offered the paper called the statement of differences, exhibited in the bill of exceptions, to show that the claim had been duly presented at the treasury and disallowed, and they also offered to prove that the disbursements were made as charged in the account. Objection was made by the district attorney to the admissibility of the evidence, because no account of the particulars of the claim was ever presented to the accounting officers of the treasury; and in making the objection he introduced the three accounts current set forth in the bill of exceptions. Both parties being heard, the court excluded the evidence, because it did not appear that the claim had been duly presented and disallowed, and the defendants excepted.

Marshals, like other officers, are required to render their accounts quarter-yearly to the accounting officers, with the vouchers necessary to the correct and prompt settlement thereof, within the time prescribed by law. In the case before the court it is not stated in the bill of exceptions, nor is it shown in the record, that any statement of items was furnished, nor that any vouchers were submitted to the accounting officers in support of the claim for credit now under consideration. Vouchers are required by the very words of the act of

congress, and it is very clear that the presentment of an account without items or vouchers would be a useless act. Without such evidences before the accounting officers, there could not be any intelligent scrutiny of the claim, nor any decision which would be satisfactory to the claimant or to the public. No evidence to prove a claim for credit can be admitted at the trial, "in suits between the United States and individuals," unless it be shown that the claim has been legally presented to the accounting officers of the treasury for their examination, and that it has been by them disallowed, except under certain special circumstances which do not exist in this case. Independently of the express words of the act of congress, the question has repeatedly been before this court, and has on every occasion been decided in the same way.

§ 339. *The right of set-off did not exist at common law, but is founded upon statute.*

The right of set-off did not exist at common law, but is founded on the statute of 2 George II., chapter 24, section 4, which in substance and effect provided that where there were mutual debts between the plaintiff and the defendant, . . . one debt may be set against the other, and such matter may be given in evidence under the general issue. Set-offs might, ever after the passage of that act, be made, in a proper case, between plaintiff and defendant, but it never extended to suits between the government and individuals, and, since the decision in the case of *United States v. Giles*, 9 Cranch, 236, it has never been pretended that, in suits "between the United States and individuals," any claim for credit can be admitted at the trial, unless it appears that the claim had previously been presented and disallowed, or was otherwise brought within the fourth section of the before-mentioned act of congress. Whether the claim for credit is a legal or equitable claim, if it has been duly presented to the accounting officers and has been by them disallowed, it is the proper subject of set-off under that act, but it cannot be adjudicated in a federal court unless it has been so presented and disallowed. *United States v. Wilkins*, 6 Wheat., 143. The rejection of such a claim by the accounting officers constitutes no objection to it as a claim for set-off, as it cannot be admitted in evidence unless it has been presented and disallowed, as required by the act of congress. *United States v. McDaniel*, 7 Pet., 11; *United States v. Ripley*, 7 id., 25. Such claims as fall within that act are not specifically defined, and, in view of that fact, this court has held that the act intended to allow the defendant the full benefit at the trial of any credit, whether it arises out of the particular transaction for which he was sued, or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt for which he is sued, subject, of course, to the requirement of the act that the claim must have been presented to the proper accounting officers and have been by them disallowed. *United States v. Fillebrown*, 7 id., 48.

§ 340. *Questions of set-off in the federal courts arise exclusively under the acts of congress, and are not affected by local laws.*

Questions of set-off in the federal courts arise exclusively under the acts of congress, and no local law or usage can have any influence in their determination. *United States v. Robeson*, 9 Pet., 324; *Gratiot v. United States*, 15 id., 370. Claims for credit cannot be admitted in suits between the United States and individuals unless they have been duly presented to the accounting officers of the treasury and have been by them disallowed, because it is so provided by

an act of congress. *United States v. Eckford*, 6 Wall., 488; *United States v. Gilmore*, 7 id., 492.

Supported as the ruling of the court is by an act of congress and by a course of decision, extending through a period of three-quarters of a century, it can hardly be expected that it will be disapproved.

Judgment affirmed.

UNITED STATES v. KIMBALL.

(11 Otto, 726-728. 1879.)

ERROR to U. S. Circuit Court, Eastern District of Arkansas.

STATEMENT OF FACTS.—Action on the bond of a collector of internal revenue, for failure to pay over a balance due for stamps, other property, and public money. The defendant turned over to his successor a list of uncollected taxes, and exhibited in evidence a certified account from the treasury department. Evidence was offered to the effect that he had used due diligence to collect, but his claim for a credit was disallowed by the commissioner of internal revenue.

Opinion by WAITE, C. J.

In a suit against a collector of internal revenue on his bond for a balance of taxes charged to him under the provisions of sec. 3218, Rev. Stat., he is entitled to a credit for all uncollected taxes transferred by him to his successor in office, if he proves that due diligence was used by him for their collection.

§ 341. *Rules of settlement with collectors of internal revenue.*

The certificate of the commissioner of internal revenue is a condition precedent to a credit by the first comptroller of the treasury before suit, but not to a defense upon the facts if a suit is brought.

§ 342. *Presentation of claim to the proper officers of the treasury.*

The presentation to the commissioner of internal revenue by a collector of a claim for credit in his account, and its rejection by him, is such a presentation of the claim "to the accounting officers of the treasury for their examination," and disallowance by them, as will permit the collector, under sec. 951, Rev. Stat., to make proof of his claim in a suit brought against him by the United States to collect what is due from him on his account.

Judgment affirmed.

UNITED STATES v. HUNT.

(15 Otto, 188-189. 1881.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—This was an action brought by the United States upon the official bond of Fidelio S. Hunt, as collector of taxes, under the internal revenue act, for the second district of Mississippi. He died pending the suit, and it was revived against his executrix. The other defendants were sureties. The condition of the obligation was that the said Hunt "shall truly and faithfully execute and discharge all the duties of the said office according to law, shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the secretary of the treasury, all public moneys which may come into his hands or possession," etc. It is alleged in the declaration that the bond was delivered and approved on July 19, 1866,

on which day Hunt entered upon the discharge of the duties of his said office, and continued therein until on or about May 23, 1867. The breach alleged was that during that period he became indebted to the United States in the sum of \$139,463.15, received by him as such collector for and on account of taxes due to the United States, being a balance reported to be due from him upon the adjustment of his account as such collector in the treasury department, of which a duly certified copy was filed, and which he had refused to pay. The sureties filed joint pleas, and the executrix pleaded separately. The pleas were alike, and amounted to a general denial of every allegation necessary to constitute a liability. There was a judgment for the defendants. The United States sued out this writ, and the errors which are assigned arise upon the rulings of the court upon questions of evidence, presented by a bill of exceptions.

The plaintiff offered in evidence the certified transcript of Hunt's account from the books of the treasury department. The certificate of the fifth auditor accompanying it states that he has examined and adjusted "an account between the United States and Fidelio S. Hunt, late collector for the second district of Mississippi, from July 19, 1866, to May 23, 1867, and find him chargeable as follows, under bond approved July 19, 1866." The debit side of the account is, "to amount of assessment lists receipted for, per form 23½, viz." Its first item is dated July 28, 1866, and is to "amount receipted for as December, 1865, list." It also embraces similar debits of the same and subsequent dates of entry, for lists of January, February, April, May and June, 1866. The last five items on the same side of the account bear date as to the entries subsequently to May 23, 1867, but are for amounts receipted for as lists of January, 1866, April and May, 1867. The credit side of the account contains items of cash paid at dates subsequent to May 23, 1867, and also gives credit for amounts collected by his successors in office on lists he receipted for, and also for amounts collected by him as collector under the first bond on lists receipted for by him as collector under the second bond. This statement of account shows a balance due the United States of the amount claimed in the declaration. The transcript included as part of the statement of account and explanatory of it, a statement of differences, showing and accounting for the discrepancies between the balance exhibited by the collector's own account and that ascertained by the adjustment. From this it appeared that the balance due the United States by the collector's account to March 31, 1867, since which date he had rendered none, was \$76,756.17, showing a difference to his debit of \$62,706.98. This is explained in part by showing the whole amount of assessments of form 23½ charged under his first bond and under his second bond separately, which he had failed to give correct credit for, to the amount of \$137,430.78; in part, by showing the amount of cash deposited by him under his first and second bonds respectively, and that he had twice credited himself with \$169,517.83 on account thereof; and by other errors, the whole amounting to \$702,434.36. On the other hand, this is reduced to the sum of \$62,706.98, the difference to be accounted for by credits for taxes abated by the adjustment, by credits therein for collections by successors in office, on bills receipted for by him during his term, and by amount claimed and credited in his accounts as collections on cotton. A list of warrants covering into the treasury the amounts of cash deposited is appended, showing the amount of each and on account of which bond it was paid.

To the introduction in evidence of this transcript objection was made on the part of the defendants, "upon the grounds that the balance exhibited by the

said account is the result of the transactions of both terms of the defendant's service, whereas the suit is upon a bond which covers only the transactions of the second term; and because it embraces transactions made by the collector after his removal from office and after the appointment and qualification of his successor, and the balance is in part made up of these transactions, occurring when the collector no longer sustained any official relation to the United States, and after the alleged breach had occurred." And in support of their said objections the defendants, by their attorneys, the bill of exceptions proceeds to state, introduced in evidence the bond of Martin Keary, the successor of the said Hunt as such tax collector, showing that the same was approved on April 29, 1867. Thereupon the objections to the introduction of the certified account in evidence were by the court sustained, and the same was excluded, the court holding that the said certified statement should stand and be considered only as a bill of particulars annexed to plaintiff's declaration. This ruling was excepted to and is assigned for error.

§ 343. *It is irregular to allow defendants in excepting to evidence to put in evidence going to the merits of the defense.*

It was an irregularity to permit the defendant to interject into the plaintiff's case testimony upon the merits of the defense in support of his objection that the evidence offered was irrelevant, and the testimony interposed was not by itself sufficient to establish the date on which Hunt ceased to hold an official relation to the United States as collector, for it did not show when his successor actually entered upon the discharge of the duties of the office. But passing by, without further comment, these minor errors, we find that the objection to the transcript of the account, as matter of evidence, is without foundation, either in fact or in law.

§ 344. *Circumstances under which a transcript of an account from the treasury of the United States is admissible in evidence.*

It was assumed on both sides, though there is no proof to that effect in the record, that Hunt had filled a prior term as collector, being his own successor, and it was admitted that his second term commenced on July 19, 1866. The objectionable items in the first part of the account charge him with amounts of assessment lists receipted for per form 23½ on dates subsequent to the beginning of his second term, though being described as lists for specified months prior to July, 1866, it is argued that he could not be chargeable upon his second bond with those sums. But this does not follow; for it is entirely consistent with the description of the lists that the collector actually received the taxes paid upon them after the date of his second term, and just as he is charged with them in this account. And so, on the other hand, with similar items charged upon receipts of assessment lists, of dates subsequent to May 23, 1867, the alleged date when his second term expired. It is consistent with the nature of those charges that they were for moneys received on account of taxes paid on account of these lists, and received by him before the end of his second term. The account charges him with distinct sums of money collected by him. They are identified by reference to assessment lists for particular months, and then by the dates of his receipts to the government for the lists, upon form 23½. No dates are traced in the account as those on which the taxes were actually collected by him, but the certificate of the treasury department declares it to be an account between the United States and the collector from the beginning to the end of the period covered by the bond in suit, and there is nothing on the face of the account which necessarily con-

tradicts this statement. The certificate has the legal effect of making the transcript *prima facie* evidence of the fact of indebtedness which it certifies, unless, upon the face of the account, it necessarily appears to be otherwise. But the ruling of the court in excluding the transcript is equally untenable upon the contrary supposition, that the items on account of which the objection was sustained were, on their face, such as could not be charged against the defendants upon the bond in suit. For, rejecting these items, there remained many others with which the collector and his sureties upon his second bond were admitted to be chargeable, and the transcript was clearly admissible in proof of these. The presence of the objectionable items could not prejudice the defendants, for, on the supposition, they were separable from the remainder of the account by mere inspection. On the other hand, their presence might be important to the government, as explanatory of corresponding items upon the credit side of the account; particularly in view of the ruling of the court which rejected the transcript as evidence against the defendants, but required it to remain upon the record as proof against the United States.

§ 345. *Receipts and statements signed by a collector competent evidence.*

For the same reasons, the subsequent ruling of the court must be held to be erroneous, by which it excluded the receipts of the collector on form 23½, which constituted the items upon the debit side of the account. Even if the receipts alone were not sufficient in each case to charge the collector with the sums charged as taxes collected upon the assessment lists, nevertheless they were competent evidence which, by other testimony, might be made full proof, until overcome by a successful defense. The ground of the objection was that the form 23½ was a receipt for alphabetical lists, showing in detail the names of persons assessed for taxes and the amounts severally due from each, and that these alphabetical lists were primary and better evidence to charge the collector than the receipt on form 23½, which expressed merely the aggregate amount of the alphabetical lists. But the receipts offered were signed by the collector, on their face constituted a part of his official transactions, and formed the very basis of the account against him upon the books of the treasury department. The originals would be competent against him, for they are not secondary evidence, although they may show the existence of other documents more in detail. The law gives to a copy certified by the treasury department at least the same force in evidence which the original would otherwise have.

The ruling of the court rejecting the original statement signed by the collector, showing the amounts collected and the amounts abated as uncollectible during the month, and those collected on May 18, 1867, was likewise erroneous for the same reasons.

For these errors, the judgment of the circuit court is reversed, with instructions to grant a new trial; and it is so ordered.

UNITED STATES v. DAVIS.

(Circuit Court for Oregon: Deady, 294-299. 1867.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—The complaint alleges the making of the bond, and that between November 1, 1861, and November 4, 1865, Davis received as postmaster the sum of \$9,032.40, and accounted for \$6,006.56 of the same, leaving a balance due the United States of \$3,025.84, for which it prays judgment against the defendants.

§ 346. *In an action on the bond of a postmaster, the defendant may set up a counterclaim, when it appears by the answer that such claim has been duly presented to the proper department for allowance, and rejected.*

The answer of the defendants substantially admits the statement of the account as set forth in the complaint, and sets up a counterclaim amounting in the aggregate to \$4,582.50. The first item in this counterclaim is \$307, for postoffice stamps delivered to the successor of Davis. The rest of the items are for office rent, clerk hire, gas, fuel and stationery. The plaintiff demurs to the counterclaim except the first item. This raises the question as to whether the defendant Davis was by law entitled to these allowances for these purposes. The answer avers that the items of the counterclaim have been duly presented to the proper department for allowance and rejected. This being the case, if Davis was entitled as a matter of right to incur these expenses and pay them out of the proceeds of the office, he is entitled to have them allowed in this action, notwithstanding the decision of the department. On the argument of the demurrer, the following acts of congress have been cited by counsel for plaintiff, regulating the compensation and allowances of deputy postmasters during the period Davis was in office. No other has been cited by counsel for the defendants, and I take it for granted, without further examination, that these are all that exist, touching this subject. Act of June 22, 1854, 10 Stat., 293, 299; of March 3, 1863, §§ 5 and 6, 10 Stat., 702; of July 1, 1864, 13 Stat., 335; and of March 3, 1865, § 3, 13 Stat., 505.

§ 347. *Under the act of 1854, the decision of the postmaster-general, in making extra allowances to postmasters, is final.*

The act of 1854 regulated the compensation and allowances of Davis until the act of July 1, 1864, went into effect. This act gave deputy postmasters a certain commission "on the postage collected at their respective offices in each quarter of the year." This act also authorizes the postmaster-general to make certain allowances to postmasters at *distributing* and *separating* offices, for extra labor and necessary expenses incurred by them in the discharge of these special duties of distributing and separating the mails. But the statute is not imperative, and gives the postmaster-general authority to make this allowance when in his judgment it is proper to do so. The statute commits the matter to the *discretion* of the postmaster-general, and the subordinate cannot claim the allowance as a matter of right. In this case it appears from the answer that the postmaster-general has exercised his authority — his discretion — and refused to make the allowance. When the defendant Davis entered upon the office at Portland, he virtually agreed to perform the duties of the position for the commission allowed by law, and such further allowances for extra labor and expenses as the postmaster-general in his discretion might deem proper to allow him. It seems the postmaster-general has not seen proper to make him any allowance. So far as this statute is concerned, this is the end of the case. The extra allowance was to depend upon the award of the postmaster-general, and not of a court or jury. The defendant never could have any *legal* right to an allowance, until it was given him by the judgment of his superior officer, and that officer having directly refused to make the allowance, I cannot see on what ground this counterclaim can be sustained.

§ 348. *An answer setting up a counterclaim for expenses, etc., must show that the defendant's office was within the meaning of the act allowing extra compensation.*

But this is not all. It does not appear from the answer that the office at Portland is or was either a *distributing* or *separating* office. Even if the statute

was absolute and gave these allowances as a matter of right, still the answer must show that the defendant was within its provisions—in other words, that the office at Portland was a *distributing* or *separating* office. As a matter of fact, it is not pretended that the defendant's office was a *distributing* office, while I suppose it was a *separating* office. Now the allowance which the postmaster-general *may make* to a separating office, is a sum sufficient to compensate for “the *extra labor* necessary to a prompt and efficient performance of the duties of *separating* and *dispatching* the mails passing through his office.” The allowance is for the extra labor in separating and handling the mail bags and dispatching them to the various offices to which they are directed from the distributing office. Nothing is to be allowed by this act to a separating office for gas, fuel, stationery or office rent. I find nothing in the act of March 3, 1863, which sustains the counterclaim of the defendants. Section 5 requires the postmaster-general to make an allowance for *clerical* service, when, “by reason of the presence of a military or naval force near any postoffice, unusual business accrues thereat.” The answer does not bring the case of the defendants within this provision. Section 6 provides that “no postmaster shall hereafter, under any pretense whatever, have, or receive, or retain for himself, in the aggregate, more than the amount of his *salary*.” Whether this provision applies to such postmasters, commonly called deputy postmasters, as received a *commission* upon postage, rather than a fixed salary, I am not prepared to say. But it matters not so far as this case is concerned. By the act of July 1, 1864, the compensation of postmasters was changed. They were divided into five classes, and to receive salaries in proportion to the compensation received during the two prior years.

§ 349. *The act of 1864, providing that the postmaster-general shall allow to postmasters for the necessary cost, in whole or in part, of rent, fuel, lights, etc., is permissive, not mandatory.*

Sections 5 and 6 of this act relate to allowances for expenses. The first of these two sections provides, “That at the postoffice of New York, and at offices of the first and second classes, the postmaster-general *shall* allow to the postmaster a just and reasonable sum for the necessary cost, *in whole or in part*, of rent, fuel, lights and clerks, to be adjusted upon a satisfactory exhibit of the facts. And at offices of the third, fourth and fifth classes, such expenses shall be paid by the postmaster, except as in the sixth section provided.” Section 6 authorizes the postmaster-general to designate distributing and separating offices at the intersection of mail routes, “and where any such office is of the third, fourth or fifth class of postoffices, he may make a reasonable allowance to such postmaster for the necessary cost, in whole or in part, of clerical services arising from such duties.” To bring this case within either of these sections, I think the answer should contain averments, either that the office kept by Davis was of the first or second class, or had been designated as a distributing or separating office. The court cannot presume that the office at Portland came within either of these categories—it must be averred.

But as this is a question of pleading rather than right, and may be avoided by amendment, if the facts will warrant, I will assume that the office at Portland, since July 1, 1864, was of the first or second class, or that it had been designated as a *separating* office. It is admitted, I believe, by counsel, that it was never a distributing office. The first assumption would bring the case within the provision of section 5. The language of this section is peculiar—the postmaster-general *shall* allow, etc. It might be said that, even where the

language of the statute was imperative, and absolutely required the postmaster-general, in a given case or contingency, to allow a postmaster certain expenses, yet still, until the allowance was made, the postmaster would have no legal right to the sum expended, which he could assert in a court in an action against him by the United States. Many reasons of public policy and convenience might be adduced in support of this construction of the statute. But notwithstanding these considerations, I think the contrary conclusion would be more consonant with justice and correct legal principles. When the statute peremptorily requires that the allowance be made, the officer makes the expenditure on the faith of the government, pledged as it were by the words of the statute, and in such case, it seems to me the safer course to hold that such an expenditure constitutes a legal claim against the United States. But this imperative language, *shall allow*, is, I think, qualified by what follows — *in whole or in part*: — *to require* the postmaster-general to allow an expenditure, *in whole or in part*, is, in effect, equivalent to authorizing him to allow it or not, in his discretion. The amendment to this section contained in section 3 of the act of March 3, 1863, uses the phrase, “authorized to allow, at his discretion.” Taken in connection with what appears to have been the uniform policy of congress in regard to the extra allowances to postmasters, namely, to enable the postmaster-general to *allow*, but not to enable the postmaster to *demand*, as a legal right, I am satisfied the language of section 5 ought to be construed as permissive and not mandatory to the postmaster-general. As to section 6, the language is only permissive; “he *may make* a reasonable allowance.” Section 8 of the act of March 3, 1865, is amendatory of section 5 of the act of July 1, 1864. It enlarges the items of expenditure for which allowances may be made to postmasters, and includes offices of the third and fourth class as well as the first and third, but leaves it in the discretion of the postmaster-general whether any allowance shall be made or not. This disposes of the counterclaim of the defendant, so far as demurred to. The demurrer is sustained.

JONES v. UNITED STATES.

(7 Howard, 681-692. 1848.)

ERROR to U. S. Circuit Court, Eastern District of Virginia.
Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—The case in the circuit court was an action of debt, instituted to recover the amount of a default claimed by the United States of Walter F. Jones as postmaster of the borough of Norfolk, in the state of Virginia. The said Walter F. Jones having been appointed postmaster of Norfolk, executed on the 8th day of August, in the year 1836, his bond, with the plaintiff in error and one Duncan Robertson as his sureties in the penalty of \$10,000, conditioned for the faithful performance of the duties of his office. In the year 1839 Walter F. Jones was removed from office, the United States claiming against him a balance of \$5,515.89 as due from him on the 31st of August in the year last mentioned; and to recover this balance the action on his official bond was instituted in the circuit court against him and his sureties. After the institution of the suit it was abated as to Walter F. Jones by his death; Robertson made default in the case, and as to him a writ of inquiry of damages was executed; the plaintiff in error alone appeared and made defense upon four several pleas, as to each of which replication and issue were taken. The first plea interposed was that of condition performed generally. The second and third

pleas, presenting substantially the same defense, rely upon the act of congress of the 3d of March, 1825, entitled "An act to reduce into one the several acts establishing and regulating the postoffice department," and particularly upon that portion of the act which prescribes that the postmaster-general shall obtain from the postmasters their accounts and vouchers for their receipts and expenditures once in three months, or oftener, with the balances therein arising in favor of the general postoffice; and that if any postmaster or other person authorized to receive the postage of letters, etc., shall neglect or refuse to render his accounts and pay over to the postmaster-general the balance due by him at the end of every three months, it shall be the duty of the postmaster-general to cause a suit to be commenced against the person so neglecting or refusing; and if default be made by the postmaster at any time, and the postmaster-general shall fail to institute suit against such postmaster and sureties within two years after such default shall be made, then and in that case the said sureties shall not be held liable to the United States nor shall suit be instituted against them. These pleas further aver that subsequently to the execution of the bond of Walter F. Jones, on the 8th of August, 1836, and during the year 1837, sundry defaults were made by him in failing to pay over money received by him as postmaster, and that these defaults were permitted to remain unclaimed by suit up to the 12th of March, 1840, the period at which this suit was instituted; a length of time from the occurrence of those defaults comprising an interval of more than two years. The fourth plea of the defendant below is simply a general averment that the causes of action in the declaration mentioned did not occur within two years next before the institution of the suit.

The only evidence adduced in this case, on behalf of the plaintiffs below, was the account certified under the act of congress from the treasury department against the postmaster, brought down to the 31st of August, 1839, exhibiting a balance in favor of the United States at that date of \$5,515.89, and all the evidence on behalf of the defendant was a letter to him from the postmaster-general dated on the 19th of December, 1837, announcing the fact that a draft had been drawn on the defendant in favor of the treasury department for the sum of \$5,000 in specie, and requesting the deposit of that sum with the Bank of Virginia at Richmond as the agent for the treasury. Upon the foregoing pleadings and evidence the following prayers were made and instructions given at the trial.

The attorney for the United States moved the court to instruct the jury "that all payments made by the postmaster, Walter F. Jones, to the general postoffice, after the execution of his official bond on the 8th of August, 1836, and subsequently to any default at the end of a quarter, without any direction by him or by the postmaster-general as to the application of said payments, should be applied in the first instance to extinguish each successive default in the order in which it fell due, and if, by such application of said payments, the jury shall believe, from the evidence, that all of the defaults which occurred two years before the institution of this suit were extinguished within two years after the same were respectively committed, that the act of congress, which limits the institution of suits against the sureties of a postmaster to two years after the default of the principal, has no application to this case, and cannot affect in any degree the plaintiffs' right to recover in this action." And the counsel for the defendant moved the court to instruct the jury: "1. That if the jury shall find that the said deputy postmaster, Walter F. Jones, committed

any default or defaults in office at any time or times more than two years before the commencement of this suit, and that such default or defaults were then known to the postmaster-general; and, further, that the said deputy postmaster continued in default to an equal or a greater amount thenceforth until he was discharged from office; that the postmaster-general failed to institute, or cause to be instituted, a suit against the said deputy postmaster and his sureties for two years from and after such default or defaults were made, then the defendant, Thomas Ap Catesby Jones, one of the sureties of the said deputy postmaster, is not liable to the United States, nor can any suit be maintained against him on the official bond of the said deputy postmaster, wherein the defendant was bound as one of the sureties for any default or defaults committed by the said deputy postmaster.

"2. That as this suit was commenced on the 12th of March, 1840, the jury should inquire whether any default was committed by the said deputy postmaster, Walter F. Jones, in not duly paying over any balance or balances of money which became due from him on account of collections by him officially made before the end of the quarter next preceding the 12th of March, 1838, namely, the quarter ending on the 31st of December, 1837. And if the jury shall find that the said deputy postmaster was so in default in not duly paying over such balances or balance due from him on account of collections by him officially made before the end of the quarter ending the 31st of December, 1837, and that such default was then known to the postmaster-general, then they should apply towards the discharge of such balances or balance, all such payments made by the said deputy postmaster during his continuance in office subsequently to the 31st of December, 1837, as they shall find to have been made out of moneys officially collected by him before that date or out of his private funds; and they should apply all other payments made by him after that date, and during his continuance in office, towards the discharge of the balances or balance which became due from him on account of moneys by him officially collected after the 31st of December, 1837, during his continuance in office.

"3. And that, as to the payment of \$1,121.54, which was made by the said deputy postmaster after he was discharged from his office, the jury should inquire whether that payment was made by him out of moneys remaining in his hands on account of collections officially made by him before the 31st of December, 1837, or out of his own private funds; or whether that payment was made out of moneys officially collected by him during his continuance in office subsequently to the 31st of December, 1837; and if the jury shall find that that payment was made, and of moneys remaining in his hands of collections by him officially made prior to the 31st of December, 1837, or out of his own private funds, then the jury should apply that payment towards the discharge of the balance which was due from him on the 31st of December, 1837; but if the jury shall find that that payment of \$1,121.54 was made by the said deputy postmaster out of money officially collected by him during his continuance in office subsequently to the 31st of December, 1837, then they should apply the said payment towards the balance that accrued and became due from him on account of moneys officially collected by him during his continuance in office subsequently to the 31st of December, 1837."

"Whereupon the court gave the said instruction prayed by the attorney for the United States, and refused to give the said instructions prayed by the counsel for the defendant; to which opinion of the court the defendant, by his counsel,

excepted, and prayed the court to sign and seal this bill of exceptions, which is done accordingly."

The jury found a verdict for the United States, assessing their damages to the sum of \$4,387.09, with interest thereon from the 31st day of August, 1839, till payment; and upon this verdict a judgment was entered for the sum of \$10,000, the penalty of the bond, to be discharged by the damages and interest by the jury assessed, and the costs of suit.

§ 350. *Appropriation, under the two years' limitation of actions against sureties, of payments made by a postmaster to defaults which occurred in previous quarters.*

It is apparent that the only question of law raised in this cause is the question of an appropriation of payments by debtor and creditor, it being insisted, in behalf of the United States, and being so ruled by the court below, that when, at the end of a quarter, there might be a default on the part of a postmaster, it was competent for him to supply such default, or to extinguish the debt then due from him, by payments made posterior to the end of the quarter; and that, in the event of an omission by the postmaster to appropriate the payments so made by him, it was the right of the government to apply them at its discretion to the extinguishment of previous balances; and that if, by such application, all defaults occurring within two years previously to the institution of the suit had been extinguished, the act of congress did not affect the plaintiff's right of recovery.

On behalf of the defendants below it is insisted that the receipts by the postmaster within a given quarter should be applied, exclusively or primarily, to the debt due from the postmaster for that quarter; and that if there should have existed any balances for previous quarters, these should not be extinguished by subsequent receipts; and that if permitted to remain for the space of two years without being claimed as such balances, by suit on the part of the government, the omission should operate a complete exoneration of the sureties. With respect to the position contended for as above, it may be remarked that a construction of the act of congress, which in numerous instances would interpose in the way of a debtor obstructions to the voluntary payment of his own debt, and compel the creditor to resort to a reluctant, dilatory and expensive litigation for its recovery, would never be adopted except under the influence of some controlling principle or necessity rendering such a proceeding unavoidable; and no such principle or necessity can be perceived where a creditor is willing to receive his money, the debtor is willing to pay it, and the surety assents to or acquiesces in the payment. We cannot, therefore, approve an interpretation of the act of congress like that assumed in the defense, which would require that quarterly balances should at all events and in opposition to the will of the parties, justly inferred from their conduct, remain open and unsatisfied, to become the subjects of future contest.

Upon the question of the appropriation of payments, some diversity, and even contrariety, may be found in the doctrines of the courts; yet nothing of the kind, it is thought, can be deduced from them which should embarrass the adjudication in this case. In the general proposition upon this subject all the courts agree. It is this: "That the party paying may direct to what the application is to be made. If he waives his right, the party receiving may select the object of appropriation. If both are silent the law must decide." With the third branch of this proposition, the most fruitful of uncertainty and embarrassment, namely, the decision which the law would make in the silence or entire

forbearance of the parties, we are here not particularly called on to deal, the subject here being more immediately the right of the creditor to make an appropriation of payments, and the limitations upon that power resulting from the delay or lapse of time from the character of the transactions between the debtor and creditor, and the rights of third persons which may be affected by those transactions. In instances of official bonds executed by the principal at different times, with separate and distinct sets of sureties, this court has settled the law to be, that the responsibility of the separate sets of sureties must have reference to and be limited by the periods for which they respectively undertake by their contract, and that neither the misfeasance nor non-feasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable. Such is the rule established in the cases of *The United States v. January*, 7 Cranch, 572, and of *The United States v. Eckford*, 1 How., 250 (§§ 595, and 584-587, *infra*).

§ 351. *Appropriation of payments; creditor's right; authorities reviewed.*

The case before us is free from any embarrassment of conflicting interests between separate sets of sureties. In this case there is but one bond; it presents the instance of an appropriation of payments between a single debtor and creditor. Upon the question, as understood in this form and with this limitation, there is not a perfect uniformity in the decisions either in England or in this country. The opinion of Sir William Grant in *Clayton's Case*, 1 Meriv., 604 *et seq.*, has often been referred to as a high authority in favor of the restriction of the right of the creditor to make the application to the exact period of time at which the payment was made. A close examination of the opinion of this able judge, however it may show the inclination of his mind on this subject, can hardly be received as an express adjudication upon the point in support of which it is adduced. In *Clayton's Case*, p. 606, speaking of the right of appropriation in the creditor in the absence of express direction, Sir Wm. Grant says: "There is certainly a great deal of authority for this doctrine; with some shades of distinction, it is sanctioned by the cases of *Goddard v. Cox*, 2 Strange, 1194; *Wilkinson v. Sterne*, 9 Mod., 427; *Newmarch v. Clay*, 14 East, 239; *Peters v. Anderson*, 5 Taunt., 596." He proceeds: "There are, however, other cases which are irreconcilable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such are, in particular, the cases of *Meggott v. Mills*, 1 Ld. Raym., 287, and *Dowe v. Holdworth*, Peake, N. P., 64. The cases then set up two conflicting rules — the presumed intention of the debtor, which, in some instances at least, is to govern, and the *ex post facto* election of the creditor which, in other instances, is to prevail. I should, therefore, feel myself a good deal embarrassed if the general question of the creditor's right to make the application of indefinite payments were now necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favor." Again, on page 610, we find the following statement from this same judge, namely, that the creditor received his account drawn out by his debtor, the banker who kept the account, and made no objection to it whatever, and the master stated in his report that the silence of the customer, the creditor, after the receipt of his banking account, is regarded as an admission of its being correct. "Both creditor and debtor must, therefore," says the judge, "be considered as having concurred in the appropriation." This case has been adverted to somewhat at

length, although it is often referred to as high and express authority, with the view of showing that it does not adjudge directly the point of the creditor's discretion in the appropriation of payments, however strongly it may intimate the inclination of the master of the rolls as to that question. Later decisions in the English courts would seem to be wholly irreconcilable with the remarks of Sir William Grant in Clayton's case. Thus, in *Simpson v. Ingham*, decided in 1823, and reported in 2 Barn. & Cress., 65, Bayley, justice, speaking of the right of creditors to appropriate payments, uses this language: "It has been insisted that, at that period of time, they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering the account; but entries made by a man for his own private purposes are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he has the right to apply the payments as he thinks fit." Holroyd, justice, in the same case, says: "The persons paying the money not having made any direct application of it, the right of making such application devolved on the receivers; and if they have done no act which can be considered as such an application, it is equally clear that, although they did not apply it at the moment of payment, they would have the right to make the application at a subsequent period. The question, therefore, is whether, from any entry in the books, there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been actually delivered. Now, these entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books shows only that the idea of so applying the payment had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect." Still later, in 1834, in the case of *Philpott v. Jones*, 2 Ad. & Ell., 41, Denman, chief justice, says: "The defendant made no appropriation of that payment; the plaintiff, therefore, may elect at any time to appropriate it to this part of his demand." And so Taunton, justice, in the same case: "Here the £17 were paid without any application to the particular items of the account. The plaintiff then might apply that payment to the items in question; and he was not bound to tell the defendant at the time that he made such application; he might make it at any time before the case came under the consideration of the jury." In *Smith v. Wigley*, 3 Moore & S., 175, Tindall, chief justice, said that the creditor must make the appropriation at the time the money comes to his hands. Yet, in *Mills v. Fowkes*, 5 Bing. N. C., 455, the same chief justice said that, in conformity with the rule in *Simpson v. Ingham*, the creditor may make the application at any time before action brought. Bosanquet, justice, said, in the same case, that the receiver might appropriate the payment, if the debtor had not, at any time before action commenced; and Coltman, justice, that, notwithstanding the doubt expressed by the master of the rolls in Clayton's case, the more correct view seemed to be "that the creditor is not limited in point of time."

In the case of *The Mayor of Alexandria v. Patten*, reported in 4 Cranch, 320,

Chief Justice Marshall said, in pronouncing the decision: "It is a clear principle of law that a person owing money on two several accounts, as upon a bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make the election immediately. After having made it, he is bound by it; but until he makes it, he is free to credit either the bond or the simple contract." So, too, Justice Story, in delivering the decision in the case of *Kirkpatrick v. United States*, 9 Wheat., 737, says: "The general doctrine is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an application after the controversy has arisen, and *a fortiori* at the time of the trial." The two cases last cited, with those of *The United States v. January*, 7 Cranch, 572, and of *The United States v. Eckford*, 1 How., 250, comprise the substance, it is believed, of all that has been ruled by this court upon the subject of the appropriation of payments. There are several state decisions upon this subject, which are not adverted to; but amongst these, if examined, there will be found some contrariety. An attempt to reconcile any discrepancies, either real or apparent, amongst either the English or American cases, would seem to be at least useless here, inasmuch as, with regard to the only principle connected with the appropriation of payments which we deem to be involved in this case, all the decisions concur. There is not even a decision to be found, which denies to the creditor, where the debtor has been quiescent, the right to appropriate payments at the periods at which they shall be made; and the concession of this restricted right we hold to be decisive of the character and fate of the transaction under review. That transaction exhibits one general account of debit and credit continued from its commencement to its close, when, and at no prior time, the balance is struck. On the due side of the account are presented the amounts received by the postmaster for postages within the periods there stated; and on the other side are entered to his credit the sums paid by him, either in cash or in drafts from the postmaster-general, in an exact conformity with the dates at which the transactions occurred. By this application, any balance which may have existed at the end of a previous quarter was extinguished, and sometimes overpaid, and the account thus brought down to the final balance. To this mode of application no just objection can be perceived; the parties interested in the payments were the same throughout, and equally liable for all; the payments being made generally, and without any appropriation by the debtors who were thus liable, it was the undoubted right of the creditor to apply them to any sums antecedently due. Indeed, in the case of *The United States v. Kirkpatrick*, this court say that, "in long running accounts, where debits and credits are perpetually occurring, and no balances otherwise adjusted than for the purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time." In this case they have been so applied, and in strict conformity with the times at which such payments were made.

We conclude our view of this question in the language of Judge Hopkinson, in the case of *The Postmaster-General v. Norvell*, Gilp., 134: "The application of the moneys received in a subsequent quarter, to the payment of the debt or balance antecedently due, being perfectly correct and lawful, it follows that no

part of the default for which suit is brought accrued two years before; on the contrary, all the balances antecedent to the last quarter were extinguished by the successive payments, and the final balance falls on the last quarter." A contrary result could be attained only by changing the manner in which the accounts have been kept, and by arranging the actual transactions as they have occurred between the parties—a proceeding which, we think, is required neither by the letter nor the objects of the act of congress. The judgment of the circuit court should therefore be, and is hereby, affirmed.

§ 352. *Credits and set-offs.*—Except in certain cases specifically excepted by statute, no credit can be allowed in an action on an official bond which has not been presented to the accounting officers of the government and by them disallowed. *United States v. Lent*,* 1 Paine, 417; *United States v. Smith*,* 1 Bond, 68; *Halliburton v. United States*,* 18 Wall., 63; *United States v. Giles*,* 9 Cr., 212; *Cox v. United States*, 6 Pet., 172 (§§ 401-404).

§ 353. The defendant must show that he comes within one of the exceptions. *Halliburton v. United States*,* 18 Wall., 63. And the rejection of claims referred by congress to an officer for settlement upon the principles of equity does not prevent their being thus offered as set-offs. *United States v. Smith*,* 1 Bond, 68.

§ 354. The rule that in an action on an official bond no credit can be allowed except in certain specified cases, unless the claim therefor has been presented to the proper accounting officers and disallowed, does not apply where a surety seeks to show by a treasury transcript that certain credits were made on the account of his principal after such principal's death, preliminary to showing that such payments were made by him. *Cox v. United States*, 6 Pet., 172 (§§ 401-404).

§ 355. In an action on an official bond, where the question is as to which of two accounts against the principal an amount which has been allowed by the officers of the treasury department shall be credited, the rule that no offset can be allowed unless the same has been first presented to the proper accounting officers and disallowed has no application. *United States v. Hough*, 18 Otto, 71 (§§ 423-426).

§ 356. In an action on the official bond of a marshal to recover moneys collected by him on executions in favor of the United States, the defendants attempted to set up items of credits disallowed by the treasury department in another matter of account between the marshal and the department, on which an action could not be maintained by the government because the statute of limitations had run. *Held*, that the set-off could not be allowed. *United States v. Prentice*,* 2 McL., 65.

§ 357. State statutes relating to set-offs can have no application in suits by the government on official bonds. *Ibid*.

§ 358. The bond given by a battalion quartermaster to the United States was conditioned that he "should faithfully expend all public moneys, and honestly account for all public property which may come into his hands in his said capacity." *Held*, that under the bond the officer was obliged to account to the United States and not merely to the quartermaster-general, and that, before he could be allowed any credits, the items thereof must have been presented to the treasury department and disallowed by it. *United States v. Lent*,* 1 Paine, 417.

§ 359. In an action against a surety on an official bond money collected by the government on an execution against another surety may be proved as a credit by the return of the marshal; and a treasury voucher is not necessary to show the amount received by the government. *Myers v. United States*,* 1 McL., 493.

§ 360. The principal and the sureties in an official bond have the right to prove that there are credits which do not appear in the transcripts from the treasury department of the principal's account and which ought justly to be allowed. The treasury transcripts are only *prima facie* evidence. *United States v. Corwin*, 1 Bond, 149.

§ 361. In an action against the sureties in the official bond of a sub-Indian agent, the defendants are entitled to credit for claims which have been presented to the treasury department and rejected, if the same are proved to be just and equitable. If the credit claimed is for money paid pursuant to law and instructions, or if the payments were made in good faith and pertained properly to the office of the principal, and were not prohibited by law, they are to be allowed. *Ibid*.

§ 362. *Evidence; transcripts.*—In an action against the sureties on a bond given by contractors to furnish provisions to troops of the United States, to recover a balance unaccounted for, a letter from an officer of the war department to one of the contractors, stating a balance due, is not admissible in evidence for the purpose of explaining the certificate from the treas-

ury department claiming the balance unaccounted for. *Pendleton v. United States*, 2 Marsh., 75.

§ 863. The receipt by a collector from his predecessor of assessment rolls of taxes imposed and uncollected is *prima facie* evidence that he received the money on them. *United States v. Stone*, 16 Otto, 525.

§ 864. It is competent for the defendants to a suit on a collector's bond to show, in their own exoneration, that the balance charged against the collector, upon the adjustment of his accounts, during the period when they were liable for his default, in fact had arisen during a prior term. A certified copy of the collector's bond and the transcripts from the treasury department are admissible for this purpose. *Ibid.*

§ 865. In actions on official bonds, unofficial letters of subordinate officers are not admissible to contradict or explain the official adjustment of the principal's accounts as shown by duly certified transcripts from the proper department. *Strong v. United States*, 6 Wall., 788.

§ 866. It seems that, in an action on an official bond, a transcript of the books of the department is inadmissible to charge the officer with any sum not coming into his hands in the ordinary course of his official duties. *Bruce v. United States*, 17 How., 437 (§§ 579-583).

§ 867. In an action on an official bond of a collector, the supreme court will not sustain exceptions to the admission in evidence of transcripts from the treasury department showing the state of the collector's account, when such transcripts appear correct upon their face, are in the usual form, containing the usual items, showing appropriate balances, and the particulars in which they are objectionable are not shown either in the record or by the argument of counsel. *United States v. Stone*, 16 Otto, 525.

§ 868. The act of March 3, 1797, makes transcripts from the books and proceedings of the treasury admissible to show the state of the accounts of collectors when suit is instituted against them on their official bonds. These papers are admissible against the sureties of a collector as well as against the collector himself. Where these records are each complete and perfect, and in the aggregate cover the entire term of the collector, it is not necessary that they should state every item of account as it occurred in the daily business of the collector. The items, when carried to the ledger account, are necessarily more or less condensed, and the act makes a transcript from the books, and not of the books, evidence. The quarterly accounts rendered to the treasury department by the collector himself are also admissible against him and his sureties. *United States v. Gausson*, 19 Wall., 198.

§ 869. In an action on an official bond a balance reported by the auditor to the comptroller as being due from the officer merely shows the amount for which the comptroller is to bring suit, and is not properly receivable in evidence; but each separate item going to make up such balance must be authenticated as required by law. *United States v. Patterson*,* Gilp., 44.

§ 870. A transcript of accounts is admissible in an action against the sureties on an official bond, even though the principal is not joined with them. The admissions of the principal in his returns of official default are equally admissible against him and his sureties. *Chadwick v. United States*,* 3 Fed. R., 750.

§ 871. In an action on the official bond of a postmaster, an authenticated transcript from the postoffice department, showing a statement of the postmaster's indebtedment, is admissible in evidence, notwithstanding it does not enumerate the items of the return made, where the postmaster himself, in his return, struck the balance shown in the transcript. *Lawrence v. United States*,* 2 McL., 581.

§ 872. In an action against the sureties on an official bond, where the principal had been re-appointed from a previous term, a treasury transcript showing the amount due from the officer at the beginning of his term is only *prima facie* evidence, and the defendants may show that such balance was in whole or in part misapplied by the collector prior to the new appointment. *United States v. Eckford*, 1 How., 250 (§§ 584-587).

§ 873. In an action on the official bond of an Indian agent, a certified transcript of the records of the treasury department is competent evidence of the receipt by the agent of the amounts charged to him, and the receipts need not be produced. Such transcript is, however, only *prima facie* correct, and may be contradicted by the defendant. *Bruce v. United States*, 17 How., 437 (§§ 579-583).

§ 874. A statement of the account of a postmaster, certified under the seal of the postoffice department, is *prima facie* evidence of his debt to the United States in an action on his official bond. *Postmaster-General v. Rice*,* Gilp., 554.

§ 875. In an action on an official bond, a treasury transcript is only *prima facie* evidence of the correctness of the balance certified, and errors in computation are no more vested rights in favor of a surety than in favor of the principal, and where such mistakes exist they can be corrected by a restatement of the account. *Soule v. United States*, 10 Otto, 8 (§§ 396-400).

§ 376. Under the law of 1797, a certified treasury transcript is evidence against a receiver of public money, though he has never been notified by the treasury department to render his accounts to the auditor of the treasury under the law of 1793, and though the suit was not on the receiver's official bond. *Walton v. United States*, 9 Wheat., 652.

IV. LIABILITY OF SURETIES.

1. In General.

SUMMARY—*Fees for inspection are public money*, § 377.—*Duress*, § 378.—*Governed by what law*, § 379.—*Money advanced to officer by mistake*, § 380.—*What duties may be imposed upon a navy agent*, § 381.—*Money received contrary to law*, §§ 382, 383.—*Money received before execution of bond*, § 384.—*Defalcations between date of appointment and the date of the execution of the bond*, §§ 385, 386.—*Return of officer not conclusive on sureties*, § 387.—*Prospective condition*, §§ 388, 389.—*Money received for stamps, but no stamps issued*, § 389.—*After-imposed duties*, §§ 390, 392-395.—*Repeal of law*, § 391.—*Postmaster's bond*, §§ 394, 395.

§ 377. Moneys received by a revenue collector as fees for inspection and gauging are public moneys within the meaning of that term as used in the collector's bond, and his sureties are liable if he fails to pay over or account for such moneys. *Soule v. United States*, §§ 396-400.

§ 378. A bond executed by a revenue collector being several, it was returned with the request that a joint and several bond be executed as required by statute. It was properly executed and returned by the principal as requested and because requested, and without objections. *Held*, there was no evidence of duress. *Ibid*.

§ 379. The liability of the sureties on an official bond is governed by the common law as existing at the seat of government where it is to be executed, and not by the rules of law existing at the place where, as a matter of fact, it was executed. *Cox v. United States*, §§ 401-404. See § 503.

§ 380. If two sums of the same amount instead of one are advanced to a disbursing agent by the mistake or laches of government officers, the sureties of such disbursing agent are liable for his misapplication of any of such funds. *United States v. Cutter*, §§ 405-408.

§ 381. Under the constitution and laws of the United States there is no such office as navy pension agent. The secretary of navy may require that the duties of such office be performed by a navy agent; and where the bond of a navy agent was conditioned to perform all the duties of such office, and follow and observe the directions of the president and the secretary of navy, it was held that the sureties on the official bond of the navy agent were liable for funds coming into his hands for the payment of naval pensions. *Ibid*.

§ 382. It seems that the sureties of a disbursing officer of the government are liable for public funds coming into the hands of their principal as such officer, even though the funds come to his hands contrary to an act of congress. *Ibid*.

§ 383. Sureties on the official bond of a government disbursing officer are liable for a misapplication of public funds by their principal, though such funds were transmitted to him without a compliance on his part with the regulations of the department under which he acts. *Ibid*.

§ 384. Though the conditions of an official bond are prospective, yet the sureties thereon are liable for moneys received by their principal after his appointment and before the execution of the bond, where such moneys are retained by him and are in his hands for some time after the bond is executed. *United States v. Boyd*, §§ 409-411.

§ 385. A recital in an official bond that a person has been appointed to an office for a certain time, commencing on such a date, does not render the sureties liable for defalcations taking place between such appointment and the execution of the bond. The liability of a surety cannot be extended by implication. *Ibid*.

§ 386. Sureties on an official bond which is prospective in its terms are not liable for defalcations of their principal before their execution of the bond. *United States v. Boyd*, §§ 412-417.

§ 387. The return of an officer that he had a certain amount of public money in his hands at the time of the execution of his official bond is not conclusive on his sureties, and such statement is open to explanation and contradiction. *Ibid*.

§ 388. An official bond prospective in its action is not rendered void by any fraud in respect to past transactions not within its condition. *Ibid*.

§ 389. A distiller of fruit brandy applied at the office of the collector for stamps for certain packages distilled. The collector being absent, and there being no stamps in the office

signed, the deputy collector took the money and gave a receipt therefor in the collector's name. No stamps were ever issued and the collector absconded with the money. *Held*, that the payment made by the distiller was not a payment of the tax; that the money received did not become public money, and that the sureties on the official bond of the collector were not liable therefor. *United States v. Hermance*, § 418.

§ 390. The official bond of a collector for the faithful performance of his duties according to law, taken under an existing law, does not cover duties imposed upon the collector by a subsequent statute, and which were not contemplated by the act under which the bond was taken. The sureties on such a bond are not liable for a breach of the after-imposed duties. A bond given for a certain term of office cannot be extended to embrace an additional term under a new appointment. *United States v. Kirkpatrick*, §§ 419-422.

§ 391. The bond of a revenue collector was conditioned that he should account for all stamps which had been or should be furnished him under an act of congress, which was repealed before the execution of the bond. *Held*, that his sureties were liable only for stamps delivered to him before the repeal of the act in question. *United States v. Hough*, §§ 423-426. See § 471.

§ 392. Sureties upon an official bond are liable for the faithful performance of all duties imposed on the officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belong to and come within the scope of the particular office, though not for those which have no connection with it and cannot be presumed to have been within the contemplation of the parties at the time their bond was executed; nor are they bound where the nature of the office has been changed. *United States v. McCartney*, §§ 437-439.

§ 393. The liability of a surety on an official bond is *strictissimi juris*, and cannot be extended by construction or implication beyond the reasonably necessary import of the language. So the sureties on the bond of the treasurer of a branch mint, conditioned that the treasurer shall perform the duties of his office and such additional duties as may hereafter be imposed by law or the regulations of the department, are not liable for the acts of such treasurer in failing to account for internal revenue stamps, the disposition of which was required by him by a statute enacted subsequently to the execution of the bond. Such disposition of stamps was not one of the functions of the treasurer of the mint as such, and such employment cannot be held to have been within the intention of the parties at the time of the execution of the bond. *United States v. Cheeseman*, §§ 431, 432.

§ 394. The sureties on a postmaster's bond, which recites that he "shall well and truly execute the duties of said office according to law and the instructions of the postmaster-general," are liable for his defaults respecting a subsequent order of the postmaster-general, to retain certain moneys instead of depositing them, as he had been before required; this order of the postmaster-general being authorized and according to law. *Boody v. United States*, §§ 433-438.

§ 395. The sureties on a postmaster's bond are liable for moneys received by him from other postmasters, under orders of the postmaster-general, where the bond requires him to account for all moneys, etc., which he, as *agent* for the general postoffice, should receive for the use and benefit of the general postoffice. *Ibid*.

[NOTES.— See §§ 439-477.]

SOULE v. UNITED STATES.

(10 Otto, 8-13. 1879.)

ERROR to U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.— Internal revenue collectors are required, before entering upon the duties of their office, to execute a bond for such amount as shall be prescribed by the commissioner, under the direction of the secretary, with not less than five sureties, conditioned that the collector shall faithfully perform his duties, and account for and pay over to the United States all public moneys which may come into his hands and possession. 13 Stat., 225. Pursuant to that requirement, the defendant first named, having been appointed such collector on the 12th of January, 1867, gave the bond described in the complaint, and the other defendants signed the same as his sureties, the charge in the complaint being that the collector failed to perform the conditions of

the bond. Service having been made, the defendants appeared and pleaded as follows: 1. That the allegations of the complaint are not true. 2. That the bond is void because executed under duress. 3. Performance.

Subsequently the parties went to trial, and the verdict and judgment were in favor of the plaintiff. Exceptions were filed by the defendants, and they sued out the present writ of error, and removed the cause into this court. Errors assigned here are as follows: 1. That the court erred in admitting in evidence the transcript of accounts as audited by the fifth auditor. 2. That the court erred in instructing the jury that the sureties were liable for the item charged in the transcript as the excess collected on the amount of gauger's fees. 3. That the court erred in instructing the jury that the transcript was *prima facie* evidence of the correctness of the item charged therein as the amount of error by the assessor in footing lists as per report of the supervisor. 4. That the court erred in instructing the jury that upon the evidence given the bond was a voluntary bond, and was not extorted, and that the collector and his sureties were liable upon it. 5. That the court erred in instructing the jury that the direction to the collector contained in the letter of the commissioner to execute the bond, he having previously given one, must be considered as the direction of the secretary of the treasury.

Five things are established by the act of congress: 1. That it is the duty of the commissioner to pay over daily to the treasurer all public moneys which may come into his possession. 2. That the treasurer is required to give proper receipts for the money, and keep a faithful account of the same. 3. That it is also the duty of the commissioner, at the end of each month, to render true and faithful accounts of all public moneys received or paid out, or paid to the treasurer, and to exhibit proper vouchers for the same. 4. That it is the duty of the fifth auditor to receive such vouchers and examine the same, and to certify the balance, if any, and to transmit the accounts with the vouchers and certificate to the first comptroller for his decision thereon. 5. That it is the duty of the commissioner, when such accounts are settled as provided in that section, to transmit a copy thereof to the secretary of the treasury. 13 Stat., 223.

§ 396. *It is the duty of the fifth auditor to audit the accounts of a collector of internal revenue.*

Argument to show that by the true construction of that section the fifth auditor is the proper officer to audit such accounts is scarcely necessary, as it is clear that the act contemplates that they should be audited, and that it does not devolve the duty upon any other officer. Conclusive support to that theory, if more be needed, is also derived from the first paragraph of section 277 of the Revised Statutes, which, among other things, provides that the fifth auditor shall receive and examine all reports of the commissioner of internal revenue, which of course embraces such accounts as that of the collector in this case, as it includes all the accounts rendered in the department of the commissioner. R. S. (2d ed.), sec. 277, p. 46. Authority to appoint gaugers was conferred by the fifty-third section of the act imposing taxes on distilled spirits and tobacco, and for other purposes. 15 Stat., 147. Fees for gauging and inspecting, as prescribed by the commissioner, were to be paid to the collector by the owner or producer of the articles to be gauged and inspected. Such fees were to be retained by the collector until the last day of each month, when the aggregate amount of fees so retained was, under regulation of the commissioner, to be paid to the officers performing that duty, not to exceed,

however, the rate of \$3,000 per annum. Four hundred and ninety-four dollars and thirty-eight cents, money collected from that source, in excess of what the collector had paid out, remained in his hands, and was charged in the accounts as settled by the accounting officers of the treasury. Due exception was taken by the sureties to the ruling of the court that they were liable for that charge. No objection was made to the charge as against the collector, but the objection was that the sureties were not liable, because the money was received under the subsequent act.

§ 397. *The sureties of a collector are bound for all public moneys which go into his hands.*

Viewed in that light, it must be assumed that the charge was a proper one as against the collector, and inasmuch as it was money collected by law of the owner or producer of the articles to be gauged and inspected, it was clearly public money in his hands to which he had no legal right. By the terms of the bond in suit the sureties are to become responsible if their principal does not justly and faithfully account for and pay over to the United States all public moneys which may come into his hands or possession. Beyond doubt the amount went into his hands and possession as public money, and in the judgment of the court here, the ruling of the court below, that the sureties are liable for it, is correct. *United States v. Powell*, 14 Wall., 493, 502 (§§ 630-634, *infra*); *United States v. Singer*, 15 id., 111, 121.

§ 398. *Treasury settlements are prima facie evidence against a collector and his sureties.*

When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a transcript from the books and proceedings of the treasury department, certified by the register, and authenticated under the seal of the department, . . . shall be submitted as evidence; and the court trying the cause shall be authorized to grant judgment and award execution accordingly. *R. S.*, sec. 886; *Bruce v. United States*, 17 How., 437 (§§ 579-583, *infra*); *Smith v. United States*, 5 Pet., 292; *Cox v. United States*, 6 id., 172 (§§ 401-404, *infra*); *Hoyt v. United States*, 10 How., 109. Treasury settlements of the kind are only *prima facie* evidence of the correctness of the balance certified; but it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. *United States v. Eckford*, 1 id., 250 (§§ 584-587, *infra*). Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account.

§ 399. *It is not extortion to require a new bond from a collector if the old one is irregular or insufficient in form.*

Sufficient appears to show that the principal defendant was appointed collector March 28, 1865, in the recess of the senate, to hold until the expiration of the then next session of congress, and no longer. On the 25th of July following he was appointed to the same office by the president and was confirmed by the senate. Due notice of his appointment was given, and he was furnished with a blank form of bond, which, on November 2, 1866, he executed with sureties; but the bond being several and not joint and several, as it should be, he was officially requested to execute a new bond correcting that error. In pursuance of that request, on the 12th of January of the next year he executed the bond described in the complaint, and from the date of the first bond to the date of

the second his accounts were settled by the treasury officers under the first bond. When the second bond was offered in evidence, the defendant objected to its admissibility; but the court overruled the objection and instructed the jury that it was not extorted, which instruction constitutes the fourth exception. Evidence to support the charge of duress is entirely wanting. Instead of that, the defendant testified that he did not remember that he made any objection to executing the bond, and supposed that he did it because the commissioner had given such directions.

§ 400. *A direction of the commissioner of internal revenue to a collector is to be regarded as a direction of the secretary of the treasury.*

Exception was also taken to the instruction of the court that the direction of the commissioner to execute a new bond must be considered as the direction of the secretary, which is so obviously correct as to require no argument in its support, as it is matter of common knowledge that the commissioner is a subordinate officer of the treasury department. *Dugan v. United States*, 3 Wheat., 172; *United States v. Kirkpatrick*, 9 id., 720; *Hamilton v. Dillin*, 21 Wall., 73. Suffice it to say that in view of these suggestions it is clear that there is no error in the record.

Judgment affirmed.

COX v. UNITED STATES.

(6 Peters, 172-204. 1832.)

ERROR to U. S. District Court, Eastern District of Louisiana.

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This cause comes up by writ of error from the district court of Louisiana district. The suit was instituted according to the practice of that court by petition, which states that Joseph H. Hawkins, late of New Orleans, navy agent of the United States, now deceased, John Dick, late of the same place, deceased, and Nathaniel Cox, of the same place, on the 10th day of March, 1821, by their bond, became jointly and severally bound to the United States, in the penalty of \$20,000. To which obligation a condition was annexed, by which it was provided that if the said Joseph H. Hawkins shall regularly account, when thereunto required, for all public moneys received by him from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government of the United States as shall be duly authorized to settle and adjust his accounts, and shall pay over, as he may be directed, any sum or sums that may be found due to the United States upon any such settlement, and shall faithfully discharge, in every respect, the trust reposed in him, then the obligation to be void, otherwise to remain in full force and virtue; and the petition further states that the said Hawkins did not account for all public moneys received by him, and did not pay over the sums due from him to the United States, but at his death remained indebted to the United States in the sum of \$15,553.18 for moneys received by him from the United States since the date of the said bond as navy agent, by reason whereof the condition of the said bond had become broken, and the said debt become due; and prayed process of summons against the legal representatives of Hawkins and Dick, deceased, and against Nathaniel Cox, and that judgment may be rendered against them for the said debt with interest and cost. A copy of the bond, duly authenticated, is annexed to the petition, and citations were issued against the legal representatives of J. H. Hawkins, deceased, and of John

Dick, deceased (without naming or designating them in any other manner), and against Nathaniel Cox.

As to the representatives of Hawkins, the citation was returned not found; and as to the representatives of John Dick, it was returned served, and the like return as to Cox. Cox appeared and answered, denying that the sum of \$15,553.18 is due from the sureties, as stated in the petition, alleging that he has paid, since the decease of Hawkins, \$7,317.54, which had been allowed at the treasury of the United States; leaving a balance only of \$8,235.64. And, according to the course of practice in Louisiana, he represents that the succession of his co-surety, John Dick, is solvent, and demands that the United States divide their action by reducing their demand to the amount of the share and proportion due by each surety, which was overruled by the court. Nathaniel Dick and James Dick appear and answer that they are two of three heirs of John Dick; and in no event bound for more than two-thirds of any debt of John Dick, and deny that the debt is in any manner due by the estate of John Dick; but should the same be proved, they say they have received no more than \$4,000 of the estate of John Dick, and are liable for no more than \$2,000 each, and pray judgment and trial by jury. The cause was tried by a jury, and a general verdict for \$20,000 found for the plaintiffs, being the amount of the penalty in the bond. Upon which the court gave judgment against the estate of John Dick and Nathaniel Cox, jointly and severally, for the sum of \$20,000, with six per cent. interest from the 2d day of January, 1830, until paid; and also gave judgment against Nathaniel Dick and James Dick for the sum of \$10,000 each, with interest, etc. In the course of the trial, a bill of exceptions was taken to the opinion of the court, in rejecting evidence offered on the part of Cox, in support of his answer, setting up the payment of \$7,317.54, made by him after the death of Hawkins.

§ 401. *A judgment for a greater amount than is demanded in the petition is erroneous.*

It is deemed unnecessary to notice the numerous and palpable errors contained in this record; that which arises from the entry of the judgment is insuperable. It is difficult to conceive, unless through mistake, how such a judgment could be entered. The demand in the petition is only \$15,553.18. The verdict of the jury is \$20,000; and, upon this, a judgment is entered up, against the estate of John Dick and Nathaniel Cox, jointly and severally, for \$20,000, and a judgment also against Nathaniel Dick and James Dick for \$10,000 each. Upon no possible grounds, therefore, can this judgment be sustained. There are, however, one or two questions arising upon this record which have been supposed at the bar to have a more general bearing, which it may be proper briefly to notice.

§ 402. *A transcript from the books of the treasury is evidence for a surety of the date of credits in the account of his principal.*

Upon the trial, the defendant, N. Cox, offered in evidence a transcript from the books of the treasury, duly authenticated, purporting to be a list of payments made and receipts taken and passed at the treasury of the United States, in the name of Joseph H. Hawkins, since the 3d of September, 1823, it having been previously shown that Hawkins died on the 1st day of October of that year. This evidence was offered in support of the allegation in Cox's answer that he had paid \$7,317.54, since the decease of Hawkins, in his capacity of surety. This testimony was objected to by the attorney of the United States, on the ground that no credits could be allowed but such as had been presented

at the treasury and refused. The objection was sustained by the court, and the evidence rejected. This was supposed, in the court below, to come within the act of congress, 2d vol., Laws U. S., 595 (1 Stats. at Large, 515), which declares that, in suits between the United States and individuals, no claim for a credit shall be admitted upon the trial (except under certain specified circumstances, not applicable to this case), but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed.

This transcript is not set out in the record, and we can only judge of it from what is stated in the bill of exceptions; and from this it does not appear to be a case coming at all within the act of congress. It was not offered as evidence of any new claim for a credit which had not been presented to the accounting officers of the treasury. All the credits claimed had been given at the treasury; and the only purpose for which it was offered was to show that such credits were given after the death of Hawkins; and although standing in his name, the payments could not have been made by him; and to let in evidence to show that they were in fact made by the surety. There is no evidence in the cause showing the course of keeping the accounts at the treasury in such cases. But it is believed that new accounts are never opened with the sureties. The accounting officers have no means of deciding whether the money is paid out of the funds of the sureties, or out of those of the principal. That is a question entirely between the sureties and the representatives of the principal. If application had been made at the treasury, and the accounting officers had transferred the payments, and given credit to Cox instead of Hawkins, it would not have changed the state of the case, as between the United States and the parties in the bond; and as between the sureties themselves, it would have decided nothing, even if that was an inquiry that could have been gone into upon this trial. But nothing done at the treasury, which did not fall within the scope of the authority of the accounting officers in settling accounts, could have been received in evidence. In the case of *The United States v. Buford*, 3 Pet., 29, it was held by this court that an account stated at the treasury department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. Such statements at the treasury can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department when the transactions are shown by its books. If, then, the accounting officers of the treasury could have done nothing more than had already been done, by giving credit on Hawkins' account for payments alleged to have been made by Cox after his death, whence the necessity of making any application to the treasury? It would have been a nugatory act; and the law surely ought not to be so construed as to require of a party a mere idle ceremony. The law was intended for real and substantial purposes; that the United States should not be surprised by claims for credits, which they might not be able to meet and explain in the hurry of a trial. But as no new credit was asked in this case, it would have been useless to make any application to the treasury for the mere purpose of being refused.

§ 403. *Claims for credits not presented to the treasury can be set up by defendant in a suit by the United States.*

The evidence offered of Hawkins' account, as navy agent, with the Branch Bank at New Orleans, was properly rejected. It was not competent evidence in this cause, in any point of view, unless it was to show that there was a bal-

ance in favor of Hawkins, which ought to go to the credit of his account with the government. But for this purpose it was not admissible, it not having been presented to the accounting officers of the treasury for allowance. This was setting up a claim for a new credit, and could not be received according to the express provisions of the act of congress. The proceedings in this cause, and the manner in which the judgment is entered, have been considered at the bar as affording a proper occasion for the court to decide whether this contract and the liability of the parties thereupon are to be governed by the rules of the civil law which prevail in Louisiana, or by the common law which prevails here.

§ 404. *An official bond is governed by the common law at the seat of government, and not the local law of the place where executed.*

It was contended on the part of the plaintiffs in error that the United States were bound to divide their action, and take judgment against each surety only, for his proportion of the sum due, according to the law of Louisiana, considering it a contract made there, and to be governed in this respect by the law of the state. On the part of the United States it is claimed that the liability of the sureties must be governed by the rules of the common law; and the bond being joint and several, each is bound for the whole, and that the contribution between the co-sureties is a matter with which the United States have no concern. The general rule on this subject is well settled, that the law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law of the place where it is to be executed. 2 Burr., 1077; 4 Term R., 182; 7 Term R., 242; 2 Johns., 241; 4 Johns., 285. There is nothing appearing on the face of this bond indicating the place of its execution, nor is there any evidence in the case showing that fact. In the absence of all proof on that point, it being an official bond, taken in pursuance of an act of congress, it might well be assumed as having been executed at the seat of government. But it is most likely that, in point of fact, for the convenience of parties, the bond was executed at New Orleans, particularly as the sufficiency of the sureties is approved by the district attorney of Louisiana.

But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the treasury department at the seat of government; and the navy agent is bound by the very terms of the bond to pay over such sum as may be found due to the United States on such settlement; and such paying over must be to the treasury department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington, and the liability of the parties must be governed by the rules of the common law. The judgment of the court below is reversed, and the cause sent back with directions to issue a *venire de novo*.

UNITED STATES v. CUTTER.

(Circuit Court for New York: 2 Curtis, 617-629. 1856.)

STATEMENT OF FACTS.—Cutter gave a bond with sureties for the faithful discharge of his duties as navy agent. By the terms of his commission he was required carefully and diligently to perform all the duties pertaining to the office, and to observe the orders of the president and secretary of the navy. This is an action on his bond, the evidence showing that he was a defaulter to the amount of \$12,581.57. Cutter absconded, and service was had on several of his sureties. At the trial copies of letters from Cutter to the secretary of the navy, and from the latter to the former, were offered in evidence, and admitted against the objections, (1) that they were not annexed to any transcript of an account; (2) some of them were copies of letters to Cutter; (3) because Cutter's admissions were not admissible against his sureties, as he was not a party to the suit. The sureties denied their liability for one item of \$18,400, because the money had gone into Cutter's hands contrary to the regulations of the navy department, and without any order from the president. It appeared that the standing regulations of the navy department, governing the requisitions of disbursing officers, had been modified in this instance by the secretary of the navy. The sureties also contended the bond covered only the duties of navy agent, and that they were not liable in respect of disbursements of navy pensions.

Opinion by CURTIS, J.

I have now maturely considered the questions of law involved in this case, and will proceed to state my opinion thereon, and to give such directions to the jury as will finally dispose of the case in this court. The first question which I have considered arises out of the evidence respecting the circumstances under which the two sums of \$18,400 came into the hands of Cutter. It is not denied that this was public money of the United States, nor that it came into the hands of Cutter to be applied by him as navy agent, to pay for the building of the dry dock at the navy yard at Portsmouth. But the ground is, that no order of the president of the United States appears to have justified this advance of money to the disbursing officer, and that in respect to one of those sums it was paid to him without his having produced the voucher required by the regulation of the navy department.

§ 405. *The fact that public money has been advanced to an officer, contrary to the act of 1823, does not relieve the sureties on his official bond from the consequences of a misappropriation thereof by such officer.*

One argument for the defendants is, that the act of congress of January 31, 1823, section 1, prohibits an advance of public money to any disbursing officer, without the especial direction of the president, and that the government has shown no such especial direction in this case. In *Williams v. United States*, 1 How., 290, the supreme court had occasion to put a construction on this section, and held that general instructions by the president to the secretary of the treasury, to make such advances to the marshals of the United States as the secretary should deem proper, and the act of the secretary in making the advance, brought the case under this law; that such duties can be performed by the president only through the agency of the appropriate department, and the act of the head of that department is, in legal effect, the act of the president. That case differs from this, in so far as there was oral evidence in that case of some former general directions of the president. No oral or written evidence has been given in this case of any directions by the president to the secretary

of the navy on this subject. The question is, is any such evidence necessary? The act of congress which authorizes the construction of this dock (9 Stat. at Large, 170) contains this language: "That the secretary of the navy is hereby directed to cause to be constructed at each of the navy yards at Kittery, etc., and the sum of \$50,000 is hereby appropriated towards said dock at Kittery." By a subsequent act (9 Stat. at Large, 270, 271), the secretary is required to make a contract with one of two sets of contractors, therein named, for building and completing this dock. By two subsequent acts (9 Stat. at Large, 377-516), further appropriations were made for prosecuting and completing the work. There can be no doubt, therefore, that the whole subject of the construction of this dock was placed by congress under the care of the secretary of the navy.

§ 406. *Where money is advanced to an officer of the navy by the direction of the secretary of the navy, the approval and direction of the president will be presumed.*

In *Wilcox v. Jackson*, 13 Pet., 498, the question arose whether the president had reserved from sale a particular tract of land. The court say: "At the request of the secretary of war, the commissioner of the general land office, in 1824, colored and marked upon the map this very section, as reserved for military purposes, and directed it to be reserved from sale for those purposes. We consider this, too, as having been done by authority of law; for amongst other provisions in the act of 1830 (4 Stat. at Large, 420), all lands are exempted from pre-emption which are reserved from sale by order of the president. The president speaks and acts through the heads of the several departments, in relation to the subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the war department. Hence, we consider the act of the war department, in requiring this reservation to be made, as being, in legal contemplation, the act of the president; and, consequently, that the reservation thus made was, in legal effect, a reservation made by order of the president, within the terms of the act of congress." I am unable to distinguish the question in this case from that arising in *Wilcox v. Jackson*. Here, the secretary of the navy not only had committed to him generally the subject of naval affairs, but the construction of this dock was expressly placed under his care by the acts of congress authorizing its erection. In reference to this subject it may be said, with even more propriety than in *Wilcox v. Jackson*, that whatever the president is to do he is to do through and by the secretary. This money was advanced to Cutter, in each instance, by the order of the secretary. So far as the authority of the president was necessary, I must consider him as speaking and acting through the secretary, to whom the subject was committed by congress. I must presume, in the absence of all evidence, that the advances made were with his approbation and under his direction, within the meaning of the act of congress.

But if this were otherwise,—if the especial personal direction of the president were necessary to bring the advance within the act of 1823,—I should have great difficulty in holding that the absence of that direction would prevent the sureties from being responsible for public money actually received by the navy agent. It came into his hands to be applied to the uses of the government. He was bound so to apply it. His failure to do so was unfaithful conduct in his office. And for all unfaithful conduct by him the sureties are responsible, unless it appears that a particular transaction is not within their contract. Re-

duced to its real substance, the argument in their favor is that, though they were responsible, according to the terms of their bond, that Cutter should faithfully perform the duties of navy agent, it is not a duty of a navy agent faithfully to apply public moneys which come to his hands contrary to the command of this act of congress. Now, the second section of this act, and another act containing provisions similar to that of its third section, have been under the consideration of the supreme court; and it has been held that these provisions of law are merely directory to the officers of the government, and make no part of the contract with the surety; that they are created by the government for its own security, and to regulate the conduct of its own affairs, and that, though the surety may place confidence in the agents of the government, and expect them to observe the prescribed regulations, he has the same means of judgment as to their fidelity in office as the government itself has, and the latter does not undertake to guaranty that fidelity. *United States v. Kirkpatrick*, 9 Wheat., 720 (§§ 419-422, *infra*); *United States v. Vanzandt*, 11 Wheat., 184 (§§ 772, 773, *infra*); *Smith v. United States*, 5 Pet., 292; *Dox v. Postmaster-General*, 1 Pet., 318 (§§ 769-771, *infra*).

I perceive no sound distinction in this respect between the first section of the act now under consideration and the second and third sections which have been thus interpreted. The former relates to placing money in the hands of the officer; the latter to allowing it to remain there and his continuance in office. Each of these regulations would, if observed, tend to diminish the responsibility of the surety and to save him from loss. If it be not a part of his contract that one should be observed, neither is it that the other should be. Indeed, in the case of *Minor v. Mechanics' Bank of Alexandria*, 1 Pet., 46, the supreme court held that, even if the president and directors of a bank were to conspire with the cashier to enable him to misappropriate the money of the bank, this would not save his sureties, which clearly shows that the obligee does not guaranty to the sureties the faithful observance by others of those precautions which, if observed, would tend materially to their security. And these views apply also to the argument grounded on the failure to observe the regulation of the department requiring the production of the triplicate bill, before remitting the money. This was a regulation made by the government for its own security in the conduct of its business, which formed no part of the contract of the surety; it was clearly in the power of the secretary to dispense with it, if he thought it needful to do so; and the failure to observe it constitutes no defense. Nor does the fact that two sums of \$18,400, instead of one, were advanced to Cutter, in any view which may be taken of the evidence, amount to a defense. If this was done inadvertently and through laches, it is settled by the cases above cited that the laches of its officers cannot prejudice the government. Whether by laches or design these two sums came to the hands of Cutter, it was public money received by him in his capacity of navy agent, and which he was bound in that capacity to apply to the uses of the United States. His misappropriation of it was unfaithful conduct as a navy agent, and for this, by the terms of their contract, the sureties are responsible.

§ 407. *Payment of navy pensions assigned to a navy agent; sureties liable.*

The next inquiry is whether these sureties were responsible for the faithful application by Cutter of the funds intrusted to him for the payment of navy pensions. In the case of *Browne v. United States*, 1 Curt., 15, I had occasion to examine the question whether the employment to pay navy pensions constituted a distinct office, under the constitution and laws of the United States.

I came to the conclusion that it did not; that this duty was assigned by the secretary of the navy to the navy agents as part of their duties as navy agents. To this conclusion I now adhere. The terms of Cutter's commission as navy agent authorize and require him "carefully and diligently to discharge the duties of navy agent, by doing and performing all manner of things thereunto appertaining; and he is to observe and follow the orders and directions which he may from time to time receive from the president of the United States and the secretary of the navy." The terms of the commission are, therefore, broad enough to include all duties which might from time to time be assigned to the officer by the orders of the secretary of the navy, provided they are among the things which by law may appertain to the office. As was observed in *Browne v. United States*, no other description of the duties and powers of this office is known to me, except that contained in the act of March 3, 1809, section 3 (2 Stat. at Large, 536), to make contracts or for the purchase of supplies, or for the disbursement, in any manner, of moneys for the use of the navy of the United States. There can be no doubt that moneys paid to officers and seamen as pensions are disbursed for the use of the navy of the United States, and that it is within the terms of the commission issued to Cutter, for the secretary of the navy to order him to pay them. When such an order had been made, the faithful disbursement of the public moneys intrusted to him for this purpose became part of his duties as navy agent, and as such within the terms of the contract of his sureties that he would faithfully perform all the duties of navy agent. The cases bear a very close resemblance to *Minor v. Mechanics' Bank of Alexandria*, 1 Pet., 72. In that case a by-law of the bank provided that "the cashier shall do and perform all other duties that may from time to time be required of him by the president or board of directors relative to the affairs of the institution." When *Minor* was appointed cashier, the duties of teller were also assigned to him. Though the office of teller and the distinct accounts which belonged to it were still kept up, the court held that the duties of teller thenceforth became part of the duties of cashier, and the sureties, who had undertaken for the faithful performance of the duties of cashier, were responsible also for the performance of those duties which had previously belonged to the office of teller. That his bond as cashier must be construed to cover all defaults in duty annexed to the office from time to time by those authorized to make such annexation.

§ 408. *Copies of letters of a navy agent to the navy department admissible against the sureties. Whether admissions of the principal are admissible against the sureties.*

The remaining inquiry is, whether the copies of the correspondence were rightly admitted. Very little practical importance can be attached to this inquiry in this case, because the letters bore only on the question of Cutter's being a defaulter, and as the state of his accounts, as settled at the treasury, was fully shown, by unexceptionable evidence, the admission or rejection of the letters became immaterial. But I think they were rightly admitted. The act of congress of September 15, 1789 (1 Stat. at Large, 69, sec. 5), provides that the secretary of state shall cause a seal of office to be made, etc., "and all copies of records and papers in the said office, authenticated under the said seal, shall be evidence equally as the original record or paper." By the act of February 22, 1849 (9 Stat. at Large, 347, sec. 3), it was enacted that "copies of books, papers, documents and records in the war, navy, treasury and postoffice departments, and in the attorney-general's office, may be certified in the same manner, and

with the same effect, as those in the department of state." This correspondence, which consisted of letters to and from Cutter, was so certified. But it is objected that the copies of the letters to Cutter are not admissible, because they are only copies of copies; that if the copies which are in the navy department had been produced, they would not be admissible without accounting for the failure to produce the originals in the possession of Cutter. But when it was admitted that Cutter was an absconding defaulter, and that his place of abode was unknown to the district attorney, the failure to produce the originals is accounted for.

It was further objected that Cutter's admissions are not evidence against his sureties. I am inclined to think the mere naked admissions of the principal, not made in the course of any business, or as parts of any acts with which the surety is connected by his contract, cannot be received in evidence against the surety. The laws on this subject are collected in 1 Phil. on Ev., 297, 390, and in Cowen & Hill's notes, vol. 3, pp. 241-245. There are cases which go so far as to admit the declarations of the principal as evidence against the surety, without restriction as to the time or circumstances under which they were made. There is also another class of cases, in which it is held that a judgment against the principal is evidence against the surety of the demand which it establishes. *Drummond v. Prestman*, 12 Wheat., 515; *Heard v. Lodge*, 20 Pick., 53. But in this case it is only needful to say that the letters, both of the secretary and Cutter, are not mere naked declarations. They are demands on the one part for payment, and on the other part replies to that demand. They are strictly part of the *res gestæ* in the administration of that office, for the faithful conduct of which the sureties were bound. And such are admissible in evidence against the sureties, upon the same principle that his accounts rendered to the department are admissible.

I have now considered all the questions raised in this case. I am of opinion that there should be a verdict rendered for the plaintiff. Upon this verdict judgment must be rendered for the amount of the penalty of the bond, to be discharged on payment of the amount actually due; that is to say, the two sums of \$12,581.57 and \$1,437.52, amounting to the sum of \$14,019.09, with interest from the date of the writ. See *Farrar v. United States*, 5 Pet., 373 (§§ 489-494, *infra*); *Ives v. Merchants' Bank*, 12 How., 159.

UNITED STATES v. BOYD.

(15 Peters, 187-209. 1841.)

ERROR to U. S. Circuit Court, District of Mississippi.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.— This was an action of debt brought upon a bond with the following recital and condition, dated June 15, 1837: "The condition of the foregoing obligation is such, that whereas the president of the United States hath, pursuant to law, appointed the said Gordon D. Boyd receiver of public moneys for the district of lands subject to sale at Columbus, in the state of Mississippi, for the term of four years from the 27th day of December, 1836: Now, therefore, if the said Gordon D. Boyd shall faithfully execute and discharge the duties of his office, then the above obligation to be void and of none effect, otherwise it shall abide and remain in full force and virtue." The defendants craved oyer of the bond, condition, etc.; and pleaded performance of the condition.

By a replication the plaintiffs assigned two breaches.

1. That said Boyd, after the 27th day of December, 1836, received in his official capacity \$59,622, which he failed to pay over to the United States, as he was bound to do by law. 2. That said Boyd, on the 27th day of December, 1836, and at divers days between that day and the 30th day of September, 1837, received \$59,622 as receiver, which sum remained in his hands on the 30th day of September, 1837; and that he failed to pay the same pursuant to his instructions from the secretary of the treasury, as he was bound to do by law, and the duties of his office. To this replication the defendants demurred; and the court below sustained the demurrer.

§ 409. *Though by the terms of their bond sureties be not responsible for prior defaults, they are liable for moneys retained and subsequently demanded by government.*

The first question arising on the pleadings is, whether the sureties of Boyd are bound for defalcations between the 27th of December, 1836, the date of the appointment, and the 15th day of June, 1837, the date of the bond. The condition of the bond is prospective, and in its last clause does not differ in effect from that passed on in the case of *Farrar v. United States*, 5 Pet., 374, 389. In that case William Rector had been appointed surveyor of public lands, and given bond with sureties, conditioned, "If the said William Rector shall faithfully execute and discharge the duties of his office, then said bond to be void," etc. Rector had been appointed and commissioned as surveyor on the 20th February, 1823. The bond bore date the 7th day of August, 1823. The prominent question presented on the trial was, whether the sureties of Rector were liable for moneys received by him as surveyor, and appropriated to his own use, after his appointment, and before the execution of the bond; on which the court held that the sureties could only be made answerable for moneys in Rector's hands at the date of the bond, which were held by him in his official capacity, in trust for the government, and not for moneys previously appropriated to his own use. Say the court: "If intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct." But the failure of the receiver to account, and pay quarterly, as prescribed by the rules of the treasury department; or monthly, if the sum of \$10,000 had been received during any one month, was no legal defalcation of which the sureties can avail themselves. Laches are not imputable to the government. The regulations requiring settlements to be made by its officers at short periods are designed for the protection of the government, and merely directory to the officers, and form no part of the contract. Such is the settled doctrine of this court, as holden in the *United States v. Kirkpatrick*, 9 Wheat., 720 (§§ 419-422, *infra*); *United States v. Vanzandt*, 11 Wheat., 184, and *United States v. Nicholl*, 12 Wheat., 509 (§§ 671-673, *infra*). It follows the averment in the replication, that Boyd, from the 27th of December, 1836, to the 30th of September, 1837, had received on behalf of the United States the sum of \$59,622, which sum, at the last date, remained in his hands, and for which he then failed to account, as bound to do by law, and the duties of his office, is a good breach of the condition, and well assigned; it matters not at what time the moneys had been received, if, after the appointment, they were held by the officer in trust for the United States, and so continued to be held, at, and after, the date of the bond. That they were so holden at the end of the third quarter of 1837 is admitted by the demurrer.

§ 410. *The liability of a surety cannot be extended by implication.*

It is insisted on behalf of the United States, that, aside from the foregoing considerations, the sureties are bound equally with the principal in the bond, on the ground that the condition, on settled legal principles, and by implication, is retrospective, and covers all defaults of the officer from the date of the commission; because it is recited, and part of the obligation, that Boyd had been appointed receiver for four years, from the 27th day of December, 1836. We have with much care considered this position, and think it cannot be sustained. This court held, in *Miller v. Stuart*, 9 Wheat., 702 (§§ 729-735, *infra*), that the liability of a surety is not to be extended, by implication, beyond the terms of his contract; that his undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms; and that the whole series of authorities proceeded on this ground. The principal ones relied on in that case have been relied on in the present; and we think the principles settled by them preclude the court from maintaining that the sureties are liable by implication, contrary to the plain prospective obligation of the bond, "that the said Boyd shall faithfully execute and discharge the duties of his office." In the language of the court in *Farrar v. United States*, 5 Pet., 389 (§§ 489-494, *infra*): "If intended to cover past dereliction, the bond should have been made retrospective in its language."

§ 411. *The rules which prevail in the courts of a state control pleadings in United States courts in that state.*

Some difficulty has been presented in regard to the form of the replication, testing it by the common law principles of pleading. It avers several breaches. The cause, however, comes by writ of error from the district of Mississippi; and the modes of proceeding of that state govern the pleadings. By the act of 1822, section 2, found in the Revised Code of Mississippi, 614, any number of breaches may be assigned; and by section 6, when a demurrer shall be joined, in any action, no defect in the pleadings shall be regarded by the court, unless specially alleged in the demurrer as causes thereof. That several breaches had been assigned is not alleged as a special cause of demurrer, and therefore could not have been noticed by the court, had no provision existed justifying more breaches than one; even had such replication been contrary to the strict rules of pleading by the common law.

It is proper to remark that, when this cause is remanded to the circuit court for further proceedings to be had therein, it will be in the condition it would have been had that court overruled the demurrer, and subject to additional pleadings, or an amendment of the present ones, according to the rules and practice of the circuit court, and on such terms as it may impose.

We order that the judgment be reversed, the demurrer overruled, and that judgment be entered by the circuit court for the penalty of the bond in favor of the United States against the defendants, to be discharged by the assessment of damages on the second breach in the replication, unless the pleadings, on leave granted, be amended, in prevention of such judgment and assessment of damages.

UNITED STATES v. BOYD.

(5 Howard, 29-51. 1846.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—The plaintiffs brought an action of debt against the defendants in the court below upon a receiver's bond in the district of Missis-

issippi for defalcation in office, and in which the latter obtained the verdict. The declaration was in the usual form for the penalty, to which several of the defendants, after craving oyer, pleaded performance. The bond bore date the 15th June, 1837, in the penalty of \$200,000, and after reciting that Boyd had been appointed receiver for the term of four years from the 27th December, 1836, the condition was that he should faithfully execute and discharge the duties of the office. The plaintiffs in their replication assigned for breach that after the 27th December, 1836, and while he was receiver, and as such, the said Boyd received divers large sums of the public moneys, amounting to the sum of \$59,622.60, and which he had failed and neglected to pay over to the government. To this replication the defendants demurred, and therefore the plaintiffs put in an amended replication, and in which a second breach was assigned, alleging that the said Boyd, after 27th December, 1836, and on divers days and times between that day and the 30th day of December, 1837, while he was receiver of the public moneys, and as such received divers large sums of the public moneys, amounting in the whole to the sum of \$59,622.60; and further, that this sum remained in the hands of the said Boyd as such receiver on the 30th September, 1837, and that he then and there wholly failed and neglected to pay over the same.

To this amended replication the defendants demurred and assigned for causes: 1. That the breaches set forth did not state the time when the said Boyd, as such receiver, received the moneys mentioned therein, nor whether the said sum was received before or after the day of the date of the bond. 2. That the said breaches did not state that the said Boyd failed or neglected to pay over the money received by him as such receiver at any time after the date of the bond.

The plaintiffs joined a demurrer, and the court below gave judgment for the defendants. The cause came up to this court on a writ of error, upon which the judgment was reversed and the case remanded for further proceedings. When the cause came back to the court below, Boyd, after craving oyer, pleaded separately performance, and to the replication assigning breaches he rejoined, setting forth a former recovery in *assumpsit* in bar of the action against him — to which the plaintiffs answered *nul tiel record*. This issue being found for the defendant he was discharged without day. The other defendants then put in a rejoinder to the amended replication of the plaintiffs, and alleged that the said Boyd did not, as receiver, receive any public moneys at the time of the execution of said bond or at any time thereafter and before the commencement of the suit, and that no public moneys of the United States for the payment of which the defendants were chargeable by virtue of their bond remained in the hands of the said Boyd as such receiver at the time of the execution of the bond or at any time thereafter and before the commencement of the suit, which the said Boyd had failed or neglected to pay over to the government. To this rejoinder the plaintiffs demurred, and the defendants joined in the demurrer. The court below gave judgment for the plaintiffs, but allowed the defendants to amend, which was done accordingly, and in the amended rejoinder they aver that no public moneys of the United States came to the hands of the said Boyd as such receiver after the execution of the said bond, nor were there any such public moneys for the payment of which the defendants were chargeable by virtue of the said bond received by him prior to the execution of the same remaining in the hands of said receiver in his official capacity at the time of the execution of said bond or at any time thereafter, which had not been paid or accounted

for according to law before the commencement of the suit upon which issue was taken.

On the trial the plaintiffs gave in evidence two treasury transcripts, one dated February 27, 1838, adjusting a balance against Boyd as receiver of \$59,622.60, due to the government on the 30th September, 1837, the other dated September 17, 1838, adjusting a like balance against him of that date. The plaintiffs also gave in evidence the returns of Boyd as such receiver to the treasury department containing the account current as kept by him with the government, covering a period from December 31, 1836, to September 25, 1837; and which agreed substantially with the balance due, as shown by the treasury transcripts. They were made monthly to the department. Upon this the plaintiffs rested.

The defendants then proved that no lands had been entered or sold at the office of the registers, at Columbus, or receiver's certificates issued by the receiver (Boyd), after the 29th of May, 1837. The last tract of land sold was entered on that day. This was proved by the register and confirmed by the records on file in the land office. It was further proved, that while the sales of the public lands were going on at Columbus, and in the month of January or February, 1837, Boyd permitted one Pearle to enter lands to the amount of some \$12,000 or \$15,000, without paying any money for the same, taking only his checks upon the Planters' Bank in the vicinity, which were uniformly dishonored as soon as presented for payment. It further appeared that Boyd himself, while such receiver, and before the execution of the bond in question, made entries in his own name, and in the name of others for his benefit, of a large quantity of the public lands at the register's office, and gave the usual certificates for that purpose, without paying for the same, except by simply charging himself in his accounts with the receipt of so much money.

In the course of the trial, evidence was given that a person by the name of Garesche appeared at Columbus, in May, 1837, claiming to be an agent from the land office department, authorized to examine the books and accounts of certain land offices, of which that at Columbus was one; he produced a letter from the department of his appointment, which was recognized as genuine, and thereupon the offices of the register and receiver were examined. The defalcation of Boyd was discovered by the agent, who communicated it to the register, but enjoined secrecy. The counsel for the plaintiffs objected to the competency of the evidence offered to prove the agency of Garesche, but the objection was overruled, and the decision of the court excepted to. The defendants then offered Boyd, the receiver, as a witness, and with a view to remove all objections, on the ground of interest, releases were executed from them to him, discharging him from all liability in case a judgment should be rendered against them. They also produced a certificate of the clerk, stating that an amount of money had been deposited in court by Cocke, one of the defendants, to cover all costs, and also a release by the said Cocke to the other defendants, discharging them from contribution.

The witness was still objected to, but admitted; to which decision the counsel for the plaintiffs excepted. In the course of the examination of this witness, an objection was taken to his testimony going to prove that he had no moneys in his hands belonging to the United States at the date of the bond, on the ground it would be in contradiction of the statements contained in his official returns to the treasury department. The objection was overruled and the testimony admitted; to which decision the counsel excepted. The witness

testified that he had no money in his hands, as receiver, or otherwise, in court for the United States, at the date of the bond; and that he had so informed Garesche, the agent, before the execution of the same; and that, after the execution, he had paid over all moneys which he had received.

The testimony here closed, and the counsel for the plaintiffs prayed the court, to instruct the jury: 1. That the official returns of the receiver to the treasury department were conclusive against the sureties. 2. That there was no sufficient legal evidence before the jury of the agency of Garesche. 3. That fraud could not be imputed to the United States.

And the counsel for the defendants prayed the court to instruct the jury: 1. That if the jury found that the balance claimed by the United States from Boyd arose from his returns, as receiver, of entries of public lands, made by him and others, prior to the execution of the bond, and that no money had been paid for the same on such entries before or after the execution of said bond, and that the entries had been made unlawfully without payment, then the sureties were not liable. 2. That the facts stated in the transcripts of the returns made by Boyd, of moneys on hand, were not conclusive against the defendants, but might be explained, contradicted or disproved by the evidence. 3. That if the jury believed that the balance claimed by the United States arose out of moneys received by Boyd before the execution of the bond, and that the same was not held by him, as receiver, in trust for the government, at or after the execution of the bond, but had been used, wasted or converted by him to his own use, prior to said execution, then the sureties were not liable.

The court charged the jury that the evidence, on the part of the plaintiffs, made out a *prima facie* case; but that, if they believed, from the whole evidence, that the defalcation of Boyd arose from the entry of lands in his own name, and in the name of others, without payment of money for the same, and previous to the 15th day of June, 1837, the date of the bond, the sureties were not responsible. The court further charged the jury that, if they believed, from the evidence, that a fraudulent design existed on the part of Boyd and Garesche to conceal the fact of Boyd's defalcation from the sureties until they should execute the bond, and that such design was communicated to the secretary of the treasury, and his answer received before the actual execution of the bond, that then the bond would be fraudulent and void, and the sureties not liable. To the instructions as given, and also to the refusal of the court to give the instructions as prayed for, the counsel for plaintiffs excepted. The jury found a verdict for the defendants.

§ 412. *Sureties, whose bond is not retrospective in terms, are not liable for antecedent misconduct.*

When this cause was formerly before the court, involving a question arising out of the pleadings, it was held that the condition of the bond was prospective, and subjected the sureties to liability only in case of default or official misconduct of the principal occurring after the execution of the instrument; and that, if intended to cover past dereliction of duty, it should have been made retrospective in its language; that the sureties had not undertaken for past misconduct. 15 Pet., 187 (§§ 409-411, *supra*). The case is now before us, after a trial on the merits, and the question is, whether or not any breach of duty has been established which entitled the government to recover the amount in question, or any part of it, against the sureties within the condition of the bond as already expounded.

Since the verdict rendered under the instruction given by the court below,

we must assume that the whole amount of the \$59,622.60, of which the receiver is in default to the government, accrued against him in consequence of the entry of public lands in his own name, and in the name of others, without the payment of any money in respect to the tracts entered in his own name, and without exacting payment of others, in respect to the tracts entered in their names; and all happening before the 15th June, 1837, the date of the bond. So the jury have found. The fraud thus developed was accomplished at the time by means of false certificates of the receipt of the purchase money by the receiver, which were given by him in the usual way, as the entries for the several tracts of land were made at the register's office, and also by entering and keeping the accounts with the government the same as if the money had been actually paid as fast as the lots were entered. The monthly or quarterly returns to the proper department would thus appear unexceptionable, and the fraud concealed until the payment of the balances should be called for by the government. According to the finding of the jury, therefore, the whole of the money, of which the receiver is claimed to be, and no doubt is, in default, and for which the sureties are and ought to be made responsible, were not only not in his hands or custody at the time of the execution of the bond, but, in point of fact, never had been in his hands at any time before or since. No part of it was ever received by anybody. The whole of the account charged was made up by means of fabricated certificates of the receiver, and false entries in his returns to the government.

The act of congress of the 24th of April, 1820, § 2 (3 Stats. at Large, 566), provides: "That credit shall not be allowed for the purchase money on the sale of any of the public lands which shall be sold after the first day of July next; but every purchaser of land sold at public sale thereafter shall, on the day of the purchase, make complete payment therefor; and the purchaser at private sale shall produce to the register of the land office a receipt from the treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money on any tract, before he shall enter the same at the land office." The acts of the receiver, out of which the defalcation in question arose, were in direct violation of this provision of law, and constituted a breach of official duty, which made him liable at once as a defaulter to the government, and would have subjected his sureties upon the official bond, if one had been given, covering this period. It was doubtless by some accident that the bond was omitted, as it will be seen by reference to the acts of congress, 2d March, 1833, § 5 (4 Stats. at Large, 653), and 3d of March, 1803, § 4, and 10th of May, 1800, § 6 (2 Stats. at Large, 230, 75), that a bond with sufficient sureties should have been given by the receiver before he entered upon the duties of his office. It is clear, therefore, that the defalcation had accrued, and Boyd had become a defaulter and debtor to the government before the present sureties had undertaken for his fidelity in office, unless we construe their obligation to be retrospective, and to cover past as well as future misconduct, which has already been otherwise determined.

Whether a receiver can purchase the public lands within his district in his own name, or in the name of others for his benefit while in office, consistent with law and the proper discharge of his official duties, it is not now necessary to express an opinion. The register is expressly prohibited, act of congress, 10th May, 1800, § 10 (2 Stats. at Large, 77), and it would have been as well if the prohibition had included the receiver. One thing, however, is clear, and which is sufficient for the purpose of this decision; the act of congress forbid-

ding the sale of the public lands on credit makes no exception in favor of any officers. He must purchase, if he purchases at all, upon the terms prescribed. If this is impracticable, it only proves that the duty of the receiver is inconsistent and incompatible with the duty of the purchaser, which might amount to a virtual prohibition. But if otherwise, and the receiver allowed to purchase, the money must be paid over as in the case of other purchasers, and deposited at the time of the purchase with the other moneys received and held by him in trust for the government. The public moneys in his hands constitute a fund which it is his duty to keep, and which the law presumes is kept, distinct and separate from his own private affairs. It is only upon this view that he can be allowed to purchase the public lands at all, consistently with the provisions of the act of congress.

§ 413. *The returns of a receiver of public moneys to the department are prima facie but not conclusive evidence against his sureties.*

It has been contended that the returns of the receiver to the treasury department after the execution of the bond, which admit the money to be then in his hands to the amount claimed, should be conclusive upon the sureties. We do not think so. The accounts rendered to the department of money received, properly authenticated, are evidence in the first instance of the indebtedness of the officer against the sureties, but subject to explanation and contradiction. They are responsible for all the public moneys which were in his hands at the date of the bond, or that may have come into them afterwards, and not properly accounted for, but not for moneys which the officer may choose falsely to admit in his hands, in his accounts with the government. The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them. The principle has been asserted and applied by this court in several cases. If the case had stood upon the first instruction of the court below, and to which we have already adverted, there would be no difficulty in affirming the judgment. But the second instruction was erroneous.

§ 414. *A fraud by which the obligors of a bond are not affected does not avoid the bond.*

The court charged that if the jury believed, from the evidence, that fraudulent design existed on the part of Boyd and Garesche to conceal the fact of the former's defalcation from the sureties until they had executed the bond, and that such design was communicated to the secretary of the treasury, and his answer received before the execution, in that case the bond would be fraudulent and void, and the sureties not liable. Now, in the first place, there is no evidence in the case laying a foundation for the charge of fraud in the execution of the bond in the view taken by the court, as matter of fact, and therefore the instruction was improperly given. And in the second place, if there had been, inasmuch as the condition of the bond is prospective, any fraud in respect to past transactions not within the condition, which is the only fraud pretended, could not upon any principles have the effect of rendering the instrument null and void in its prospective operation.

§ 415. *Authority must be shown before the acts or declarations of an agent are admissible.*

We may add, also, that, so far as the agency of Garesche was material in making out the allegation of fraud for the purpose of defeating the action, the proof was altogether incompetent. His acts and declarations for the purpose were admitted without previous evidence of his appointment as agent, and also

secondary proof of the contents of a pretended letter of appointment, without first accounting for the non-production of the original. Before a party can be made responsible for the acts and declarations of another, there must be legal evidence of his authority to act in the matter.

§ 416. *Withdrawing a demurrer and going to issue waives it even after judgment upon the demurrer.*

The counsel for the defendants ask the court to revise the judgment of the court below, rendered upon the demurrer to the rejoinders of the defendants to the plaintiffs' amended replication, overruling the demurrer, insisting that the rejoinder was good, and that judgment should have been rendered for the defendants. The answer to this is, that the withdrawal of the demurrer, and going to issue upon the pleading, operated as a waiver of the judgment. If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings, and have permitted the judgment on the demurrer to stand.

§ 417. *Judgment for costs cannot be rendered against the United States.*

Another ground upon which the judgment must be reversed is, that a judgment for costs was rendered against the plaintiffs. The United States are not liable for costs. Some other points were made in the course of the trial, but it is unimportant to notice them. Judgment of the court below reversed, with a *venire de novo*.

UNITED STATES v. HERMANCE.

(Circuit Court for New York: 15 Blatchford, 6-13. 1878.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This was an action upon the official bond of John P. Curtis, as collector of internal revenue for the thirteenth collection district of the state of New York. The collector had absconded previous to the commencement of the suit, and process was served only upon his sureties. The facts are these: Four distillers of brandy from fruit, having in their respective distilleries brandy in casks, which had been duly gauged and reported, in the form required by law, to the collector and to the internal revenue department, went to the office of the collector to pay the taxes. He being absent and there being no stamps in the office signed, they each paid the deputy collector the amount of money which was required, and left with the understanding that they were to receive the proper stamps at some future time. Upon making the payment they took from the deputy receipts in the following form, to wit: "United States Internal Revenue, Collector's Office, 13th District, New York, July 22, 1875. Received from Hiram Atkins, five hundred thirty-four $\frac{40}{100}$ dollars, for tax on 764 gallons cider brandy, at 70 cents per gallon, \$534.80. J. P. Curtis, Collector, A. C. Norris, Deputy." The several payments were made July 22d, August 31st, September 15th, October 1st, and October 26th, 1875. On the 4th of November, in the same year, Curtis, the collector, absconded, having converted the money thus paid to his own use, and never having entered it upon his books or reported it to the department. The distillers never received their stamps from him, and none were ever prepared for them by him. On the 9th of November the office of the collector was taken possession by a duly authorized revenue agent, and he remained in charge until November 17th, when an acting collector was appointed. After this, against the protest of the sureties upon the bond, stamps were issued to the distillers by the acting collector,

upon the direction of the commissioner of internal revenue, ante-dated as of November 16, 1875. Upon this state of facts the district court gave judgment for the defendants, and the judgment has been brought here for review by this writ of error.

§ 418. *The payment of internal revenue tax by a distiller to the collector without the delivery of the stamps will not charge the collector's sureties, although he give his receipt as collector for the money.*

The single question to be determined is, whether what was done between the distillers and the deputy collector, before the collector was suspended from office, amounted in law to a payment of the taxes upon the brandy in the possession of the distillers. If it did, the money in the hands of the collector was public money, to be accounted for and paid over only to the United States. But, until the payment of the taxes was complete, no such accountability arose. The spirits in this case were distilled from fruit, and, therefore, under the operation of section 3255 of the Revised Statutes, resort must be had to regulations of the commissioner of internal revenue, approved by the secretary of the treasury, as well as the acts of congress, to ascertain when the taxes could be paid and what must be done to effect a payment. Brandy distilled from fruit must be drawn into casks, each of not less capacity than ten gallons, wine measure, and must be retained at the designated place of deposit at the distillery until the tax is paid thereon and the stamps are attached thereto. On the 25th of each month, the distiller is required to notify the collector of his district, in a particular form, of the probable number of packages that will be distilled by him during the month, and the probable number of wine gallons, with his request to have the same gauged and marked; and, on the receipt of such notice, and after the last day of the month, the collector is required to cause the brandy produced during the month to be gauged, proved and marked by a United States gauger. The gauger, upon receiving the order of the collector, must proceed at once to gauge, prove and mark each cask of such spirits that he may find in the distillery or designated place of deposit, and to cut upon the bung stave of each cask the wine gallons, the proof and the proof gallons, and to cut or burn upon the head of each cask the name of such distiller, the district, the serial number of the cask and the kind of spirits, and to mark thereon the date of the gauge and the name of the gauger by whom made, placing such date and name on the head of the cask in such way as to admit of the attaching of the tax-paid stamp between them. On completing his inspection, the gauger must immediately make report thereof in duplicate, according to a particular form, showing for whom gauged and where, the number of casks, the serial number of each, the proof, the wine gallons and proof gallons of each, the kind of spirits and the amount of tax thereon, and sign the same, delivering one copy thereof to the distiller and transmitting one to the collector of the district. Reg. & Inst., Series 6, No. 7, p. 90. All stamps required for distilled spirits are engraved in their several kinds in book form, and are issued by the commissioner of internal revenue to collectors, upon their requisition, in such numbers as may be necessary. Each stamp has an engraved stub attached to it, with a number corresponding with an engraved number on the stamp. The stub must not be removed from the book, and there must be entered upon it such memoranda of its corresponding stamp as may be necessary to preserve a perfect record of the use of the stamp detached. R. S., sec. 3312. On every stamp for the payment of tax on distilled spirits there is engraved words and figures representing a decimal number of gallons, and on the stub correspond-

ing a similar number of gallons, and between the stamp and the stub, and connecting them, are nine engraved coupons, which, beginning next to the stamp, indicate in succession the several numbers of gallons between the number named in the stamp and the decimal number next above. When a collector receives the tax on the distilled spirits contained in any cask, he must detach from the book a stamp representing the denominate quantity nearest to the quantity of proof spirits in the cask as shown by the gauger's return, with such number of the coupons attached thereto as shall be necessary to make up the whole number of proof gallons in the cask. All unused coupons must remain attached to the stub, and no coupon is of any value when detached from the stamp. Sec. 3313. The books of tax-paid stamps issued to a collector are charged to his account at the full value of the tax on the number of gallons represented on the stamps and coupons contained in the book. Every collector must make monthly returns of all tax-paid stamps issued by him to be affixed to any cask or package containing distilled spirits on which the tax has been paid, and account for the tax collected. It is the duty of the collector to return to the commissioner the book of marginal stubs as soon as the stamps are used. Sec. 3314. When taxes as shown in the gauger's report are paid upon spirits distilled from fruit, the collector is required to prepare tax-paid stamps of the proper denomination, with all the blanks filled up according to the facts appearing in the gauger's return, including the serial number of the cask to which each stamp is to be attached, which stamp must be signed by the collector, as well as by the gauger making the return, and delivered to the distillers. Reg., p. 91. This stamp must then be affixed to the cask by the distiller and canceled. That being done, he is permitted to sell the spirits in the tax-stamped packages, at the place of manufacture (Reg., p. 92); but until the tax is paid and the stamp is affixed, the packages cannot be removed or sold. When taxes are paid upon spirits distilled from grain, and an order is obtained for a withdrawal of the spirits from a warehouse, the collector cuts the tax-paid stamps from his book and they are affixed by the gauger to the casks, in the presence of the store-keeper, and the cask is branded in a particular manner.

From this statement it is apparent that taxes can only be paid upon distilled spirits in casks which have been properly gauged and marked. The payment, too, must be of the tax upon the contents of each cask by itself, and for each payment a tax-paid stamp is to be issued, corresponding with the gauge and the marks of the cask to which it relates. The transaction is something more than the mere payment of a tax. In effect, it is the purchase from the collector, by the distiller, of stamps which must be affixed to the packages before the spirits they contain can be put upon the market and sold. It is of no importance that the price to be paid for the stamp is the amount of the tax upon the purchase to which it is to be affixed. The payment is of no avail to the distiller, for the purposes of trade, without the stamp. He cannot get the stamp until he pays the tax. Therefore, he pays the tax to get the stamp. The fruit distiller is permitted to take the stamp from the collector and affix it himself, and the gauger does the same thing for the grain distiller. To the distiller the stamp on the package is the essential thing. Without it his payment is of no use to him. So long as the blank stamp remains in the book of stamps, and in the possession and under the control of the collector, it is a voucher to him in his settlement of accounts with the government. He is charged with all stamps and coupons delivered to him, and credited with such as he returns. The government has no means of knowing what his collections

have been, except by taking an account of the stamps he has issued. Until, then, a stamp has been at least prepared for issue, it would seem to be clear that the distiller might withdraw his money and leave his taxes unpaid. If this be so, the payment is not complete. So long as the distiller can control his money in the hands of the collector, it is held as bailee for him and not as public money of the United States. The provision which requires the collector to detach the stamps from the book, when he receives the tax, is part of the system of checks and balances adopted for the security both of the government and the tax-payer. The distiller need not pay until he can obtain his stamps; and, as the issue of the stamps is the evidence upon which the government relies to show the amount for which the collector is accountable, good faith requires that payments should not be made except in the regular way.

In this case the receipts taken from the deputy collector indicate no application of the money paid to specific casks of spirits. It is possible that the records of the office may have furnished evidence of the manner in which it was expected the distribution would be made, but none was actually made at the time, so far as the record discloses. If the payment had been made before the spirits were drawn into casks, or even before the casks were gauged, marked and reported by the gauger, it could not be seriously contended that the money paid was public money in the hands of the collector. And the obvious reason is that no application of the payment could then be made. From this it would seem to follow that actual application was essential to the completion of any payment of taxes upon distilled spirits, and that, as the law has only provided one way in which the collector can bind the government by his application, to wit, by filling up and detaching the appropriate stamp from his book, a payment could not be complete until this was done. This is in accordance with the analogies of the law. As has been seen, the payment of a tax upon distilled spirits is, in effect, if not in reality, the purchase of the stamp which is to make the payment available, and as a purchase would not be complete until the stamp had been put in a condition by the collector to be affixed to the cask, or, at least, until it had been legally designated and set apart for that purpose, it is not unreasonable to require the same things to be done before the payment shall be considered complete. The object of the payment, so far as the distiller is concerned, is to enable him to control and dispose of his property. This he cannot do until he is in a condition to attach to it the instrument which the law has made the only evidence that it may lawfully be put upon the market. He ought not to be bound by his payment, therefore, until his right to control this evidence is complete. That certainly cannot be until all has been done by the collector which is necessary to fit the evidence for use, and it has been legally set apart for that purpose. That was not done in this case before the defaulting collector was removed from his office, and it is not claimed that the sureties can be held by what was done afterwards.

Judgment affirmed.

UNITED STATES v. KIRKPATRICK.

(9 Wheaton, 720-738. 1824.)

ERROR to U. S. District Court, Western District of Pennsylvania.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—In this case the court cannot but lament the extreme irregularity and laxity of the pleadings, if, indeed, the informal minutes upon the record be entitled, in any measure, to the appellation of pleadings. Some

apology is, indeed, to be found in the asserted inaccurate local practice in the state courts; but it is impossible, without breaking down the best settled principles of law, not to perceive that the very errors in the pleadings are, of themselves, sufficient to justify a reversal of the judgment and an award of a repleader. The agreement of the parties filed in the case may, indeed, help the formal defects, but cannot be admitted to dispense with the substance of appropriate pleas; for, otherwise, it would be difficult to ascertain what was tried or to be tried; and we might as well dispense with the declaration itself as with the subsequent pleadings. It is to be hoped that, in future, a more correct practice will find its way into the district court.

Three errors have been insisted upon by the government, as contained in the charge of the court below. The first is that the judge limited the responsibility of the sureties upon the collector's bond to the duties and obligations imposed by the acts of congress, antecedently passed, thus excluding the liability created by the subsequent statutes. The second is the direction of the judge that the jury were at liberty to impute laches to the government from the delay to call the collector to account at the periods prescribed by law, and the consequent injury to the sureties. The third is the direction that the payments made by the collector might, under the circumstances, be applied to the discharge of the balance due from collections made under the acts which were in force when the bond was given.

§ 419. *Sureties in an official bond are not liable for the performance of duties imposed by subsequent laws, and not contemplated by the conditions of the bond.*

As to the first point. The collector was appointed under the act of the 22d of July, 1813, c. 16 (3 Stats. at Large, 22), for the assessment and collection of direct taxes and internal duties. In the second section it provides "that one collector, etc., shall be appointed for each of the said collection districts, etc.; and if the appointment of the said collectors, or any of them, shall not be made during the present session, the president of the United States shall be, and is hereby, empowered to make such appointment during the recess of the senate, by granting commissions which shall expire at the end of their next session." The eighteenth section of the same act further provides "that each collector, etc., shall give bond, with one or more good and sufficient sureties, etc., in at least double the amount of the taxes assessed in the collection district for which he may be appointed, which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office according to law, and particularly for the due collection and payment of all moneys assessed upon such district." The condition of this bond principally refers, as will appear on an inspection of the act, to assessments of direct taxes. But the subsequent acts, act of the 24th of July, 1813, c. 21, s. 14 (3 Stats. at Large, 38), and c. 24, s. 6 (id., 41), and c. 25, s. 3 (id., 42), and s. 10, and the act of the 2d of August, 1813, c. 39 (3 Stats. at Large, 72), s. 2 and s. 5, and c. 53 (id., 80), s. 13, laying internal duties, contain provisions enlarging the authority of the collector; and the act of the 2d of August, 1813, c. 56 (id., 82), expressly extends the liability under the bond to the due collection and payment of all moneys accruing from the duties laid by these acts. So that there is no doubt that, as to bonds subsequently given, the language of the condition is to receive an interpretation which shall secure the fidelity of the collector under all these acts. The collector, whose bond is in question, was appointed by the president on the 11th of November, 1813, and, by the terms of his commission, he was to hold his office during the pleasure of the pres-

ident, "and until the end of the next session of the senate of the United States, and no longer." The bond in question was given by the collector, and by the defendants, as his sureties, on the 4th of December of the same year; and it follows, in its terms, the requirements of the act of congress. On the 24th of January, 1814, the president, with the advice and consent of the senate, reappointed the party collector, etc., and by his new commission he was to hold his office "during the pleasure of the president of the United States for the time being." No new bond was taken under this commission. Under these circumstances, the district judge held that the liability of the sureties was strictly confined to the duties and obligations created by the acts passed antecedent to the date of the bond. And we are of opinion that this is the true construction of the condition of the bond. There is nothing in the original act, under which the appointment was made, which contemplates a permanent and continuing liability for all duties under all laws which might be subsequently passed. In its terms, the condition, as expounded by the other parts of the act, had a principal reference to the assessments of direct taxes; and it is extended further in its operation only by the express and positive directions of the act of the 2d of August, 1813, c. 56, s. 1. To this extent, therefore, it may well be of force; but to go beyond it would be to exceed the legislative declaration, and create a general where the act had fixed a limited responsibility. If the argument on behalf of the government were correct, the provision so solicitously placed in this last act was wholly unnecessary, for the liability would expand with the new duties imposed by every successive act of the legislature. But the act itself furnishes no ground for such an exposition, and we do not feel ourselves at liberty to give to contracts of this sort further efficacy than the laws and the parties must have had in their contemplation.

§ 420. *An appointment by the president, confirmed by the senate, is not a continuation of a prior commission to the end of the next session of the senate.*

This point, however, becomes of comparatively small importance in the cause, if another, which has been argued in this connection, cannot be maintained. We allude to the question as to the duration and force of the original commission of the collector. Strictly speaking, this question does not arise upon the present record. For, although the court below decided that, in point of law, both commissions constituted but one continuing appointment, the second commission operating only as a confirmation of the first, yet, as the verdict was found for the defendants on another ground, and no exception was taken by them, it is not matter of error which can be assigned upon the present occasion. But, as it is manifest that the same question must arise upon any subsequent trial, if there should be a reversal of the judgment, and will form a most important and perhaps decisive ground of argument; and as all the parties are desirous of our opinion on this point, and it has been fully argued from its bearing on the other points of this cause, and might have been material, if our decision on the first point had been different, we have no hesitation in declaring our opinion that the decision of the court below was founded in mistake. The act under which this appointment was made authorizes the president, in the recess of the senate, to make appointments, by granting commissions which shall expire at the end of their next session. The first commission is, as has been already stated, in conformity to this provision of the act, and is, by express terms, limited to continue to the "end of the next session of the senate, and no longer." It follows, therefore, both by the enactment

of law and the form of the grant, that the first commission must have expired of itself at that period; and, as the next session of the senate ended in April, 1814, that is the utmost extent to which it could reach. The bond in question was given with express reference to this commission; and its obligatory force was consequently confined to acts done while that commission had a legal continuance, and could not go beyond it. And here would have been the natural termination of the liability. But, in the mean time, a new appointment was made by the president, with the advice and consent of the senate; and as soon as that was accepted by the collector, it was a virtual superseding and surrender of the former commission. The two commissions cannot be considered as one continuing appointment, without manifest repugnancy. The commissions are not only different in date, and given under different authorities and sureties, but they are of different natures. The first is limited in its duration to a specified period; the second is unlimited in duration, and during the pleasure of the president. If the latter operated merely as a confirmation of the former, then it confirmed its existence only during the original period fixed by the law. But such an effect is not pretended, and would be irreconcilable with the terms and intent of the commission. It has been suggested that the practice of the government has been to consider such commissions as one continuing commission. But whatever weight the practice of the government may be entitled to, in cases of doubtful construction, it can have no influence to change the clear language of the law. In short, if the nomination to and approval by the senate was a mere confirmation, and not equivalent to a new appointment, there was no necessity for the second commission; and yet the argument supposes that it could not be dispensed with; for if no commission had been issued, the first, by its own limitation, would have expired.

§ 421. *A surety in an official bond is not exonerated by the laches of government agents in calling his principal to account.*

Then, as to the point of laches, we are of opinion that the charge of the court below, which supposes that laches will discharge the bond, cannot be maintained as law. The general principle is that laches is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities. On the other hand, the mischiefs to the agents and their sureties would be scarcely less tolerable. For if, where the laws, as in the present instance, require quarterly accounts and settlements, a mere omission to account is to be deemed a breach of the bond, for which a suit must be immediately brought, upon the peril of loss from imputed laches, the collectors and their sureties would be oppressed with the most expensive and vexatious litigation; and their whole real estate, which by law is subjected to a lien, upon the commencement of a suit, would be perpetually embarrassed in its transfers. This consideration of public or private inconvenience is not to overrule the settled principles of law, but it is certainly entitled to great weight where a new doctrine is to be promulgated. It is admitted that mere laches, unaccompanied with fraud, forms no discharge of a contract of this nature between private individuals. Such is the clear result of the authorities. Why, then, should a

more rigid principle be applied to the government? a principle which is at war with the general indulgence allowed to its rights, which are ordinarily protected from the bars arising from length of time and negligence? It is said that the laws require that settlements should be made at short and stated periods; and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety. The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has of this the same means of judgment as the government itself; and the latter does not undertake to guaranty such fidelity. No case has been cited at the bar, in support of the doctrine, except that of *The People v. Jansen*, in 7 Johns., 332. In respect to that case, it may be observed that it is distinguishable from the present in some of its leading circumstances. But, if it were not, we are not prepared to yield to its authority. It is encountered by other authorities, which have been cited at the bar; and the total silence in the English books, in a case of so frequent occurrence, affords strong reason to believe that it never has been supposed that laches would be fatal, in the case of the government, where it would not affect private persons. Without going more at large into this question, we are of opinion that the mere laches of the public officers constitutes no ground of discharge in the present case.

§ 422. *Where no appropriation was made by either party of payments, before a controversy, then the law makes the appropriation and applies the payments to the debts according to priority of time.*

The last ground respects the manner in which the court below laid down the law respecting the appropriation of payments. In our opinion, there is no error in the charge on this point. The general doctrine is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and *a fortiori* at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments *pro tanto* of the debts antecedently due.

Upon the whole, it is the opinion of the court that, for the error of the district court on the question of laches, the judgment ought to be reversed, and a *venire facias de novo* awarded, with directions, also, to allow the parties liberty to amend their pleadings.

UNITED STATES v. HOUGH.

(13 Otto, 71-74. 1880.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

Opinion by Mr. JUSTICE MILLER.

STATEMENT OF FACTS.—Ruel Hough, collector of internal revenue for the first district of Tennessee, was furnished by the commissioner of internal revenue with a large amount of revenue stamps, and on the 16th day of Sep-

tember, 1864, he gave, with sureties, bond to the United States in the sum of \$25,000, conditioned for the payment of the money received by him for such stamps, and a faithful return of those not sold, whenever required so to do. Suit was brought on this bond. Treasury transcripts were offered in evidence by the plaintiff, showing a statement of his account in reference to revenue stamps, dated September 30, 1870, by which he was found to be indebted to the United States on that account in the sum of \$6,093.78. Evidence was offered by the defendants tending to show a balance of \$6,434.75 due to him for salary, commissions, and expenses as disbursing agent, which he, before the institution of the suit, had instructed the accounting officer to convey to the credit of this stamp account, and which was sufficient to satisfy it. Evidence was also offered tending to show a sum due from Hough to the United States for money received as collector of internal revenue, much larger than the amount of his credit for salary and commissions as disbursing agent. The case was tried by a jury. There was a verdict for the defendants, on which judgment was rendered. The United States sued out this writ. The main assignments of error relate to the charge of the court to the jury, and the refusal of the court to charge as requested by counsel for the United States.

§ 423. *What not an exception to a charge.*

With reference to the charge given by the court, while it is found in the bill of exceptions, there is clearly no exception shown to that charge. The bill, after reciting the charge, is immediately followed by the statement that "the district attorney moved the court for a new trial, which motion was overruled by the court, to all which the district attorney excepted, and tenders this his bill of exceptions," etc. No mention is made of any exception or any objection to the charge of the court, and none can be considered here.

§ 424. *Where a number of instructions are asked together, if one is erroneous all may be refused.*

Before this, however, the district attorney had asked of the court to give a charge, consisting of four propositions, which are set out, and "which instructions," says the bill, "the court refused to give, and the district attorney excepted." According to the well-settled rule of this court, if either of these four propositions was erroneous, or, in other words, if all the charge thus asked was not sound law, the court did right in refusing the prayer which presented them as a whole. See *Johnston v. Jones*, 1 Black, 209; *Harvey v. Tyler*, 2 Wall., 328; *Lincoln v. Claffin*, 7 id., 132; *Beaver v. Taylor*, 93 U. S., 46; *Worthington v. Mason*, 101 id., 149.

§ 425. *The sureties of a collector of internal revenue are not liable for stamps received by him after the repeal of the act under which his bond was given.*

One of the propositions so asked was that, under the bond sued on in this case, the sureties of Hough are liable for all amounts of stamps which the proof shows came to his hand as stamp agent, both before and since the execution of the bond, unless the same had been properly accounted for. It is true that one condition of the bond is to make a faithful return, whenever so required, of the moneys received by him for such stamped vellum, parchment or paper and adhesive stamps, as have been or may hereafter be delivered to him; but it is also a part of the condition of the bond describing the stamps for which they shall be liable, that they were stamps delivered and to be delivered under "the act of congress to provide internal revenue for the support of the government, approved March 3, 1863," pursuant to the sixteenth section of that act. Now, that act, and especially the sixteenth section of it, was repealed by

the act of June 30, 1864, which enacts its own provisions on this subject. The act of March 3, 1863, was, therefore, no longer in existence when the bond was taken which binds the sureties for stamps received under its provisions, and, as the obligation of sureties cannot be extended beyond what they have in terms assumed, they cannot be held liable for stamps furnished under the act of 1864. The date of the bond, be it remembered, was September 16, 1864. The act of 1863 had then been repealed more than two months. Stamps undoubtedly had been delivered, before the repeal of the act of 1863, to Hough which had not been accounted for when the bond was given, and it was competent for the government to take a bond covering the stamps advanced to him under that act. It was also competent for the sureties to limit their liabilities to stamps received under the act of 1863, and the record shows that they did. The court below told the jury that the sureties were only liable for stamps received by Hough prior to the 30th of June, 1864, the date of the repealing act, and to this no exception was taken. As we think the court was right in this, the charge asked by the district attorney was properly rejected. The difficulty seems to have grown out of the use of a form of bond framed under a statute which had been repealed.

§ 426. *Allowance of claims; set-offs.*

Objection is made to the admission of two pieces of evidence designed to show that Hough had applied the credit due him as disbursing agent to the extinguishment of the balance due from him as stamp agent. The objection is not made to the pertinency of the evidence, but to the fact that it was not presented for allowance as a credit to the proper accounting officer of the treasury, and rejected, as provided in section 951, Revised Statutes. The answer to this is that the claim itself had been allowed by the proper accounting officer of the treasury, and the point in issue was as to the application of the sum so allowed to one of two distinct claims of the government against him. To such a case the section has no application. Though there may have been many errors committed in the trial of this case, there are none so presented by the record that we can correct them.

Judgment affirmed.

UNITED STATES v. MCCARTNEY.

(Circuit Court for Massachusetts: 1 Federal Reporter, 104-111. 1890.)

STATEMENT OF FACTS.—Action against the sureties of a collector of internal revenue on his official bond. After the execution of the bond an act was passed allowing store-keepers a certain compensation, and McCartney, the defendant collector, paid out a portion of the money he received for this purpose, and the question raised by the pleadings and evidence was whether the sureties on the bond were liable for the action of the collector under this later act.

Opinion by LOWELL, J.

The learned judge of the district court ruled, as I think I should have ruled in his place, that the bond remained valid only in respect to those disbursements which could have been required to be made by the collector under the law as it stood at the date of the bond. That this ruling was sound so far as it sustained the obligation for the original duties of the principal obligor, if the evidence was such that the amount due for a breach of those duties could be discriminated from that which arose from a failure in the new duty, is not to be doubted. *Gausson v. United States*, 97 U. S., 584 (§§ 739-742, *infra*); *United*

States v. Singer, 15 Wall., 111; *United States v. Kirkpatrick*, 9 Wheat., 720 (§§ 419–422, *supra*); *Com. v. Holmes*, 25 Gratt., 771. A careful examination of the subject convinces me that a ruling should have been given, as prayed by the plaintiffs, that the bond was applicable to the pay of store-keepers as well.

§ 427. *The sureties on an official bond are liable for the discharge of all the duties of the office by their principal, whether imposed by precedent or subsequent legislation.*

It is said by a late learned commentator that, according to the weight of authority, the sureties of an officer, upon his official bond, are liable for the faithful performance of all duties imposed upon the officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belong to, and come within the scope of, the particular office, though not for those which have no connection with it, and cannot be presumed to have been within the contemplation of the parties at the time the bond was executed. *Notes to Rees v. Berrington*, 2 Lead. Cas. Eq. (4th Am. ed.), 1867–1913. The language used in the foregoing extract is taken from one of the decisions which I shall cite, and the context and citations show that it refers to public officers and to the weight of authority in the United States. A similar statement is made in *Brandt's Suretyship*, § 469. I have examined the cases cited by these authors and some others, and find their positions to be sustained.

§ 428. — *authorities reviewed.*

The sureties of a postmaster are not discharged by the subsequent passage of an act raising the rates of postage. *Postmaster-General v. Munger*, 2 Paine, 189 (§§ 598–601, *infra*); *Boody v. United States*, 1 Woodb. & M., 150 (§§ 433–438, *infra*). It was held in *White v. Fox*, 22 Maine, 341, that the sureties of a clerk of court remain liable though a penalty of twenty-five per cent. per annum is afterwards imposed by law for a failure by the clerk to pay over his surplus fees in due season. In that case *Shepley, J.*, said: "If the sureties on the official bonds of persons holding offices created by law, and the duties of which are prescribed by law, were to be discharged by every change of the law relating to the duties, it would, in these days of over frequent change, be to little purpose to trouble officers to obtain sureties. There is little of similarity between such cases and those arising out of offices or trusts whose duties are assigned or regulated by contract." Page 347. Like decisions have been made in several states and circuits in regard to sheriffs, constables, collectors of taxes, collectors of customs and other officers. *Illinois v. Ridgeway*, 12 Ill., 14; *Smith v. Peoria Co.*, 59 Ill., 412; *People v. Vilas*, 36 N. Y., 459–465; *Mayor v. Sibberns*, 3 Abb. App. Cas., 266; *Bartlett v. The Governor*, 2 Bibb, 586; *Colter v. Morgan*, 12 B. Mon., 278; *Com. v. Gabbert*, 5 Bush, 438; *Marney v. State*, 13 Mo., 7; *King v. Nichols*, 16 Ohio St., 80; *United States v. Gaussen*, 2 Woods, 92. The decision last cited was affirmed on another ground, and the supreme court has never decided this point, but the remarks of *Strong, J.*, show it to be his opinion that the bond will not be discharged unless duties of a different nature are imposed, or (which is the English way of putting it) the duties of the office are so increased that the court can fairly call it a different office from that originally undertaken. *United States v. Gaussen*, 97 U. S., 584. Strong remarks in support of the general rule as above laid down will be found in the opinions of *Clifford, J.*, in *United States v. Powell*, 14 Wall., 493 (§§ 630–634, *infra*), of *Hunt, J.*, now of the supreme court, in *People v. Vilas*, 36 N. Y., 465, where he mentions collectors of customs and of internal revenue, and of *Swayne, J.*, in *United States v. Singer*, 15 Wall., 111.

I have found very few cases in the United States which can be cited in opposition to this rule. I have not fully examined the law of England, but will mention an early case because it is very often cited in this country and has been misunderstood. *Bartlett v. Attorney-General, Parker*, 277, was decided in the exchequer in 1709, and is reported briefly, but with much precision, as follows: "Clarke, in 1691, was made collector of the customs in the port of Boston; Bartlett and others were security for him. In 1698 (10 William III.) the duties were granted upon coal, etc., which by the statute were to be under the management of the commissioners of the customs, and certain clauses for that purpose in the act. *The commissioners gave Clarke a deputation for that purpose and took security.* Clarke afterwards died; the customs were paid, but on this new coal duty £1,000 remained unpaid, upon which the bond was put in suit against Bartlett, the widow and executrix of Bartlett, the security, and she brought her bill, and the question was whether the bond in which Bartlett became security extended to this new duty on coals. After adjournment the barons delivered their opinions *seriatim*, and unanimously held that the bond did not extend to the duty on coals;" and they granted a perpetual stay of the action. I have put one line of the report in italics in order to point out what I understand to be the actual legal result. The new duty does not appear to have been considered a customs duty at all, though put under the management of the commissioners of customs. The statute, which I have examined (9 and 10 William III., c. 13), leaves no doubt of this in my mind, and it seems that the commissioners took a new bond under it. The case, therefore, is one of a new office bestowed upon the same person who already held one; and, of course, the old bond does not apply to the new office, and does remain good for its own purposes. *Skillett v. Fletcher*, L. R., 1 C. P., 217, and 2 C. P., 469. Another case of the highest authority is *United States v. Kirkpatrick*, 9 Wheat., 720. In that case a collector appointed during a recess of the senate to hold until the end of the next session and no longer, was nominated to and confirmed by the senate at its next session, and received a new commission, but gave no new bond. The decision was that the old bond ended with the expiration of the old commission. But Mr. Justice Story comments on the great change of duties which had been imposed upon the officer by some later statutes, and says that the new liabilities would not have been within the condition of the bond had it remained in force. The case, in that respect, may well fall within the qualifications of the rule which I will now proceed to consider.

§ 429. — *the rule does not apply if the office has been wholly changed, or if the new duties are not germane to those of the original appointment.*

The rule is usually said to be thus qualified: that it shall not apply if the office has been wholly changed, or if the new duties, however unimportant in themselves, are not germane to those of the original appointment. These qualifications lead to some uncertainty, because courts may differ as to what changes are in kind or degree within the limitation. I have found but two cases in which it has been held that the new duties were so different from the old that they could not be supposed to be within the contemplation of the parties. In *United States v. Singer*, 15 Wall., 111, a distiller had given bond to comply with the provisions of the law in relation to the duties and business of distillers, and pay all penalties incurred or fines imposed upon them for a violation of any of the said provisions. These provisions were numerous, requiring notices, returns, keeping books, paying taxes, etc., etc. When the bond was given the

law was that the store-keepers, who were officers of the United States appointed to duty at the warehouses of distillers, should be paid by the United States; afterwards a joint resolution was passed in congress requiring the distillers to reimburse to the United States the expenses and salary of store-keepers. The action upon the bond alleged as a breach the non-payment of certain taxes, and the failure to reimburse these expenses which had been paid by the United States before the passage of the joint resolution. The point that the bond was entirely discharged does not appear to have been taken, and the court reversed the ruling which had decided that no taxes were due, and of course upheld the bond *pro tanto*. As to the salary of a store-keeper, they held that the joint resolution did not apply to salaries paid before its passage; but that, if it did, the parties could not be supposed to have had in mind that the United States would pass a law throwing the expenses of their own officers upon the distiller. In *People v. Tompkins*, 74 Ill., 482, A. was appointed chief inspector of grain in a certain city and gave bond. The law imposed important duties upon the inspector, and his liabilities were correspondingly great; but they looked to a careful and impartial inspection of grain, and not to any direct pecuniary responsibility. The duties of chief inspector might be regulated to a certain extent by certain commissioners, and after the bond was given A. was duly required by the commissioners to receive and account for the fees of inspection. The court held that while such a designation of duty was within the power of the commissioners, the sureties could have had no reason to expect that a responsibility of that nature would be imposed upon their principal.

§ 430. *Duties belonging to the office of internal revenue collector.*

In this case the obligation imposed upon McCartney to pay store-keepers in addition to his own salary and commissions, and the payment of assessors, assistant assessors, clerks, etc., appears to me to be *ejusdem generis* with those duties which the obligors knew he was to perform, and therefore to bring this case within the general rule. Notwithstanding general rules every contract must be interpreted by its own words; but I do not find anything in this bond to take it out of the rule. The recital that McCartney had been designated as disbursing agent to pay the expenses incident to the internal revenue laws, when construed by the light of the law prevailing in the United States, refers to future as well as present laws and expenses, so far as they are germane to the office; and, moreover, the condition is general to account as such disbursing agent, which is an undertaking to account as such public agents are by law required to account.

The defendants took no exceptions to the rulings of the district judge, but it was necessary to consider the points which I have decided, not only because it comes within the exceptions of the plaintiff, but because if, upon the admitted facts, the bond was void, the judge was right in ordering a verdict for the defendants. I do not find it necessary to decide whether any case is made by the declaration, because that may be amended; nor whether a part of the transcripts from the treasury department was not properly verified, because, before the next trial, a further verification may be obtained. So far, however, as the defendants' objection is that the collector was only bound to pay the expenses of his district at some time, before or after he had left office, and that the bond does not require him to pay anything to the United States under any circumstances, I ought to say that, in my opinion, the condition to account and pay over obliges him to pay the expenses while he holds office, and that, when he retires, he must pay the balance in his hands to his successor, or to some other

officer duly authorized by the United States to receive it. Upon the broad ground which I have been considering the order must be for a *venire de novo*.

UNITED STATES v. CHEESEMAN.

(Circuit Court for California: 8 Sawyer, 424-434. 1875.)

Opinion by SAWYER, J.

STATEMENT OF FACTS.—This is an action on the official bond of D. W. Cheeseman, as assistant treasurer of the United States, and treasurer of the branch mint at San Francisco. The eighth article of the complaint alleges as one breach, that the principal in the bond failed to account for a certain amount of internal revenue stamps supplied him for sale by the commissioner of internal revenue of the United States under authority of acts of congress. The defendants claim that there is no liability under the conditions of the bond and the statute for any delinquency of the assistant treasurer as internal revenue stamp agent; that for this reason the deficiency alleged in article 8 does not constitute a breach in the condition of the bond, and that the matter alleged is therefore immaterial; and, on that ground, they move to strike it out in accordance with the practice under the State Code of Procedure. The bond sued on bears date July 2, 1864. The act of August 6, 1846, provided for the appointment of assistant treasurers of the United States at certain cities. 9 Stat., 60, sec. 5. Section 6 provides: "That the treasurer of the United States, the treasurer of the mint of the United States, the treasurers, and those acting as such, of the various branch mints, all collectors of the customs, all surveyors of the customs acting also as collectors, all assistant treasurers, all receivers of public moneys at the several land offices, all postmasters, and all public officers of whatsoever character, be, and they are hereby, required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the government which may be imposed by this or any other act of congress, or by any regulation of the treasury department made in conformity to law; and also to do and perform all acts and duties required by law, or by direction of any of the executive departments of the government, as agents for paying pensions, or for making any other disbursements which either of the heads of these departments may be required by law to make, and which are of a character to be made by the depositaries hereby constituted, consistently with the other official duties imposed upon them." Section 7 provides that all the treasurers and assistant treasurers named in the act "shall respectively give bonds to the United States faithfully to discharge the duties of their respective offices according to law."

On July 3, 1852, "An act to establish a branch mint of the United States in California" was passed, section 7 of which provides as follows: "That the said branch mint shall be the place of deposit for the public moneys collected in the custom-houses in the state of California, and for such other public moneys as the secretary of the treasury may direct; and the treasurer of said branch mint shall have the custody of the same; and shall perform the duties of an assistant treasurer, and for that purpose shall be subject to all the pro-

visions contained in an act entitled 'An act to provide for the better organization of the treasury, and for the collection, safe-keeping, transfer and disbursement of the public revenue,' approved August 6, 1846, which relates to the treasurer of the branch mint at New Orleans."

The defendant, Cheeseman, was appointed treasurer of said branch mint, and as such gave the bond in suit. The condition of the bond follows the language of the said act of August 6, 1846, before cited, and will be set out in the course of this opinion. It also adds, "to be substituted for present bond of \$400,000 by virtue of act of May 23, 1850." 9 Stat., 436. This act relates to a bullion fund set apart to pay for bullion received at the mint before it is coined; and provides for the increasing of bonds of treasurers to cover the increased responsibility under the operation of the act. No reference is made in the condition of the bond in suit to stamps, stamp agents, or to any other act of congress, than those just cited.

By the act of July 1, 1862, as one source of revenue, congress provided that certain merchandise and certain instruments should be stamped with stamps to be furnished by the government; and by section 102 the commissioner was authorized to furnish any person such stamps upon payment of the amount of duty represented by such stamps, less a commission of five per cent. when the amounts taken were fifty dollars or more. It also provided for the return of such stamps, so furnished, as should become unfit for use, or for which the purchaser should have no use. 12 Stat., 477, sec. 102. This act was amended December 25, 1862, by which the commissioner of internal revenue was authorized to supply the assistant treasurer at San Francisco with stamps "without requiring prepayment therefor," provided "that no greater commission be allowed than is now provided by law"—that is to say, no greater than was allowed private parties, who received stamps upon payment, as provided in the statute before cited. 12 Stat., 632, sec. 2. On June 30, 1864, congress passed another act, which covers the whole subject of internal revenue taxation, and especially that portion relating to stamp duties. Section 173 of this act repeals by direct reference nearly all the acts upon the subject, and then adds a general clause, "together with all acts and parts of acts inconsistent herewith." Section 161 of this act, like section 102 of the act of July 1, 1862, authorizes the commissioner of internal revenue to supply any person with stamps upon payment of the amount represented, less commissions allowed for selling, or otherwise, and for the return of those not used; and to supply certain designated manufacturers with stamps "without prepayment therefor, on a credit not exceeding sixty days," upon "such security as he (the commissioner) may judge necessary to secure payment," etc. Section 170 provides as follows: "That in any collection district, where, in the judgment of the commissioner of internal revenue, the facilities for the procurement and distribution of stamped vellum, parchment or paper, and adhesive stamps, are or shall be insufficient, the commissioner, as aforesaid, is authorized to furnish, supply and deliver to the collector and to the assessor of any such district, and to any assistant treasurer of the United States, or designated depository thereof, or any postmaster, a suitable quantity or amount of stamped vellum, parchment or paper, and adhesive stamps, without prepayment therefor, and shall allow the highest rates of commissions allowed by law to any other parties purchasing the same, and may in advance require of any such collector, assessor, assistant treasurer of the United States or postmaster a bond with sufficient sureties, to an amount equal to the value of any stamped vellum, parchment or

paper, and adhesive stamps, which may be placed in his hands and remain unaccounted for, conditioned for the faithful return, whenever so required, of all quantities or amounts undisposed of, and for the payment monthly of all quantities or amounts sold or not remaining on hand. And it shall be the duty of such collector to supply his deputies with, or sell to other parties within his district who make application therefor, stamped vellum, parchment or paper, and adhesive stamps, upon the same terms allowed by law, or under the regulations of the commissioner of internal revenue, who is hereby authorized to make such other regulations, not inconsistent herewith, for the security of the United States and the better accommodation of the public, in relation to the matters hereinbefore mentioned, as he may judge necessary and expedient. And the secretary of the treasury may from time to time make such regulations as he may find necessary to insure the safe-keeping or prevent the illegal use of all such stamped vellum, parchment, paper and adhesive stamps." 13 Stat., 297, sec. 170.

§ 431. *When a statute may be regarded as a substitute for another act and repealing it by implication.*

These are the only statutes brought to the attention of the court bearing upon the question presented by the motion to strike out. The bond in question was given after the passage of the last named act of June 30, 1864. This act clearly operated as a repeal of the act of December 25, 1862, although the latter act is not specifically referred to in the repealing clause. But the latter embraces the entire subject matter of the prior act on this subject, making changes on the point in question and adding other provisions, and was manifestly intended as a substitute for it. In such cases it is well settled that the operation of the later act is to repeal the one for which it is substituted. *Murdock v. City of Memphis*, 20 Wall., 617; *United States v. Tynen*, 11 Wall., 88; *Henderson's Tobacco*, 11 id., 652; *Bartlett v. King*, 12 Mass., 537; *Commonwealth v. Cooley*, 10 Pick., 36; *Pierpont v. Crouch*, 10 Cal., 315; *Sedg. on Stat.*, 126; *Butler v. Bicknell*, 11 Int. Rev. Rec., 30; *Norris v. Crocker*, 13 How., 438. The act of 1862, therefore, need not be considered.

§ 432. *The liability of sureties is strictissimi juris, and cannot be extended by implication.*

The liabilities of sureties cannot be extended by implication or construction. The surety cannot be bound beyond the scope of his engagement. He is entitled to stand upon the strict terms of his contract. His liability is *strictissimi juris*, and cannot be extended beyond the reasonably necessary import of the language of his bond. *Miller v. Stuart*, 9 Wheat., 703 (§§ 729-735, *infra*); *United States v. Boyd*, 15 Pet., 207-9 (§§ 409-411, *supra*); *Leggett v. Humphreys*, 21 How., 76 (§§ 486-488, *infra*); *Morton v. Thomas*, 24 How., 317; *Smith v. United States*, 2 Wall., 235 (§§ 723-728, *infra*). Is the default alleged in article 8 of the complaint fairly within the terms of the condition of the bond? The condition of the bond is in the language of the act of 1846, which was passed long before there was any act relating to stamps in force. One of the conditions is in the language of section 7 of said act, that the principal "shall truly and faithfully continue to execute and discharge all the duties of the said office according to the laws of the land." These duties were specifically defined by section 6 of the same act, and another condition of the same bond follows substantially the language of that section, and is, that "he shall truly and faithfully continue to execute and discharge all the duties of the said office according to the laws of the United States, and moreover has

well, truly and faithfully kept and shall well, truly and faithfully keep safely without loaning, using, depositing in bank or exchanging for other funds than as allowed by the act of congress hereinafter specially referred to and described, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same has been or shall be ordered by the proper department or officer of the government to be transferred or paid out; and when such orders for transfer or payment have been or shall be received, has faithfully and promptly made, and shall faithfully and promptly make the same as directed, and has done and shall do and perform all other duties as fiscal agent of the government, which have been or may be imposed by any act of congress, or by any regulation of the treasury department made in conformity to law; and also has done and performed, and shall do and perform all acts and duties required by law, or by direction of any of the executive departments of the government, as agent for paying pensions, or for making any other disbursements which either of the heads of these departments may be required by the law to make, and which are of a character to be made by a depositary constituted by an act of congress, entitled 'An act to provide for the better organization of the treasury, and for the collection, safe keeping, transfer and disbursement of the public revenue,' approved August 6, 1846, consistently with the other official duties imposed upon him, then this obligation to be void and of none effect," etc.

The language of the statute and of the condition is very broad, but the words must be taken as having reference to such duties only as have some natural relation to the ordinary duties imposed upon the particular officer who gives the bond. The language prescribing the duties is the same for "all collectors of customs, all surveyors of customs acting also as collectors, all assistant treasurers, all receivers of public moneys at the several land offices, all postmasters and all public officers of whatsoever character." All these officers are provided for in the same section. It can hardly be supposed that congress intended that the words "all other duties as fiscal agents of the government which may be imposed by this or any other act," in the section prescribing the duties of the officers mentioned, and which is inserted in the treasurer's bond in suit, should include the duties of collectors of customs, receivers of land offices and postmasters, in case congress should, after giving the bond, see fit to impose the duties of such officers on the assistant treasurer. If so, then the duties of all officers, who have anything to do with the moneys of the government, might be imposed on an assistant treasurer, and the liabilities of his sureties extended far beyond anything contemplated at the time of the execution of the bond. We think these words only intended to include such duties as naturally and ordinarily belong to the particular officer giving the bond, or have some obvious relation to such duties, and such as the sureties acquainted with the duties of the various public officers as usually devolved upon them by law might reasonably be expected to contemplate at the time of executing the bond, as likely to be imposed upon their principal in case the exigencies of government should require it; and not those duties which are usually imposed upon, and more appropriately belong to, an entirely different class of officers. Thus the duties of treasurer are usually to keep safely, and pay out upon lawful authority, the public moneys, not to act as collectors of customs, postmasters, receivers of land offices, or other officers engaged in collecting the different branches of the public revenues. Treasurers are ordinarily understood to be keepers of the public funds collected by other classes of public officers to whom those specific

duties are specially assigned. We do not think the words of the treasurer's bond under consideration would cover the duties of collectors of customs, etc., imposed by act of congress or a regulation of the treasury department after the giving of the bond. The sale of stamps required by act of congress to be used upon certain specified merchandise and written instruments is one mode of raising and collecting revenue; and the furnishing of stamps to the assistant treasurer for sale to other parties, in pursuance of section 170 of the act of 1864, is but making him an agent for the sale of stamps, and collection to the extent of sales of that branch of the public revenue. The stamps themselves are not money. There is no natural or necessary connection of this service with the ordinary duties of that officer as treasurer. The service is more appropriate to other officers, whose duties are to collect revenue, and it was at first imposed on that class of officers. Section 102 of the act of July 1, 1862, as has been seen, authorized the commissioner to "supply collectors, deputy collectors, postmasters, stationers and other persons (without naming assistant treasurers), at his discretion, with adhesive stamps," etc., "upon payment at the time of delivery" of the amount of duties "said stamps represent;" and to allow five per cent. as commission, providing also for a return of such as were not used. Section 161 of the act of June 30, 1864, made a similar provision as to similar parties, the supply to be made upon payment, and also authorized the delivery of stamps to certain manufacturers without payment, upon giving satisfactory security for payment within sixty days. Section 170 of the same act authorized the commissioner of internal revenue in those districts where in his judgment the facilities for distribution of stamps were insufficient, to furnish to the collector and assessor of the district, and to any assistant treasurer, or any postmaster, a suitable quantity of stamps "without payment therefor," and to allow the highest rates of commission allowed other parties purchasing the same; and provided that the "commissioner may in advance require of any such collector, assessor, assistant treasurer of the United States, or postmaster, a bond with sufficient sureties to an amount equal to the value of any stamped vellum, parchment or paper and adhesive stamps which may be placed in his hands and remain unaccounted for, conditioned for the faithful return, whenever so required, of all quantities or amounts sold or not, remaining on hand."

Thus it will be seen that under section 161 the stamps were to be supplied to certain officers and persons only on prepayment of the amount represented by the stamps, less commissions, to certain manufacturers on credit upon giving security, and under section 170 they might be supplied for sale on similar commissions to certain officers named without prepayment, in the discretion of the commissioner, but he was authorized to require security, and the condition of the bond is prescribed. Some of the officers mentioned in both sections are the same, as postmasters and collectors. It seems to be a fair inference from these sections that congress intended that there should be in all cases either prepayment of the value, less commissions, or special security given for the faithful performance of this particular duty. Why require prepayment of collectors and postmasters in section 161, if their official bonds as collectors and postmasters already given covered the duty? or why authorize the supply of stamps to these same officers in section 170 of the same act, and require other special security, if it was contemplated that their bonds as collectors and postmasters already given protected the government? These officers, like assistant treasurers, give bonds for the faithful discharge of their duties, which are prescribed by section 6 of the act of 1846. If the assistant treasurer's bond under that

act covers the liabilities by reason of the provisions of section 6, the same must be true of the collectors' and postmasters' bonds. It seems very evident to us that congress intended that the specific bond authorized by section 170 of the act of 1864 should be given to cover the specific duty devolved upon the stamp agents provided for in that section, that is to say, when stamps are delivered without prepayment. The language is not that an "additional" bond shall be required, but that "a bond with sufficient sureties" may be required. If congress had contemplated that a bond as assistant treasurer should cover this duty, there would have been no need of this bond, or if it had supposed the bond already given insufficient, it would naturally have authorized an additional bond, as in case of the bullion fund, with a condition covering all duties instead of limiting the responsibility to that particular duty. The bond in question was given after the passage of the act of 1864, yet it does not contain the condition prescribed by section 170 to cover the duties of the assistant treasurer as stamp agent, and makes no reference to it. It does, however, refer in terms to the act of 1846 and to the act of 1850 relating to a bullion fund, and purports to have been executed in pursuance of those acts. It seems to refer specifically to all duties intended to be covered. *Expressio unius est exclusio alterius*. The parties executed the bond, and the secretary of the treasury accepted it in this form. If it was intended to cover the duties of the assistant treasurer, as stamp agent under the act of 1864, it is reasonable to presume that the secretary of the treasury would have required the conditions prescribed by section 170 to be inserted, or at least to have required some reference in the bond to those duties, or to that act. The secretary prescribes the form of the bond.

We think the reasonable conclusion is, that congress intended to require a distinct and separate bond containing the conditions prescribed in section 170 of the act of 1864, to cover the duties of stamp agents provided for in that act; that as the bond in suit was given since the passage of the act of 1864, and does not contain the conditions prescribed by that act, and makes no reference to the act, but only refers to the acts of 1846 and 1850, the sureties might have reasonably supposed, and were entitled to suppose, that another bond would be given to cover the service of stamp agent, should the commissioner exercise his discretion, and require that service of the person acting as assistant treasurer, and that their liabilities upon the bond were limited to the duties of assistant treasurer and treasurer of the mint, and such duties as usually pertain to that office, and as they existed under prior acts of congress; and that they are not liable on the bond in suit for the delinquencies set out in article 8 of the complaint. The result is that the averments of said article are immaterial, and should be stricken from the complaint, and it is so ordered.

BOODY v. UNITED STATES.

(Circuit Court for Maine: 1 Woodbury & Minot, 150-171. 1846.)

STATEMENT OF FACTS.—Boody and Nutter were sureties on the bonds of Todd as postmaster at Portland. Todd was a defaulter, and suit was brought against him, Boody and Nutter in the United States district court; judgment was rendered against them, and the sureties sued out a writ of error. The sureties were on both of two successive bonds, and sought to avail themselves of the statute of limitations to defeat their liability on the first claim, that the deficit on that was barred by the statute, and that the payments made by Todd were to be credited on the deficit on the second bond. The facts necessary to

explain the rulings of the court on these and other points appear sufficiently in the opinion.

§ 433. *The sureties of a postmaster are liable for his non-compliance with subsequent as well as past laws and orders till his official term expires.*

Opinion by WOODBURY, J.

The first exception taken to the ruling of the district court is the instruction to the jury "that the order of the postmaster-general of May, 1837, by which Todd was directed to retain the money which he collected in his own hands, instead of depositing it in a bank, as had been before required, did not exonerate his sureties from their responsibility, but that they continued liable for his defaults after that order to the same extent that they were before." It is sufficient to remark on this that the condition of the bond signed by the plaintiffs in error is that "the said Thomas Todd shall well and truly execute the duties of the said office according to law and the instructions of the postmaster-general." The only exceptions which can be raised to this instruction under that condition are two. The first one is that this order was issued after the date of all the bonds, and that the condition does not apply to subsequent orders.

But there are no words limiting its application to past orders, and, in the nature and reason of the case, it should not be limited to past orders any more than to past laws. The object is to preserve obedience and uniformity and harmony among that class of officers, and hence orders given—whether after or before the bond—are general and require a strict compliance till the whole term of office of the postmaster expires. The term of office is the limitation during which the orders may be issued, else both obedience and uniformity and all improvement in former orders or regulations, by experience or discoveries, are defeated, as to all old postmasters under their existing bonds. It follows, also, that if new laws can be passed and must be obeyed, and the sureties held, if passed during the continuance of the term of office, new orders may be, when the language in the condition applicable to both is the same; and, furthermore, that a new law, however great an improvement, would in many respects become inefficient and unequal and not uniform in its operation if the postmaster-general could not issue a new order directing the details of its execution which his deputies were bound to obey and their sureties held responsible for.

§ 434. *The sureties of a postmaster are responsible for public money received by him till it is paid over to public creditors or to some officer of the government authorized to receive it.*

Congress have expressly authorized the postmaster-general to issue such orders and to make suitable regulations, it being impossible to legislate with sufficient minuteness for everything in such a department more than in the army or navy. First section of act of 1825, chapter 64. In all these, however, the orders issued must of course not be in conflict with any law, and hence the other exception, which can be made in some cases with success, is made here, and is next to be considered. It is that the new order is one contrary to law. It is undoubtedly true that the condition requiring obedience to orders of the postmaster-general cannot exact it to orders not justified by the acts of congress. But I can see no illegality in this order to the deputy to retain the money collected till drawn for by the postmaster-general rather than to deposit it in banks. These last at that time had ceased to pay out specie and had forfeited their situation as public depositories.

Under the fiscal system of the United States all collecting officers and their

sureties are responsible, and ever have been, for the money they officially receive, till it is paid over to public creditors on some order from the treasurer or paid to some other officer having the control over their receipts. And whether that order be to deposit it periodically with some bank or receiver-general, or be to pay it out on particular drafts, where no public depository exists by law, or the sums collected are too small for requiring a deposit of them for safety, is immaterial under the language of the bond and the spirit of the financial system which then prevailed. The sureties agree to be responsible for his fidelity in these and other matters according to the current and changing laws of congress and the legal orders of the postmaster-general under them, during the whole of the official term, and to the amount of the penalty in the bond. Their security is, they are liable only to that amount, however much the collections in the hands of their principal may accumulate, or his other receipts, as agent of the department, exceed the penalty.

The second exception is to the instruction, "That the account between Todd and the general postoffice being an open and running account, all payments made by him from time to time, in the absence of any specific appropriation by him at the time of making them, were by law appropriated to the payment and extinction of the oldest charges on the debit side of the account; that this was the general rule of law with respect to the appropriation of payments upon an open and running account, when no special appropriation was made, either by the debtor or creditor, at the time the payment was made, to any particular item of the account; that the proviso in the thirty-seventh section of the act of July, 1836, ch. 270, which directed that payments made subsequent to the execution of a new bond, by a deputy postmaster, shall first be applied to the discharge of any balance which may be due on the old bond, unless when the debtor specially directs it to be applied to his new account, at the time of the payment, is not limited to the cases where a new bond is required at the request of the sureties, in order to be released from their suretyship, but extends to all cases where a new bond is required by the postmaster-general, or he shall deem it necessary, for any cause, to require a new bond."

§ 435. *Where a payment was made by a postmaster four days before the execution of a second bond, sufficient to cover the liability on the first, such payment must be considered as made on the first bond.*

The correctness of this instruction is not material to the plaintiffs, who were sureties in all the three bonds given in behalf of Todd, and who are of course liable for all the balances, except in one respect. They might avail themselves of the statute of limitations as to the balances that were due on the first two bonds, if they have not been since legally discharged. Act of 1825, ch. 64, § 3. The limitation is two years from and after any default, and this action was brought June 1, 1840, while the first commission and bond expired July 2, 1836, and the second bond January 9, 1837, both more than two years before suit. The third commission and bond terminated September 21, 1839, not two years before suit. On a careful comparison of dates, however, the objection to the instruction on this point is not very material as to the balance due July 2, 1836, because before the second bond was given, viz., on the 12th of July, 1836, a payment was made by Todd, which reduced that balance to only \$8.34. It is objected that this payment may have been made on the second bond. But this payment could not in any view be regarded as made under or upon the second bond, as that bond was not in existence till four days after, viz., the 16th of July, 1836.

As a further evidence that this payment must have been made on account of the former balance, under the first bond, the quarter had just ended on the 1st of July, and he owed nothing to the department, except on that balance, till the 1st of August; after which, anything due before and from the month of July, probably he paid on the 8th of August, as \$350 were then paid; and after August had expired he paid for that month, probably \$400, as that sum was then paid. It would hardly answer to presume that on the 12th of July he was paying money not intended to be on account of what was already due, but in advance of what was not due, and of what he afterwards appears to have paid in a different manner, when it became due. Nor is there any evidence that this payment on the 12th of July was made from accruing receipts under the second bond or commission, so as to bring it within the case of Eckford, hereafter examined, nor is there any such presumption, but rather the reverse, as the second bond had not been in existence, and the amount being \$1,191.60, was much larger than the usual receipts since the second appointment.

§ 436. *Where no specific directions are given by the debtor payments are applied to the oldest debt.*

In relation to the second balance, it is, to be sure, much larger, being \$1,567, and deserves more consideration. It would be barred by the limitation of two years, from the 9th of January, 1837, the date of the third bond, if it had not been extinguished by the subsequent payments, which were applicable to it. They are so applicable by the express words of the thirty-seventh section of the act of 1836, ch. 270, even under its limited construction, as reaching only cases of new bonds given within the official term — this bond being a new one given within that term. The case of *United States v. Eckford*, 1 How., 250 (§§ 584–587, *infra*), is not like this; because in that case no express provision of law existed requiring, as here, subsequent payments to be applied under a preceding bond, where no direction to the contrary was given by the debtor. And if the \$8.34 should also be held to be extinguished by force of subsequent payments, on the general and equitable principle at common law that the payments of a debtor, where no specific direction is given by him at the time, shall be applied to the oldest debts, it would not conflict with the case of *Eckford*, unless it appeared that this sum and all these subsequent payments were made from subsequent and accruing receipts, about which there is no evidence in the cause. Other cases hold that the creditor has his election, and may apply the payment before suit to any debt he pleases, where a special statute or the debtor gives no direction how to apply it. 1 Meriv., 606; 2 Strange, 1194; 14 East, 239; 5 Taunt., 596; *Postmaster-General v. Norvell*, Gilp., 106, 126; 1 McL., 497; *United States v. Kirkpatrick*, 9 Wheat., 720 (§§ 419–422, *supra*).

The general principle in favor of an application of the payment to the oldest debt, where nothing has been done or directed, seems too well settled to be overturned by straining the case of *Eckford* beyond the facts proved here, and for only the sum of \$8.34. 1 Ld. Raym., 287; Peake, N. P., 64; *Mayor of Alexandria v. Patten*, 4 Cranch, 317; *Field v. Holland*, 6 Cranch, 8, 27; *Postmaster-General v. Furber*, 4 Mason, 333; 1 How., 250; *Gratiot v. United States*, 15 Pet., 336; *Devaynes v. Noble*, 1 Meriv., 529. A rule in accordance with this principle existed under the civil law. Digest, B. 46, tit. 3, § 5. For if neither the creditor nor the debtor applies the payment, nor a special statute, the law ought to do it, and, as a general rule, to the oldest debt. *Myers v. United States*, 1 McL., 498. Either of the above rules would decide this point in favor

of the United States. It is true that some exceptions exist to these principles; but I do not think that any of them include the present case. See some in 1 How., 250, and 5 Mason, 85; *United States v. January*, 7 Cranch, 572; Gilp., 126; 5 Pet., 373 (§§ 489-494, *infra*). The test of the exception, in the case of different bonds and commissions, is, that money actually collected and accruing under one cannot be applied to the other without the consent of all concerned. *Myers v. United States*, 1 McL., 498. But here there is no evidence whatever that the small balance due after the 12th of July, or the payment then made, was from money accruing under the second appointment. Indeed, as before shown, the presumption is evident that it could not be, as it was so much larger than the ordinary receipts during only twelve days. Nor do I mean by this conclusion to impugn the case of *The United States v. Giles*, 9 Cranch, 212, any more than the case of *Eckford*, because the former decision holds merely that the sureties in each official bond are liable only for defaults happening within the term each covers. And the whole inquiry, as to the correctness of this second instruction, is founded entirely on the idea that such a principle is applicable here, though the sureties in all the bonds are the same. *United States v. Kirkpatrick*, 9 Wheat., 720. And I give the sureties the benefit of it, in order that they may avoid the balance due under each bond by the statute of limitations, if it has not been paid or discharged since, in conformity to sound legal principles and the provision of the act of congress specially referring to a part of it. This is treating sureties liberally, as the cases require (*Miller v. Stewart*, 9 Wheat., 680; §§ 729-735, *infra*), though I think that the law in many cases has been construed quite beyond any reasonable intention of its makers, or of parties to contracts, from a natural sympathy in their behalf.

§ 437. *A postmaster is the agent of the postmaster-general, who can employ him to keep safely the money collected by himself and other postmasters, and his bond covers these duties.*

The third and last exception is to the instruction: "That the sum of \$1,165.61, which was received by Todd from other postmasters, under orders from the postmaster-general, directing the same to be deposited in his hands, was covered by that clause in his bond which required him to account for all moneys, bills, bonds, notes, receipts and other vouchers which he, as agent of the general postoffice, should receive for the use and benefit of the general postoffice; that the order of the postmaster-general, directing him to receive and hold these moneys for the United States, was authorized by the third section of the act of March 3, 1836, chapter 270, and that his sureties were responsible for his default in not paying over and accounting for the same, as they are for his not accounting for the money received in the ordinary discharge of his duties as postmaster." It is to be remembered that the postmasters, in different cities or towns, are, in fact and in law, deputies or agents of the postmaster-general. It was once contended that he, on that account, was liable for their default. But their agency being public, and the liabilities of each regulated by law, without imposing such a responsibility over on him, he has not, in such cases, been made chargeable for their misfeasances. Thus it was held in the following cases, after much deliberation, that the postmaster-general is not liable personally or officially for the neglect or wrong of a deputy or of a letter or mail carrier. *Whitfield v. Lord Le Despencer*, Cowp., 754; *Lane v. Cotton*, 1 Ld. Raym., 646; S. C., 12 Mod., 472; 3 Peere Wms., 394, note; *Story on Bailm.*, § 461 *et seq.* They are still, however, his agents, and are liable to be called on as

such to transact business for him connected with his official duties. One of his duties is to collect and disburse the money received for postage, and to keep it safely till expended. Hence he can make his deputies agents for this purpose within convenient limits; and the sureties, as in respect to the collections of each deputy at his own office, do not act in the dark or at random as to their responsibilities, because they cannot be held liable beyond the amount of the penalty in their bond, and they knowingly and deliberately stipulate to be liable to the extent of that. Besides this, in the bond itself, the acting of postmasters as agents is thus recognized: Said Todd "shall also faithfully do and perform, *as agent* for the general postoffice, all such acts and things as may be required of him by the postmaster-general, and, moreover, shall faithfully account with the United States for all moneys, bills, bonds, notes, receipts and other vouchers, which he, as agent aforesaid, shall receive for the use and benefit of said general postoffice."

§ 438. *Construction of statute of 1836, chapter 270, section 1.*

The act of 1836, chapter 270, section 1, which requires the revenues and debts due to the postoffice department to be paid into the treasury of the United States, and the money disbursed to be drawn therefrom, does not refer to each individual collection or payment, but the aggregate quarterly and yearly collections and expenditures. This is in order to make them appear on the exhibit of the annual receipts and expenditures of the country, and also in the annual appropriations, which was not the case formerly. This is effected by large "covering warrants," quarterly or otherwise, and not by a deposit and warrant in each individual case over the Union; else the labor and details would be insuperable, without a great additional force in the department. The collections, then, till disbursed, are kept as formerly by the postmaster-general with his deputies, or, when safe deposit banks exist, with them. The responsibility of depositing is usually small on this account, as the current demands of the deposit, being greater, or as great, as the receipts, quickly and constantly absorb most of the receipts.

There are several other points stated in argument and at the trial. But as these alone were made at the time of the charge to the jury, and as the rulings or opinions concerning others, such as the accounts of Todd being all open and running, or the bond being joint, instead of joint and several, even if incorrect, do not reach and alter the merits of the case, as decided on other grounds, it is unnecessary to enlarge upon them. For the reasons I have given, let the judgment below be affirmed.

§ 439. *Matter of strict law.*—The obligation of a surety is a matter of strict law, and can never arise from implication. The bond must speak for itself, and its language can never be extended or altered to the injury of the surety. *Myers v. United States*,* 1 McL., 493.

§ 440. *Executed in blank.*—The date of an official bond was left blank at the time of its execution by the sureties. *Held*, such execution authorized the principal to insert the date at his discretion, and that, having done so before the delivery of the bond to the officers of the government, the bond was valid. *United States v. Halstead*,* 6 Ben., 205.

§ 441. A printed blank in the form used for a paymaster's official bond was signed by the sureties before any of the blanks were filled. It was afterwards signed by the principal, and the blanks were filled by him, but without any express authority. After such execution and filling up by the principal it was accepted by the government. *Held*, that the sureties were not liable. *United States v. Nelson*,* 2 Marsh., 64.

§ 442. *Delay in settlement.*—In debt on a sheriff's bond, in Virginia, conditioned for the payment of officers' fees paid into his hands at such times as are limited by law, and the law requires him to account on or before the 1st of September for fees put into his hands before March 1st, the sureties are not liable for his failure to deliver over before the 1st of September fees paid into his hands after March 1st. *Debotts v. McCulloch*, 1 Cr. C. C., 286.

§ 443. **Limitation.**—In an action on an official bond the lapse of eleven years since default is not sufficient to raise a legal presumption that the debt has been paid, and will not release the sureties. *Postmaster-General v. Rice*, * Gilp., 554.

§ 444. **Not concluded, when.**—Sureties on an official bond are not concluded by statements of government officers as to the amount of their liability, in which they have acquiesced under mistake of fact, or by the fact that they have executed a mortgage to secure the amount thus stated. *United States v. White*, * 4 Wash., 414.

§ 445. A surety on a bond is not bound by a judgment rendered against his principal in a state court after the removal of the case, as far as the surety is concerned, to a federal court. *State of Missouri v. Tiedermann*, 3 McC., 408.

§ 446. A surety on a bond is not bound by a settlement made by his principal and the obligee, at which he was not present or consenting, but in an action against him he is entitled to whatever rights he would have had, had he been present at a settlement under the contract and availed himself of any defenses which his principal might have set up. *Ibid*.

§ 447. **Lien.**—Where an act of congress creates a lien on the real estate of collectors and their sureties, commencing with the service of the original writ in the suit on the bond, and provides for the execution of this lien when there is a want of personal property of the collector or his sureties to satisfy the judgment on the bond, a bill in equity will not lie to subject real estate conveyed by one of the sureties to the payment of such a judgment, when it is shown that the other sureties are willing to pay their aliquot parts and their personalty has not yet been exhausted in payment of the judgment. *United States v. Graves*, 2 Marsh., 379.

§ 448. **Retaining salary.**—On the death of a principal in a bond he was found to be a defaulter, and the fourth auditor wrote to the purser of the navy to retain the pay of a surety, who was a surgeon's mate, to meet the delinquency of the principal. Subsequently the secretary of the navy wrote the surety that his accounts were settled, and that he would thereafter receive his pay and rations. A certain amount was then due to the surety, but less than the amount of the defalcation, and was retained to be applied on the bond. The accounts of the principal were not at the time settled. *Held*, that the surety was not released from further liability. *United States v. Beattie*, * Gilp., 92.

§ 449. **Docket entries.**—In an action on the official bond of a marshal docket entries of moneys paid to him are admissible evidence to charge his sureties. *Williams v. United States*, * 1 How., 290.

§ 450. **Release from imprisonment.**—The release of a debtor from imprisonment by special act of congress, retaining the right to proceed against his property, present and future, does not release the surety. *Hunter v. United States*, * 5 Pet., 178.

§ 451. **Payment of amount due.**—If sureties in a marshal's bond have paid to those who are entitled to it a sum equal to the penalty of their bond, they may set it up as a matter of defense, or, perhaps, they may be discharged on motion; but it is not necessary in bringing a suit on such bond to aver in the declaration the non-payment of the penalty. *Sperring v. Taylor*, 2 McL., 362.

§ 452. **Settlement of accounts.**—It seems that the sureties on an official bond are bound to see that their principal keeps the condition of his bond; and, if he dies with his accounts in arrears, it is their duty, through the appointment of an administrator or otherwise, to have his accounts made up and forwarded to the department for settlement. *United States v. Humason*, * 7 Saw., 252.

§ 453. **Error in judgment.**—Where the bond is conditioned for the faithful execution of the duties of the office, a surety is not liable for an error in judgment, or want of skill on the part of the principal; he is liable, however, in case of gross negligence. *Common Council of Alexandria v. Corse*, * 2 Cr. C. C., 363.

§ 454. **Irregular appointment.**—A bond given to the United States by one irregularly appointed to an office established by law, to faithfully discharge the duties of that office, is binding on the sureties. *United States v. Maurice*, 2 Marsh., 96.

§ 455. **Invalid bond.**—A surety upon an invalid official bond is not liable for the default of his principal. *Jackson v. Simonton*, * 4 Cr. C. C., 250.

§ 456. **Limits of district.**—Where the district of a surveyor-general depends upon the construction of certain acts of congress, and such construction has been settled and sanctioned for a series of years, a surety on his official bond cannot set up that a large part of the moneys in regard to which default is alleged was required to be disbursed beyond the proper limits of his district. *United States v. Lytle*, 5 McL., 9.

§ 457. **Purser.**—The sureties in the official bond of a purser, stationed at a navy yard, at which there is no navy agent, are liable for the defaults of their principal in failing to disburse or account for moneys remitted to him as purser, notwithstanding some portion of the moneys remitted to him would have been remitted to the navy agent, if some person holding

the office of navy agent had been stationed at that yard. *Strong v. United States*, 6 Wall., 788.

§ 458. **Bond of receiver of public money.**—A plea by a surety in an action on the official bond of a receiver of public moneys, that the receiver had made returns to the treasury department of moneys received by him which he, in fact, never received, and that the sums so returned were included in the amount claimed in the declaration, is bad. *United States v. Girault*, 11 How., 22.

§ 459. The sureties in the official bond of a receiver of public moneys, conditioned for the faithful execution and discharge of the duties of his office, are not responsible for moneys which did not come into the hands of their principal after the execution of their bond, or which, being received before, did not remain in his hands after that time. *Ibid.*

§ 460. Where a receiver of public moneys neglects to make the proper entries in his books, his sureties are liable for a reasonable sum expended by the government for the purpose of procuring the necessary entries to be made. *United States v. Wann*, * 3 McL., 179.

§ 461. **Advances.**—Where sureties undertake to account for advances they are not liable for advances beyond the limitations of the bond. *United States v. Tillotson*, * 1 Paine, 305.

§ 462. **Where the officer acts in another capacity.**—The sureties on an official bond, conditioned that their principal shall faithfully execute the duties of invalid pension agent, are not liable for his acts while acting as agent for paying navy and privateer pensioners under separate and distinct appointments. A surety can never be bound beyond the scope of his engagement. *United States v. White*, * 4 Wash., 414.

§ 463. By the statutes of Wyoming the judge of probate was *ex officio* county treasurer, and the statute required a bond to be given for the faithful performance of his duties by the probate judge as such and as *ex officio* county treasurer. A bond with sureties was entered into, conditioned simply for the faithful performance of the duties required by law of the probate judge. *Held*, that the sureties on the bond were not liable for the acts of the judge of probate while acting as county treasurer, that clause being omitted from the bond. *Territory of Wyoming v. Ritter*, * 1 Wyom. T., 818.

§ 464. **Time of defalcation.**—Sureties on an official bond are not liable for defalcations of their principal occurring before the execution of the bond unless a condition to that effect is expressly included in the bond. *Myers v. United States*, * 1 McL., 493.

§ 465. The sureties of a receiver are not liable on his bond for defaults made prior to the execution of the bond. Fraudulent and fabricated receipts sent by him to the treasury department, after the execution of the bond, showing that he was in possession of moneys for public lands sold to others, and taken up by himself, will not preclude the sureties from showing that, in fact, he had not collected these moneys, and was not in possession of them at the date of the bond. *United States v. Boyd*, 5 How., 29.

§ 466. The sureties on the official bond of a receiver of public money are only liable for moneys received subsequent to the date of the bond, and a declaration in an action against such a surety which does not show that the moneys were received between the date of the bond and the end of the receiver's official term is fatally defective. *United States v. Spencer*, 2 McL., 408.

§ 467. While a surety is not liable for money placed in his principal's hands after his term has expired, he is liable for money received while in office, but for which he fails to account after his term has expired. *United States v. Nicholl*, 12 Wheat., 505 (§§ 671-673.)

§ 468. Sureties on an official bond, conditioned for the faithful performance of the duties of the office during the continuance of the incumbent therein, are not liable for moneys received by their principal after his removal from office. *United States v. Giles*, * 9 Cr., 212.

§ 469. Sureties on an official bond are not liable for past defaults of their principals, unless the bond is so conditioned. *Farrar v. United States*, 5 Pet., 373 (§§ 489-494).

§ 470. A count on an official bond which does not show that the money for which sureties are sought to be held responsible was received by their principal after the date of the execution of their bond, and contains no averment that such moneys, if received before, remained in his hands after date, is insufficient. *United States v. Linn*, 1 How., 104.

§ 471. **By what law governed.**—The sureties of an officer on his official bond are liable for the faithful performance of all duties imposed on him, whether by laws previous or subsequent to the execution of the bond, if they properly belong to and are within the scope of the particular office, and not for those unconnected with it, and which cannot be supposed to have been contemplated by the parties at the time they executed the bond. So sureties in a distiller's bond were held not responsible for salary and expenses of store-keepers, charged against distillers and proprietors of bonded warehouses by a joint resolution of congress, passed after the bond was entered into. *United States v. Singer*, 2 Biss., 226. See §§ 390, 392-395.

§ 472. It seems that the sureties on an official bond, conditioned that the principal shall faithfully expend moneys received by him for a specific object, are not liable for the expenditure of moneys received by him for other purposes. *United States v. Willard*, * 1 Paine, 589.

§ 473. The sureties on an official bond are liable for the faithful performance by the principal of acts imposed by a law passed after the execution of the bond. *Chadwick v. United States*, * 8 Fed. R., 750.

§ 474. The sureties on the official bond of a consul, conditioned that he shall faithfully perform the duties of his office according to a certain act of congress, are not liable for moneys coming into his hands for a purpose not embraced by the act mentioned, though he is himself liable therefor, and both he and they are liable if the purpose for which the money came into his hands was one embraced within the act. *United States v. Bell*, * Gilp., 41.

§ 475. Miscellaneous.—Though any fraudulent and collusive attempt between a principal and surety to cover up their effects would be void, yet the principal may *bona fide* secure the surety against the latter's contingent liability. *Leggett v. Humphreys*, 21 How., 66 (§§ 486-488).

§ 476. The sureties on a collector's bond are liable for moneys turned over to the collector by his predecessor or transmitted to him by order of the government. *Broome v. United States*, 15 How., 143 (§§ 552-555).

§ 477. Where additional duties are imposed upon a collector by the superior officers of the department, if the duties are properly imposed, the liability of the parties to his bond is not affected, and, if improperly imposed, neither he nor his sureties are bound for any failure to discharge such duties, but he and his sureties are still bound for the proper discharge of his duty as collector. *United States v. Gaussen*, * 2 Woods, 92.

2. Amount of Recovery.

SUMMARY.—*Liability cannot exceed that of principal*, § 478.—*Judgment a defense*, § 479.—*Not liable beyond penalty*, §§ 490, 491; *damages not recoverable*, § 492.—*Money received prior to execution of bond; evidence*, § 493.—*Liable for costs and interest*, § 494.

§ 478. The liability of a surety cannot exceed the liability of his principal; and where the liability of the principal has been fixed by a judgment against him, a judgment against the surety for the same amount cannot be reversed because it is too small, even though the judgment against the principal may be reversed for that reason. *United States v. Allsbury*, § 485.

§ 479. In an action on an official bond in a federal court judgment was rendered in favor of the surety, but on appeal the judgment was reversed, and the case remanded for further proceedings. Pending the appeal the property of the surety was seized on execution on judgments in the state courts and the full amount of the penalty collected. *Held*, that this was a good defense in the former action. *Leggett v. Humphreys*, §§ 486-488.

§ 490. Sureties are not liable beyond the amount of the penalty named in the bond. They are never held responsible beyond the clear and absolute terms and meaning of their undertakings. Presumptions and equities are never allowed to enlarge or in any degree change their legal obligations. *Ibid*.

§ 481. A judgment against the sureties on an official bond cannot exceed the penalty named in the bond. *Farrar v. United States*, §§ 489-494.

§ 482. In an action against the sureties on an official bond, where the issue tried is whether the principal has paid over certain moneys, the judgment, if for the plaintiff, must be that he recover the debt, *i. e.*, the penalty of the bond, and not the damages, if the amount claimed exceeds the penalty named. *Ibid*.

§ 483. In an action against the sureties on an official bond, where part of the sums sought to be recovered were received by the principal prior to the execution of the bond, it is error to reject testimony offered by the defense to show that such sums had been converted by the principal prior to the time of the execution of the bond; and in such a case it is not necessary that a claim for such discounts be made to the treasury department before that evidence can be admitted. Such evidence does not go to lessen any existing liability but to negative its ever having existed. *Ibid*.

§ 484. Though sureties on bonds are only liable for the penalty named therein, yet in some cases they are liable for costs and interest. So where an action was brought on an official bond, and judgment against the principal and sureties was taken by default, but the default was afterwards removed and judgment was rendered against both on the trial, and it appeared that the surety had no notice of the defalcations of the principal till the commence-

ment of the action, it was held that judgment was properly rendered against the surety for costs and interest from the time of the commencement of the suit. *United States v. Hills*, §§ 495, 496.

[NOTES.—See §§ 497-501.]

UNITED STATES v. ALLSBURY.

(4 Wallace, 186, 187. 1866.)

ERROR to U. S. District Court, Western District of Texas.

STATEMENT OF FACTS.—Action on a bond was brought against Dashiel and Paschal, his surety, and judgment, which was afterwards reversed, was rendered for the United States for \$10,318.22, a part of the sum claimed. This case is against the representatives of Allsbury, who was also on Dashiel's bond as surety. After the above judgment was rendered, and before its reversal, Allsbury's case came on for trial. The judgment was pleaded *puis darrein continuance* to fix amount of recovery. The court allowed it, and so instructed the jury, who found accordingly. Wherefore writ of error.

§ 485. *In an action against a surety, judgment against his principal and co-surety fixes amount of recovery, though said judgment is afterwards reversed.*

Opinion by MR. JUSTICE NELSON.

It is unnecessary to refer to authorities to show that the liability of the surety cannot exceed that of his principal; and that amount having been fixed by a judgment at law, it formed the rule to determine the sum to be recovered in this suit. The verdict and judgment were competent evidence on behalf of the surety for this purpose; indeed the highest evidence of the fact. Other questions would have arisen if this judgment had been offered against the surety. The counsel for the government, if desirous of recovering a greater amount, should have postponed the trial of this case till the error had been corrected which was committed in the case against the principal. Then he would have been in a situation to avoid the effect of the erroneous judgment. This is the only question presented on the record.

Judgment affirmed.

LEGGETT v. HUMPHREYS.

(21 Howard, 66-80. 1858.)

APPEAL from U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—The controversy between these parties, although in its progress it has been much complicated and involved, yet, as to the principle by which its true character is defined, and by which its decision should be controlled, is simple enough. That principle is the extent of the pecuniary responsibility sustained by the surety in an official bond for the conduct of his principal. To a correct comprehension of the position of the parties to this cause, some length of detail as to the facts and pleadings it contains is necessary.

The appellee, together with one Grissom, having in the year 1837 bound himself in the penalty of \$15,000, as surety to the official bond of Richard J. Bland, sheriff of Claiborne county, in the state of Mississippi, a suit was instituted in the name of the governor of the state upon that bond, for the use of the appellants, in the circuit court of the United States for the southern district of Mississippi, charging a breach of the condition of that bond by Bland, in

having released from jail one McNider, against whom the appellants had recovered a judgment in the circuit court aforesaid, and whom, after being charged in execution in that court, the marshal had committed to the custody of Bland, the sheriff. Under certain provisions of the statutes of Mississippi, it was pleaded in defense to this action that McNider, being insolvent and unable to pay his prison fees, the appellants, who were non-residents, had failed to pay those fees, or, as required by the law of the state, to give security for their payment, or to appoint an agent within the county on whom demand for the prison fees could be made; and that in consequence of such failure, McNider had, by a regular judicial order, been discharged from jail as an insolvent debtor. Upon a demurrer to the plaintiff's replications to these pleas, the circuit court gave judgment with costs in favor of the sheriff and the appellee, Humphreys, the suit having been previously discontinued as to the other surety, Grissom. This judgment was upon a writ of error reversed by this court, and the cause was remanded to the circuit court with instructions (Bland, the sheriff, pending the cause here, having died) to enter a judgment against the appellee, as surety, for the sum of \$3,910.78, besides the costs. *Vide* McNutt v. Bland, 2 Howard, 28.

In the interval between the emanation of the writ of error and the reversal of the judgment of the circuit court, two judgments were, on motion, obtained in the state court against the sheriff and Humphreys as his surety, by the Planters' Bank of Mississippi, one for the sum of \$12,325.22, and the other for \$2,674.75, making an aggregate amount exceeding the penalty of the bond in which the appellee was surety; and the property of that surety was levied upon and sold under execution, and the proceeds applied in full satisfaction of the amount of the penalty. Upon the receipt in the circuit court of the mandate of this court, the appellee, as surety as aforesaid, moved the circuit court for leave to plead *puis darrein continuance*, the judgment, levy and satisfaction above mentioned, in fulfilment of his bond and of his liability for the sheriff; but the circuit court refused leave to plead these facts in discharge or satisfaction of the penalty, and, in literal obedience to the mandate of this court, rendered judgment against the appellee, as surety, for the sum hereinbefore mentioned. The appellee, Humphreys, then exhibited his bill on the equity side of the circuit court, alleging the foregoing facts, and averring, moreover, that no notice or process of any kind had ever been served upon him in the suit of McNutt v. Bland, but that the return of the officer of service as to the appellee was absolutely false. Upon these allegations, an injunction to the judgment at law was granted by the circuit court, but subsequently, upon a demurrer to the bill by the appellants, the injunction was dissolved and the bill dismissed. From this decree of dismissal an appeal was taken to this court, who, after a hearing, expressed the following conclusions, viz.:

"In the case before us, the surety had been compelled to pay the whole amount of his bond by process from the state courts before the present defendants obtained their judgment against him, but after the institution of their suit. This would have been a good defense to the action, if pleaded *puis darrein continuance*. The complainant tendered his plea at the proper time, and was refused the benefit of it, not because it was adjudged insufficient as a defense, but because the court considered they had no discretion to allow it. The mandate from this court was probably made without reference to the possible consequences which might flow from it. At all events, it operated unjustly by precluding the plaintiff from an opportunity of making a just and legal

defense to the action. The payment was made whilst the cause was pending here. The party was guilty of no laches, but lost the benefit of his defense by an accident over which he had no control. He is therefore in the same condition as if the defense had arisen after judgment, which would entitle him to relief by *audita querela*, or bill in equity. We are therefore of the opinion that the complainant was entitled to the relief prayed for in the bill, and that the decree of the court below should be reversed."

The cause was thereupon remanded to the circuit court for further proceedings to be had therein, in conformity with the above opinion. *Vide* 9 How., 313, 314, *Humphreys v. Leggett*. On the filing of the mandate in this latter case, the defendants (the present appellants) being ruled by the circuit court to answer the bill for the injunction, admit by their answer the recovery of their judgment against Humphreys as surety for Bland. They acknowledged their belief of the judgments in the state court against the sheriff and his surety, and the levy under those judgments, and the return of satisfaction upon the executions by the proper officer, but allege that the judgments were fraudulently suffered in order to defeat the appellants; that no money was paid under the pretended sale, and that the property was retained by Humphreys. In an amended answer, filed by leave of the court, the appellants alleged that Bland, the sheriff, had transferred the judgments in the state court, for \$10,524, to Humphreys, who, under that assignment, had received the sum of \$18,000; that he had not discharged the penalty of the sheriff's bond, and from various sources had received funds exceeding all his liabilities arising therefrom. Subsequently, viz., in 1851, the appellants, by a cross bill against the appellee, charged that Bland, to indemnify the appellee as surety in the bond of 1837, had assigned certain debts and other subjects of property, real and personal, to an amount more than equal to the penalty of that bond; that among these subjects were the fee bills due to Bland, as sheriff, to a large amount, and also the judgments set forth in the original bill as having been recovered in the state courts; and that these judgments had been discharged by Humphreys by notes purchased by him at the depreciation of fifty cents in the dollar. To this cross bill a demurrer was interposed by Humphreys, but, upon being ruled by the court to answer, he admitted that in March, 1840, Bland conveyed in a deed of that date, to Volney Stamps, the property mentioned in that deed, in trust, to indemnify the appellee as surety in the official bond of Bland of November, 1837, and to indemnify the same appellee and one Flowers, as sureties for Bland on his official bond of 1839, and to save them harmless against *all loss and damage, and all money paid or charge or expense to be incurred*, in consequence of being sureties in the said official bonds. He admits that so much of the property as could be found has been sold by the trustee, and that from the proceeds of sale, after deducting the expenses of sale, respondent has received three-fourths, amounting to \$3,825, and the said Flowers one-fourth, amounting to \$1,275, which make the whole amount that has been realized from the trust fund. He admits that in 1840, for his further indemnity, Bland assigned to him all the fees then due to the former as sheriff of Claiborne county, but alleges that from this source there has been received an aggregate amount of only \$3,288.17, as shown by the statements of the persons employed in the collection of those fees, filed as exhibits with the answer. The respondent further admits that after the recovery by the Planters' Bank of the \$12,325.22 against said Bland and respondent, which recovery was founded on an original judgment of the said bank against P. Hoopes, J. H. Moore and John M. Car-

penter, the said Bland claiming to be the owner of that judgment, did assign all his rights and interests therein to respondent for his indemnity, as he had to pay the penalty of the bond.

The respondent claims the benefit of that judgment, but alleges that he has collected nothing under it from either Hoopes or Moore, each of whom became insolvent prior to 1840, and still continued insolvent. That the judgment of the Planters' Bank against Campbell, Pierson and Moore for \$3,702.66 had always been unproductive and worthless, and that nothing had been or would be received therefrom, by reason of the insolvency of the defendants in that judgment. That in a suit pending in the superior court of chancery of the state of Mississippi, upon a creditor's bill, the respondent has exhibited the former judgment of the Planters' Bank for \$10,855.93, as a claim against the estate of H. Carpenter & Co., and the commissioner has reported it as a valid claim for that amount, with interest thereon from November 1, 1840. That this report having been excepted to and remaining still a subject of contest, the court of chancery had in the meantime, out of the funds of the estate, ordered the payment to the appellee of the amount of the said judgment or claim for \$10,855.93, with interest, amounting in the whole to \$18,852.75, upon his entering into bond with security to refund that amount in the event that it should be disallowed by the court. With this answer denying his having been indemnified, were exhibited, as parts thereof, the deed of trust from Bland, the amount of fees collected under the assignment from Bland, and a statement of the account between Bland and Humphreys. With the original bill of Humphreys were exhibited, also, the bonds in which he was bound as surety, the records of the judgments on motion against the sheriff and Humphreys; and by the deposition of Maury, the attorney for the Planters' Bank, was proved the satisfaction of those judgments by sales of the property of Humphreys under execution. At the May term of the circuit court in the year 1856, this cause having been submitted to the court upon the original bill, the answer and replication, and the exhibits and proofs, and upon the cross bill and the answer thereto, and upon the exhibits therewith, the following decree was then made: "It is ordered, adjudged and decreed that the injunction heretofore granted in this cause be made perpetual, and that the defendants, Leggett, Smith and Lawrence, and their agents and attorneys, be and they are hereby forever enjoined and restrained from taking out any execution upon a certain judgment rendered on the law side of this court, on the 14th day of May, 1845, in favor of Alexander McNutt, governor, suing for the use of Leggett, Smith and Lawrence, against the said Humphreys, the complainant, for the sum of \$6,355.33, being the judgment mentioned in the bill of complaint in this cause, and that they be forever enjoined and restrained from taking or adopting any step or proceeding to enforce the payment of the said judgment by the complainant Humphreys, or the collection thereof out of his estate. And it is further adjudged and decreed that the said complainant do recover of the said defendants his costs of suit to be taxed." This decree having been brought by appeal before the court, its legality and justice are now the subjects for our examination.

With reference to the defense essayed by the defendant in the suit of McNutt v. Bland, after the filing of the mandate of this court in that cause, the opinion of this court in the case of Humphreys v. Leggett would seem to be conclusive, both as to the period at which the defense was proffered, and the legitimacy and sufficiency of the defense, if substantiated by proof. The facts

tendered in defense coming into existence after the issues previously made up, were not on that account less essentially connected with the character of the controversy, nor could the defendant for that reason have been justly deprived of their influence upon that controversy. He appears to have sought to avail himself of the earliest and only opportunity for alleging them by plea *provis darrein continuance*. In support of his right so to plead, it would be adding nothing to the clearly expressed opinion of this court, in the 9th of Howard, to refer to cases collated in elementary treatises on pleading.

§ 486. *The obligations of a surety cannot be extended by implication. The terms of his contract will be strictly construed.*

In judging of the character or sufficiency of the defense alleged for the exemption of the appellee, there should be taken as a guide the rule, which is perhaps without an exception, that sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings. Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations. This rule is thus forcibly put by Chancellor Kent in the third Commentaries, p. 124, where he says: "When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle is well settled that the case must be brought strictly within the terms of the guaranty, and the liability of the surety cannot be extended by implication." It will be seen that, to a certain extent, even the creditor whose claim the surety has under the terms of his obligation been compelled to satisfy, may be required to co-operate in effecting the indemnity of the latter. Thus it is said, on the same page of the work just quoted, that "the claim against a surety is *strictissimi juris*; and it is a well settled principle that a surety who pays the debt of his principal will in a clear case in equity be substituted in the place of the creditor to all the liens held by him to secure the payment of his debt; and the creditor is bound to preserve them unimpaired when he intends to look to the surety." For this doctrine are cited numerous English and American authorities.

§ 487. — *authorities reviewed.*

In the case of *Graves v. McCall*, 1 Wash., 364, it is said by the court of appeals of Virginia "that a court of equity will not charge a surety farther than he is bound at law; but if a surety bound at law cannot be charged there for the want of the instrument of which the creditor is deprived by accident or fraud, a court of equity will restore the paper to its *legal force*." In the case of *The United States v. White*, 4 Wash., 414, it is ruled by Washington, justice, "that a surety can never be bound beyond the scope of his engagement, and therefore a surety for the faithful service of B. as clerk to C., who afterwards enters into partnership with D., is not liable for unfaithful conduct to C. and D." The same law has been explicitly and repeatedly ruled by this court, as will be seen in the cases of *Miller v. Stewart*, 9 Wheat., 680 (§§ 729-735, *infra*); *McGill v. Bank of United States*, 12 Wheat., 511 (§§ 566, 567, *infra*); *United States v. Boyd*, 15 Pet., 187 (§§ 409-411, *supra*).

The principle which limits the liability of the surety by the penalty of his bond inheres intrinsically in the character of his engagement. He does not undertake to perform the acts or duties stipulated by his principal, and would not be permitted to control their performance; and *could not*, where his principal was a public officer, legally assume the functions of that principal. The undertaking of the surety is essentially a pledge to make good the misfeasance or non-feasance of his principal to an amount co-extensive with the penalty of

his bond. In addition to this interpretation resulting from the character of the obligation of the surety, the statute of Mississippi, which necessarily enters into and controls all contracts made under its authority, expressly limits the responsibility of a surety in a sheriff's bond to the amount of the penalty of that bond. *Vide* Hut. Miss. Co., p. 441, art. III, sec. 1. Indeed, it has scarcely been contested in argument in this case that the extent of the surety's liability upon the sheriff's bond was measured by the amount of the penalty. The great effort of counsel has been to show in this case that satisfaction of the penalty of the bond has not been honestly made, but has been fraudulently evaded. 1. By the provisions of the deed of trust for the indemnity of the appellee, and in the application of the property thereby conveyed, and by the subsequent assignment of fees to a large amount, exceeding together in value the judgments of the Planters' Bank against the sheriff and his surety. 2. By the sale of the property of the appellee under the executions in behalf of the Planters' Bank at a sacrifice greatly below its value.

The force of these positions will now be considered.

§ 488. *A principal may indemnify his surety, and the proceeds of such indemnity cannot increase the liability of the surety.*

Whilst it may be conceded that a fraudulent combination between the officer and his surety, for the purpose of shielding the property of both or either from just responsibility, and in contemplation of delinquency in the former, would have the effect of vitiating any compact or instrument made with such a design, it is undeniable that an open and honest effort of a principal to protect his surety against casualties incident to a responsibility about to be assumed for him cannot be obnoxious to objection; and it is equally clear, that the simple fact of the existence of such an effort, unattended by any known *indicium* of fraud, and unassailed by plain or probable direct proofs, can warrant no just impeachment of such an effort, which may be praiseworthy and just with reference to its object, and calculated to promote the performance of services to the public which otherwise could not be undertaken. The practice of providing such an indemnity for sureties is known to be usual and frequent, and it would be difficult to imagine an objection, either legal or moral, to its application to the extent to which the surety had been made answerable upon his bond. The right of a debtor, in the first instance, to apply his payments wherever his funds are not specifically bound, is universally admitted. The judgment of the circuit court in the case of *McNutt v. Bland* having been against the plaintiff, and the deed by Bland for the indemnity of the appellee having been executed for a *bona fide* consideration pending the proceedings on the writ of error to the circuit court, and no final judgment of that court having been entered to this day, there was no specific lien on the property of Bland which prevented its appropriation in exoneration of his surety, or which forbade any payments or assignments by him in discharge of his liability. A strong illustration of this position may be seen in the case of *The United States v. Cochran*, decided by Marshall, chief justice, and reported in the second volume of *Brockenbrough's Reports*, p. 274 (2 Marsh., 274). It is one of that class in which priority is claimed for the United States in instances of insolvency of their debtors. It is thus stated by the judge:

"Robert Cochran, collector at the port of Wilmington, N. C., being very largely indebted to the United States, made a deed of his property for their benefit. Previous to the execution of this deed he deposited \$10,000, the amount of the bond executed to the United States for the faithful performance

of his duty, in a trunk, which was placed in the bank, and absconded. From Baltimore he addressed a letter to his sureties, requesting the trunk to be taken out and the money to be applied to their exoneration. The money was received at the treasury, and the bond given up. It being afterwards discovered that this was the money of the collector, and not of the sureties, this suit is brought to compel the sureties to pay the amount of the bond, considering the money received as constituting no equitable discharge as to them. . . . The act of congress does not transfer the property itself to the United States, but subjects it to their debts in the first instance. The assignee holds it as the debtor would hold it, liable to the claim of the United States, and if he converts it to his own use, or puts it out of the reach of the United States, he is undoubtedly responsible for its value. . . . But the power of the debtor to apply his payments is co-extensive with that of the creditor. This principle has, it is believed, never been denied. If it be correct, then the power of Mr. Cochran to apply this sum of money in discharge of the bond, and in exoneration of the sureties to it, is co-extensive with that of the United States to make the same application of it. If, then, Mr. Cochran had without any assignment of his property paid this money into the treasury, with a direction that it should be applied to the bond, he would have exercised a right which the law gives to every debtor. . . . Does the transfer of this money to the sureties change the law of the case? We think not. It has been very properly argued that the act of congress gives to the debt due to the United States priority over debts due to individuals, but not to one part of the debt due to the United States over any other part of it; nor does it vest the property absolutely in the United States, though it gives them the right to pursue it for the purpose of appropriating it in payment. It would seem to follow that the right to apply payments whilst the money is in the hands of the debtors is not affected by the act of congress, but remains as it would stand independent of that act. If, then, the sureties had declared to the treasury department that the money was received from Mr. Cochran to be paid in discharge of their bond, and had tendered it in payment thereof, we think the tender would have been valid, and might have been pleaded in a suit on the bond."

This was a case where there was a legal priority in the creditor, where there existed a *quasi* lien, or a restriction upon the power of the debtor to dispose of his property, so as to exempt it or its value from the claim of the creditor. In the case under consideration, no such restriction existed; no lien by judgment or other specific claim upon the property conveyed in trust to Stamps; and no evidence having been adduced of a fraudulent purpose in making that conveyance, no valid objection is perceived to an application of the proceeds of that conveyance towards the indemnity of the surety; and these proceeds, together with the amount of the sheriff's fee bills collected, it is shown by the testimony, are far short of the penalty of the bond discharged by the surety. The right to any surplus which, upon a settlement between the appellee and Bland, or his representatives, may remain in the hands of the former, we regard as not involved in, nor pertinent to, this controversy, which relates regularly and exclusively to the question whether the appellee, as the surety for Bland, has fulfilled the exigency of his bond by a satisfaction of the penalty.

In answer to the objection which has been urged, and founded on the alleged sacrifice of the property of the appellee in the sale under the judgments of the Planters' Bank, it may be remarked that the relevancy or force of such an objection is not perceived. The questions here are these, and these only, viz.:

whether the penalty of the bond executed by the appellee has been satisfied, or whether there remains still a portion of that penalty of which the appellants can claim the benefit? The judgments in favor of the bank, the levy upon the property of the appellee, the sale and satisfaction to the full amount of the penalty, are facts all established of record. Whatever sacrifice of the property of the appellee, by these undoubted proceedings, may have been produced is his loss, and his only, and can in no wise affect the validity of his release by the fulfilment of his obligation. The decree of the circuit court is therefore affirmed, with costs.

FARRAR v. UNITED STATES.

(5 Peters, 373-389. 1831.)

ERROR to U. S. District Court, District of Missouri.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This was a suit instituted below, against the plaintiffs here, to recover a debt of \$30,000, for which they had become bound to the United States, as sureties for one Rector, who is described in the bond as “surveyor of the public lands in the states of Illinois and Missouri, and the territory of Arkansas.” The plea was performance, and the breach alleged in the replication is in these words: “That at the time of the execution of the bond, there were in the hands of the said William Rector, as such surveyor, to be by him in the discharge of the duties of his office applied and disbursed for the use and benefit of the plaintiffs, divers sums of money, amounting, etc., and that the said William Rector hath not applied and disbursed the same money, or any part thereof, for the use and benefit of the plaintiffs, as in the execution of the duties of his said office he ought to have done.” On this plea issue was taken, and at the trial a bill of exceptions was taken to sundry instructions of the court, given or refused, which will be considered in their proper place. Two questions of a more general character must first be disposed of.

§ 489. *Judgment cannot be rendered against sureties in an official bond for a greater amount than the penalty of the bond.*

The first arises on the form of the judgment; the jury having found for the plaintiffs below, on the breach assigned, assess the damages for breach of the condition at \$41,000; and the judgment rendered is *quod recuperet*, the damages, not the debt aforesaid. The parties, plaintiffs in error, are the sureties, and it is perfectly clear that, as to them, a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is actually due; which of course can only be where it is a sum less than the penalty. It is proposed on behalf of the United States to release the surplus, and such is their right; but this still leaves the form of the judgment uncured and unamended.

§ 490. *Judgment against a surety on an official bond should be for the aforesaid debt, i. e., the penalty of the bond.*

It would seem that, in adopting this form of rendering judgment, the court below has been misled by the application of the twenty-sixth section of the act of 1789 to this subject. If so, it is a clear misapprehension; since that section, if it sanctions such a judgment at all, is expressly confined to three cases: default, confession, or demurrer; with neither of which is the present case affected. There is no doubt, then, that the judgment must be reversed on this ground; but as other points, as well as those made in the bill of exceptions, might again

embarrass the cause in the court below, and would most probably bring it back again here, it becomes necessary to consider those points.

§ 491. *A surveyor of public lands is required by law to give bond and security.*

The second preliminary point alluded to is, whether the bond was not taken without law, or contrary to law, so as to be illegal and invalid. This turns on the official character assigned to Rector in the bond, or on that in which in fact he is to be regarded in law. He is described as "surveyor of public land" in certain districts, not as surveyor-general. And such, in fact, was his literal character, for the office of surveyor-general still exists, nominally unique, although a large proportion of his powers and duties have been transferred to the surveyors of public lands in certain districts, subsequently detached from the region over which his powers were originally extended. In deciding on this point three questions are to be considered; first, whether he was bound to give bond at all; secondly, whether the words of the condition embrace the duties of a disbursing officer; and thirdly, whether those duties were incident to his office. Upon looking through all the laws passed upon this subject, it can hardly be doubted that this officer was intended to be included in the provision of the act of May 7, 1822, requiring security of the surveyor-general. Literally, there was at that time provision made under the laws for only one surveyor-general; but it is abundantly evident that the officer who gave this bond was intended to be included in the provisions of that act, under the description of a surveyor-general. The indiscriminate use of this appellation in the previous and subsequent legislation of congress on the subject will lead us to this conclusion.

Until the passing of the act of February 28, 1806 (2 Stats. at Large, 352), all the surveying for the United States was carried on under the provisions of the act of May 18, 1796 (1 Stats. at Large, 464), as amended by the act of May 10, 1800 (2 Stats. at Large, 73), and under the control and superintendence of the surveyor-general. In the year 1806, after the purchase of Louisiana, the powers of that officer were extended to the country newly acquired, and he was enjoined to appoint a sufficient number of skilful surveyors as deputies, one of whom, to be appointed with the approbation of the secretary of the treasury, was to assume the character of principal deputy, and to exercise over the co-deputies the general power vested in, and exercised previously by, the surveyor-general. The subordinate character of all these officers was distinctly marked by that act, and yet we find that, in the act of March 3, 1807 (2 Stats. at Large, 440), in the second section of the act, the epithet of surveyor-general is expressly applied to that individual of them who should have been employed in surveying the public lands south of the Tennessee. 4 Laws U. S., 111. Yet, at a subsequent day, to wit, March 3, 1815 (3 Stats. at Large, 228; 4 Laws U. S., 834), we find the same officer designated generally as a surveyor of that district of country. So, also, when the act of April 29, 1816 (3 Stats. at Large, 325), was passed, which abolished the appointment of these deputies, and conferred the appointment of their present substitutes upon the president, the latter are simply designated as a surveyor, and not surveyor-general. Yet, when the act of May 7, 1822, is passed, requiring bond to be given by these officers, it is expressed altogether in the plural number, as recognizing the existence of more than one surveyor-general. There were, then, no other officers in existence, besides the actual surveyor-general, who could come within the literal enactments of that statute, unless we include a surveyor appointed under the

provisions of the act of April 29, 1816. That is the present obligor. And if further confirmation be required to establish the necessary extension of the provisions of that law to the present cause, we have it in the act of May 26, 1824 (4 Stats. at Large, 66), in the second section of that act, the language of which expressly recognizes the existence of more than one surveyor-general. It is clear, then, that from the time that the appointment of deputies by the surveyor-general was superseded by the appointment of surveyors by the treasury department, the independent character in which those officers then acted identified them with the surveyor-general so far as to have led to the use of language, by congress, adapted to confounding them with the surveyor-general.

§ 492. *A surveyor of public lands is a disbursing officer of the government.*

We, therefore, have no doubt that they were included in the provisions of the act which required bonds to be taken on their accession to office. Nor do we think that there is any more doubt that the law contemplates them as disbursing officers. It is express in requiring them to give bond for the faithful disbursement of public money; and *cui bono* do this if they were not regarded as disbursing officers?

§ 493. *The statute requiring the surveyor to give bond for the faithful disbursement of public money and faithful discharge of duty, does a bond for the latter only cover breaches of the former duty?*

But the words of the statute which relate to disbursements are omitted from the condition of this bond, and the only words inserted are, "that he shall faithfully discharge the duties of his office." The court feel no difficulty in maintaining that, where the conditions are cumulative, the omission of one condition cannot invalidate the bond so far as the other operates to bind the party. But the question is one of much more difficulty, whether, where the law is express that the condition shall be both for the faithful disbursement of money and the general discharge of duty, and the latter only is inserted, the former may still be held to be comprised within the general words of the latter. But for the language used in the statute, the court has no doubt that the case would have been open to proof, that the disbursement of money was one of the known and habitual duties of the office, and included in the general words; but whether the omission of the express words which imposed this liability does not preclude a resort to their restoration incidentally by proof, is a question on which the court have felt much difficulty, and which they will not now decide.

The next questions to be considered are those presented by the bill of exceptions, and of these, that which goes to the sufficiency of the certificate has already been disposed of in the case of *Smith v. United States*, 5 Pet., 292, in which the same form of certificate was held to be a substantial compliance with the law under which it was resorted to as proof.

The remaining questions grow out of this state of facts. Rector was appointed surveyor, or, at least, commissioned as such on the 13th June, 1823, and this bond bears date the 7th August, 1823. Between the 3d of March and the 4th of June in the same year there had been paid to him from the treasury the sum of money found by the jury. So that it was paid to him before the commission and before the bond in proof. On this state of facts the bill of exceptions asserts three grounds of defense. 1. That the sureties could not be made liable at all for the money so paid. 2. That if at all, they ought to be let into proof that Rector had appropriated the money to his own use before the date of the bond; or, 3. That he had paid it, or enough of it to cover the

penalty of the bond to the use of the United States before they became bound for him.

§ 494. *Sureties are not liable for past defaults unless made so by the terms of their bonds.*

On these points we feel no difficulty in affirming that, for any sums paid to Rector prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is on the presumption that he still held the money in bank or otherwise. If still in his hands, he was, up to that time, bailee to the government; but upon the contrary hypothesis, he had become a debtor or defaulter to the government, and his offense was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct. They ought, therefore, to have been let into proof of the actual state of facts so vitally important to their defense; and whether paid away in violation or in execution of the trust reposed in him, if paid away, he no longer stood in the relation of bailee. It was not, then, a case to which that act (1 Stats. at Large, 515) applies, which requires the submission of accounts to the treasury before discounts can be given in evidence, since this defense goes not to discharge a liability incurred, but to negative its ever existing. In giving instructions to the jury on these points, therefore, the court erred, as well as in refusing to let the defendants into proof, as prayed, since such testimony presents a direct negative to the breach alleged, which is, that the obligor then had the money in his hands. Judgment reversed, and *venire facias de novo* awarded.

UNITED STATES v. HILLS.

(Circuit Court for Massachusetts: 4 Clifford, 618-623. 1878.)

§ 495. *Sureties are, in many cases, bound beyond the penalty of their bond for costs, and interest which has accrued by their own fault.*

Opinion by CLIFFORD, J.

Sureties, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as accrued from their own default in unjustly withholding payment after being notified of the default of the principal. *Lyon v. Clark*, 8 N. Y., 155; *Welch v. Clarkson*, 6 Term R., 304. When allowed, it is upon the ground that a debt which is due, and the payment of which is wrongfully delayed, should carry interest. *The Northumbria, L. R.*, 3 Adm. & Ecc., 11. Interest from the date of the writ may be allowed, and for no greater amount, where the case is heard on an agreed statement of facts. *Ives v. Merchants' Bank*, 12 How., 164.

STATEMENT OF FACTS.—Sufficient appears to show that Frederick C. Hills was appointed acting assistant paymaster and clerk in the navy; that he gave an official bond in the penal sum of \$5,000, conditioned that he should faithfully discharge all his duties as such officer; and that the defendant was one of his sureties in that bond. Contrary to the stipulation of the bond, the principal made default, as charged in the declaration; that is, he did not faithfully discharge all his duties as such assistant paymaster and clerk. Instead of that, he failed to pay over to the United States property, money and bonds in his hands, belonging to the United States, which it was his duty to pay over and account for, within the meaning of his said official bond. Due request to the principal is alleged and his refusal to comply. Service was made, and the

principal and surety failing to appear, they were defaulted. But they subsequently appeared, and the default was taken off. Suffice it to say, without entering into the details of the proceedings, that judgment was rendered against the principal in favor of the United States, for the whole amount claimed by the United States, including principal, with interest from August 24, 1864, to December 31, 1877, the date of the judgment, and taxable costs. Interest as against the surety was allowed only from the date of the writ, the judgment against him being for the sum of \$515 debt, and interest from the date of the writ to the date of the judgment, with costs of suit. Exceptions were duly filed by the plaintiffs to the ruling of the district court that the surety was liable for interest only from the date of the writ. Error to that effect having been duly assigned, the plaintiffs sued out a writ of error and removed the cause into this court.

§ 496. — *authorities reviewed.*

Interest is only claimed by the plaintiffs from the date of the last sum received by the principal. When the accounts of the principal were adjusted by the accounting officers of the treasury does not appear; but it does sufficiently appear that no demand was ever made of the surety; nor is it pretended that he ever had any notice of the default of the principal prior to the commencement of the suit. Authority for the rule adopted by the district court is found in the case of *M'Gill v. Bank*, 12 Wheat., 514 (§§ 566, 567, *infra*), where interest was allowed only from the date of the writ. Prior to that there was no default of the surety, as he had no notice that the principal had committed any breach of the bond. Where a bond, with a penalty, is given for the performance of covenants, the recovery must be limited to the penalty, especially in the case of sureties. *Bank of U. S. v. Magill*, 1 Paine, 670. Had there been any previous demand of the penalty, or any acknowledgment that the whole was due, the court intimated, in that case, that interest might have been recoverable from that time. Sureties are only bound to the extent of the obligation expressed in their covenants, unless they are themselves guilty of default, or appear and make defense, in which case they become responsible for costs, and, in many cases, for interest by the way of damages for the delay of payment. *The Wanata*, 95 U. S., 612. Aid may also be derived in the solution of the question from the decisions of the British courts in construing the act of parliament passed to limit the liability of ship-owners. By that act the liability of ship-owners, in the cases therein specified, was limited to the value of the ship and freight. Cases have arisen under that act where it is held that the court cannot decree against the owner for any excess of damages beyond the proceeds of the ship. *The Volant*, 1 W. Rob., 383. But it is settled law that defending owners, in such a case, are liable for costs even beyond the proceeds, because to that extent they are in fault. *The John Dunn*, *id.*, 160. And Lord Denman sustained the ruling of the admiralty court. *Ex parte Rayne*, 1 Gale & D., 377; *Gale v. Laurie*, 5 Barn. & Cress., 156.

Replevin bonds are bonds with a penalty, and where property was replevied and a bond given for a return in case the plaintiff was defeated, the recovery of the property having been demanded and refused, a suit was brought upon the bond. Held by the supreme court of Massachusetts, that judgment should be rendered for the penal sum of the bond, with interest from the demand. *Leighton v. Brown*, 98 Mass., 516; *McClusky v. Cromwell*, 11 N. Y., 593. Interest, say the same court in another case, where the suit was against the sureties of a defaulting cashier, is to be added as damages for the detention of the

money, for such time as the case shows that the defendants have been in default for its non-payment. As a general rule, say the court in that case, where a debtor is in default for not paying money in pursuance of his contract, he is liable for interest thereon from the day of his default, and when a demand is necessary to put the debtor in fault, interest is to be given only from the demand. Where interest is not stipulated for as part of the contract, it is given by way of damages for the detention of the money. If the surety becomes charged, by the default of the principal, for the amount of the penalty, or any portion of it, then it is his duty to pay the same on demand, and, if he neglects or refuses, the general principle as stated, applies, and the interest is added by way of damages for his own default, not as enlarging in any degree his liability for the misconduct of the principal. *Bank v. Smith*, 12 Allen, 252; *Brangwin v. Perrott*, 2 W. Bl., 1190. Interest may be recovered on the judgment, *transit in rem judicatum*, but not on the bond. *McClure v. Dunkin*, 1 East, 436; *Heford v. Alger*, 1 Taunt., 220; *Clark v. Bush*, 3 Cow., 158.

Authorities of a standard character decide that the surety, as a general rule, is not liable beyond the amount of the penalty, even though the principal and interest due by the condition of the bond exceed that amount. Yet the same authorities admit he may make himself liable for interests and costs even beyond that amount, if he delays the collection of the money by litigation. *Mower v. Kip*, 6 Paige, 88. Whenever a debtor, whether principal or surety, is in default for not paying money, delivering property or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which he has done him by such neglect. *Van Rensselaer v. Jewett*, 2 N. Y., 140; *Leggett v. Humphreys*, 21 How., 75. Except where there is an express contract to pay interest, it is only recoverable as damages for the detention of the money which the party ought to pay. *Abbott v. Wilmot*, 22 Vt., 437; *Evans v. Beckwith*, 37 Vt., 285; *Simmons v. Almy*, 103 Mass., 36. Bail-bond sureties, say the same court, are liable only for the penalty of the bond with interest from the return of *non est inventus* as to the principal. *Id.*, 398. Suppose that is so, still the attempt is made in argument to show that the United States are entitled to greater rights by virtue of the provision contained in section 26 of the judiciary act, which provides that in certain cases the court before whom the action is shall render judgment for the plaintiff, to recover so much as is due according to equity. 1 Stat. at L., 87; R. S., § 961. Under that provision the judgment is not for the penalty of the bond, but for so much as is due according to equity; and the provision is, that if the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury. Neither party made any such request in this case, and the matter was properly determined by the court. But the provision has no application whatever to the question involved in the present writ of error. It is cited in argument as a new provision, but it has been in force since our judicial system was organized, and it was never heard that it was intended to enlarge the liability of a surety in such a case as that before the court. *United States v. Curtis*, decided Mass. District, May Term, 1876. For these reasons I am of the opinion that there is no error in the record.

Exceptions overruled, and judgment affirmed.

§ 497. Amount of recovery.— The complainant was a surety in the official bond of a sheriff. The defendant brought suit thereon in the federal circuit court, where judgment went against him. On error the supreme court reversed this judgment and remanded the cause, with directions to enter judgment against complainant, the surviving surety. Pending the

writ of error, judgments were obtained in the state courts upon the bond, and the whole amount of the penalty collected by the sale of complainant's property on execution. Complainant applied to the court to plead his payment of the penalty *puis darrein continuance*, but his application was refused. The local laws of the state limited the liability of sureties in sheriffs' bonds to the amount of the penalty. *Held*, that complainant was entitled to have the execution of the defendant's judgment at law enjoined. *Humphreys v. Leggett*, 9 How., 297.

§ 498. Where a bond with a penalty is given for the performance of covenants, the recovery must be limited to the penalty, although damages may have been sustained to a greater amount. (But it is suggested that the rule might be different in case of bonds for the payment of money only.) Interest, in addition to the penalty, may be recovered, but only from the commencement of the suit, where there has not been a demand. *Bank of United States v. Magill*,* 1 Paine, 661.

§ 499. Sureties had made partial payments, on account of the breach of the bond, before the institution of the suit. In entering judgment in a suit on the bond, the court did not allow interest on such partial payments. *Held*, no error. Sureties are discharged only on the payment of the penalty of the bond, interest and costs. *McGill v. Bank of United States*, 12 Wheat., 511 (§§ 566, 567).

§ 500. In an action on a collector's official bond against the administrator of the estate of a surety, deceased, who had paid away the assets of the estate of his intestate, before notice of the claim of the United States upon the bond, *held*, that the payment was not a *devastavit*, and that the judgment could not exceed the penalty of the bond. *United States v. Ricketts*, 2 Cr. C. C., 558.

§ 501. The sureties of a defaulting officer are only liable for interest from the time they have notice that a definite sum is due from their principal. *United States v. Curtis*,* 10 Otto 119.

3. Signing Conditionally.

SUMMARY — *Acknowledgment and delivery, effect of*, § 502. — *By what law governed*, § 503. — *Estoppel by delivery*, § 504.

§ 502. The unconditional acknowledgment of a United States paymaster's bond by two sureties, and its delivery to the government, is sufficient to rebut any inference against its validity, drawn from the simple fact of its not having been signed by a third person whose name appeared as a surety on the face of the bond; there being no evidence before the court that the two sureties signed the bond to be delivered on condition that the third should sign it also. *Duncan v. United States*, §§ 505-510. See § 512.

§ 503. A United States paymaster's official bond, executed in Louisiana, is governed, both as to its execution and obligation, by the common law and not by the civil law which was in force in that territory at the time. *Ibid.* See § 379.

§ 504. Where a distiller's bond in all respects regular upon its face has been delivered to the proper government officer without notice of any condition, the sureties thereon are estopped to deny their liability thereon on the ground that they signed only on condition that the bond should not be delivered until another party should sign as co-surety. *Dair v. United States*, § 511.

[NOTES.— See §§ 512-516.]

UNCAN v. UNITED STATES.

(7 Peters, 435-452. 1833.)

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.— This writ of error is prosecuted to reverse a judgment of the district court, which exercises circuit court powers, in the state of Louisiana.

In the year 1829 an action was commenced by the United States against the plaintiffs in error, on a bond given by William Carson, as paymaster, and signed by A. L. Duncan and John Carson, as his sureties. The bond bears date the 4th day of March, 1807, and contains a condition "that, if the above-bounden William Carson, paymaster for the United States of America, do and shall well

and truly, according to law, perform and discharge the duties of said office of paymaster, etc., within the district of Orleans, then the obligation to be void," etc. The breach alleged in the petition was, that William Carson, paymaster, etc., "has not well and truly, according to law, discharged and performed the duties of said office for the district of Orleans; but that, on the contrary, he did, in his life-time, receive large sums of money in his capacity aforesaid, which, although frequently requested, he refused to pay into the treasury of the United States." The defendants in their answer say that, "by and in said bond, it was stipulated and understood, when the same was signed by Abner L. Duncan, as security for said Carson, that one Thomas Duncan should also sign the same, as his co-surety, but that the said Thomas Duncan never did sign the same, and said bond never was completed, nor was said A. L. Duncan ever bound thereby." They also aver that they are not liable for the alleged defalcation in the accounts of said Carson, because he acted as paymaster out of the limits of the district of Louisiana, and the said deficiencies, if any exist, occurred without the limits of said district. Before the jury were sworn, the defendants offered a statement to the court, for the purpose of obtaining a special verdict on the facts, in pursuance of the provisions of the tenth section of a statute of Louisiana, passed in 1817. But the court overruled the statement, and would not suffer the same to be given to the jury for a special finding, because it was contrary to the practice of the court to compel a jury to find a special verdict. To this decision an exception was taken.

A transcript of the accounts of Carson, duly certified by the treasury department, was then given in evidence to the jury; and the judge charged the jury, that the bond sued on was not to be governed by the laws of Louisiana, or those in force in the territory of Orleans, at the time said bond was signed by A. L. Duncan, who signed it in New Orleans, in the then said territory, but that this, and all similar bonds, must be considered as having been executed at the seat of government of the United States, and to be governed by the principles of the common law. That although the copy of the bond sued on exhibited a scrawl instead of a seal, yet they had a right to presume that the original bond had been executed according to law. That the jury were bound to presume, in the absence of all proof as to the limits of the district of Orleans, that the defalcation of Carson occurred in the district of Orleans, although it was proved that he disbursed moneys, as paymaster, at Fort Stoddart and at Washington, in the territory of Mississippi; and that, if the defendant Carson had acted as paymaster beyond the limits of the district of Orleans, it was incumbent on the defendants to prove the fact. And the judge also charged the jury that the possession of the bond by the treasury department was *prima facie* evidence of delivery,—to which charge exceptions were taken.

The jury rendered a verdict against the defendants, for \$6,126, with interest, etc. This judgment the plaintiffs in error pray may be reversed, on the following grounds: 1. Because the surety, Abner L. Duncan, is not bound; as when he executed the bond it was agreed that it should also be signed by Thomas Duncan. 2. Because William Carson was appointed paymaster for a certain district, and the judgment covers defalcations which may have occurred out of such district. 3. The rejection by the court of the statement of facts, on which a special verdict was prayed. 4. Because the rejection of this statement precluded the defendants from proving that the bond was delivered as an escrow.

§ 505. *If a surety signs an instrument upon condition that another person shall become a co-surety, he is not bound till the condition is complied with.*

As to the first error assigned, it appears, on an inspection of the bond, it was drawn in the names of Abner L. Duncan, John Carson and Thomas Duncan, as sureties for William Carson, but that Thomas Duncan never signed it. There are no witnesses to the bond, but on the day of its date it was acknowledged by William Carson and Abner L. Duncan before a notary public at New Orleans, and on the 21st day of May following John Carson acknowledged it before a notary public at Harrisburg, in Pennsylvania. To sustain this ground reference is made to a decision of the supreme court of Louisiana in the case of *Wells v. Dill*, reported in 1 Mart., N. S., 592. In their decision the court say that "The defendant is sued on the ground that he signed, as surety, an instrument purporting to be a bond, signed by Charles Blanchard, for his faithful performance of the duties of curator to the vacant estate of one Jared Risdon, deceased. In opposition to this action the defendant relies principally on the want of the signature of another person to the instrument, whose name is mentioned in the body of it as co-surety. The bond is drawn in the name of Charles R. Blanchard as principal, and the defendant and Walter Turnbull as sureties. At the bottom the names of Blanchard and Dill are affixed; that of Turnbull is wanting. We agree with the defendant that, under these circumstances, his signature to the obligation does not bind him. The contract is incomplete until all the parties contemplated to join in its execution affix their names to it, and while in this state cannot be enforced against any one of them. The law presumes that the party signing did so upon the condition that the other obligors named in the instrument should sign it, and their failure to comply with their agreement gives him a right to retract." Pothier is cited by the court to sustain this principle. There can be no doubt that, under the civil law, the principle is correctly stated by the court. It must be observed, however, that the court say the want of Turnbull's signature was principally relied on to invalidate the bond, so that there seems to have been no circumstances going to refute the presumption against its validity arising from its face, and that the omission of the signature was not the only ground of objection to it.

§ 506. *Delivery of an instrument as an escrow.*

It is a principle of the common law too well settled to be controverted, that where an instrument is delivered as an escrow, or where one surety has signed it on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen. And if it appeared in the present case that Abner L. Duncan signed the bond to be delivered on condition that Thomas Duncan should execute it, there can be no doubt the plea should have been sustained in the court below. But the delivery of the bond, as well as the signatures of the parties, is a question of fact for the jury, and this court cannot determine the legal question arising on such fact unless it be stated in a bill of exceptions. The acknowledgment of the bond by Abner L. Duncan and afterwards by John Carson, unconditionally, and its delivery to the government, would seem to rebut the inference drawn by the plaintiffs against its validity from the simple fact of its not having been signed by Thomas Duncan. There is, therefore, nothing upon the face of the record which would go to destroy the validity of this bond.

§ 507. *The local law of a state cannot affect the validity of an official bond given to the federal government.*

A question was raised and elaborately argued by the counsel for the plaintiffs,

whether this bond, having been executed at New Orleans, was not governed, not only as to the manner of its execution, but also as to the extent of the obligations incurred under it, by the principles of the civil law. In the case of *Cox v. United States*, 6 Pet., 172 (§§ 401-404, *supra*), decided at the last term, this question was settled. This is an official bond, and was given in pursuance of a law of the United States. By this law the conditions of the bond were fixed, and also the manner in which its obligations should be enforced. It was delivered to the treasury department at Washington, and to the treasury did the paymaster and his sureties become bound to pay any moneys in his hands. These powers exercised by the federal government cannot be questioned. It has the power of prescribing, under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties. And in such cases the local law cannot affect the contract, as it is made with the government, and in contemplation of law, at the place where its principal powers are exercised.

§ 508. *Where bond is given to secure faithful performance of official duties within a certain district, the presumption is that deficiencies took place within the district.*

As there was no evidence before the jury that any part of the defalcation of the paymaster occurred without the limits of the district in which, as appears by the bond, he was to act, the court below might well instruct the jury that, in the absence of such proof, they were bound to presume that the deficiency took place within the district. The rejection of the special verdict by the court is the ground which seems most to be relied on for a reversal of this judgment.

§ 509. *Practice in Louisiana in case of special verdicts.*

In 1817 the legislature of Louisiana enacted that "in every case to be tried by a jury, if one of the parties demands that the facts set forth in the petition and answer should be submitted to the said jury, to have a special verdict thereon, both parties shall proceed, before the jury are sworn, to make a written statement of the facts so alleged and denied, the pertinency of which statement shall be judged of by the counsel and signed by the judge, and the jury shall be sworn to decide the question of fact or facts so alleged and denied," etc.

On the 26th of May, 1824, congress passed an act (4 Stats. at Large, 62), entitled "An act to regulate the practice in the courts of the United States for the district of Louisiana, in which it is provided that the mode of proceeding in civil causes in the courts of the United States, that now are, or hereafter may be, established in the state of Louisiana, shall be conformable to the laws directing the mode of the practice in the district courts of said state; provided that the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the state courts, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such exist, between such state laws and the laws of the United States." This section was a virtual repeal, within the state of Louisiana, of all previous acts of congress which regulated the practice of the courts of the United States, and which came within its purview. It adopted the practice of the state courts of Louisiana, subject to such alterations as the district judge of the United States might deem necessary to conform to the organization of the district court, and avoid any discrepancy with the laws of the Union.

By a code of the Louisiana legislature, passed in 1829, called the "Code of Procedure," the act of 1817 was repealed. This repealing act was not before the court until the present session; and a question is made under it, whether it does not, by virtue of the act of congress of 1824, change the practice of the district court. It is insisted for the plaintiffs that it could not have been the intention of congress, by the act of 1824, to subject the practice of the district court in Louisiana to any changes which the legislature of that state might adopt in reference to the practice of the state courts; and the construction which has been given to the act of 1792 (1 Stats. at Large, 275), which regulates process in the courts of the United States, is relied on as conclusive on the point. This act, by re-enacting the act of 1789 (1 Stats. at Large, 93), adopted the "modes of process" for the district and circuit courts which were in use at the time of its passage in the supreme courts of the respective states, but did not require, as this court have decided, a conformity to the changes which might be made in the process of those courts. Nor did the act apply to those states which were subsequently admitted into the Union. But this defect was removed by the act of the 19th of May, 1828 (4 id., 278), which placed all the courts of the United States on the same footing in this respect, except such as are held in the state of Louisiana. It does not appear that the district court of Louisiana, by the adoption of any written rule, has altered the practice which this court, in the case of *Parsons v. Armor* and *Parsons v. Bedford*, reported in 3 Pet., 413 and 433, considered as having been adopted by the act of 1824. But if the questions raised in these cases occurred after the act of 1817 was repealed by the Code of Procedure in 1829, the fact was not known to the court. As the act of 1824 adopted the practice of the state courts, before this court could sanction a disregard of such practice, it must appear that, by an exercise of the power of the district court, or by some other means, the practice had been altered.

§ 510. *A court may change its practice without the adoption of written rules.*

It is not essential that any court, in establishing or changing its practice, should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court. In the case under consideration, it appears that the Louisiana law which regulated the practice of the district court of Louisiana has not only been repealed, but the record shows that in the year 1830, when the decision objected to was made, there was no such practice of the court as was adopted by the act of 1824. The court refused to suffer the statement of facts to go to the jury for a special finding, because they say "such was contrary to the practice of the court." On a question of practice, under the circumstances of this case, it would seem that the decision of the district court, as above made, should be conclusive. How can the practice of the court be better known or established than by its own solemn adjudication on the subject?

In regard to the last error assigned, it is not perceived how the refusal of the special verdict precluded the defendants from proving that the bond was delivered as an escrow. Such evidence was admissible under the plea or answer of the defendants, but it does not appear that any such was offered and rejected by the court. The judgment of the district court must be affirmed, with costs.

DAIR v. UNITED STATES.

(16 Wallace, 1-6. 1872.)

ERROR to U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—Debt on a distiller's bond, executed by Dair and Sauks as principals. The sureties denied their liability, and the court found the following facts: That the sureties signed the bond on the condition that it was not to be delivered until signed by another party as co-surety; that the bond was delivered to one of the principals, who delivered it to the United States without the condition being performed; that the United States had no notice of the condition, the bond being regular on its face.

§ 511. *The sureties in a bond in due form and signed by all the obligors named are estopped, after it has been acted upon by the government, to set up a condition that another surety was to join in its execution.*

Opinion by MR. JUSTICE DAVIS.

It is important that the question involved in this case should be settled, on account of the various interests connected with the administration of governmental affairs, requiring official bonds to be taken, which, as a general thing, are rarely executed in the presence of both parties. It is easy to see, if the obligors are at liberty, when litigation arises and loss is likely to fall upon them, to set up a condition, unknown to the person whose duty it was to take the bond, and which is unjust in its result, that the difficulties of procuring satisfactory indemnity from those who are required by law to give it will be greatly increased. Especially is that so since parties to the action are permitted to testify.

In *Green v. The United States*, 9 Wall., 658, the cause of action and defense were the same as in this suit, but as the judgment was reversed on another ground, and the merits of the defense were not discussed, they were not decided. As the case was sent back for a new trial, the court thought proper to call the attention of the court below and of counsel to the subject, and took occasion to say that it had grave doubts whether the facts set up were a valid defense to the action. Subsequent reflection has confirmed the views then entertained, and we are now prepared to say that the position of the defendants cannot be maintained. The ancient rules of the common law in relation to estoppels *in pais* have been relaxed, and the tendency of modern decisions is to take a broader view of the purpose to be accomplished by them, and they are now applied so as to reach the case of a party whose conduct is purposely fraudulent or will effect an unjust result. It must be conceded that courts of justice, if in their power to do so, should not allow a party who, by act or admission, has induced another with whom he was contracting to pursue a line of conduct injurious to his interests, to deny the act or retract the admission in case of apprehended loss. Sound policy requires that the person who proceeds on the faith of an act or admission of this character should be protected by estopping the party who has brought about this state of things from alleging anything in opposition to the natural consequences of his own course of action. It is, accordingly, established doctrine, that whenever an act is done or statement made by a party, which cannot be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence. 2 Smith's Lead. Cas., 7th ed., note to the *Duchess of Kingston's Case*, 424.

Why should not this principle of estoppel, on every reason of justice and

good faith, be applied to the covenant on which this action is founded. The bond was in all respects regular, executed according to prescribed forms, and accepted by the officer whose duty it was to take it, as a completed contract. There was nothing on the face of the paper or in the transaction itself to put the officer on inquiry, or to raise even a suspicion in his mind that a condition was annexed to the delivery of the instrument. The transaction was one of ordinary occurrence in the administration of the revenue laws, and if the officer was satisfied of the sufficiency of the indemnity, there being no circumstances to create distrust that the principal obligors who tendered the bond were not upright men, there was nothing left for him to do but to take it and issue the license. This was done, and the government will be greatly prejudiced if the sureties who were relied on to perform the conditions in case of the failure of the principals can defeat a recovery on the ground that they did not intend to be bound unless another shared the responsibility, and so told the principal obligors who solicited their signatures. But they did not inform the revenue officer of this condition, and their omission to do so then estops them from setting it up now. The silence which they imposed upon themselves at the time makes their present conduct culpable, for it is not to be doubted that the officer in charge of this business would have acted differently if the information which the principals received had been communicated to him. In the execution of the bond the sureties declared to all persons interested to know that they were parties to the covenant and bound by it, and in the belief that this was so they were accepted and the license granted. They cannot, therefore, contravene the statement thus made and relied on without a fraud on their part and injury to another, and where these things concur the estoppel is imposed by law. As they confided in Dair, it is more consonant with reason that they should suffer for his misconduct than the government, who was not placed in a position of trust with regard to him.

The case of *Pawling v. United States*, 4 Cranch, 219, has been cited as an authority against the position taken in this case; but it is not so, because the additional securities to be procured in that case were named on the face of the bond, and this fact is stated in the plea. If the name of Joseph Cloud appeared as a co-surety on the face of this bond, the estoppel would not apply, for the reason that the incompleteness of the instrument would have been brought to the notice of the agent of the government, who would have been put on inquiry to ascertain why Cloud did not execute it, and the pursuit of this inquiry would have disclosed to him the exact condition of things.

In any case, if the bond is so written that it appears that several were expected to sign it, the obligee takes it with notice that the obligors who do sign it can set up in defense the want of execution by the others, if they agreed to become bound, only on condition that the other co-sureties joined in the execution. We are aware that there is a conflict of opinion in the courts of this country upon the points decided in this case, but we think we are sustained by the weight of authority. At any rate, it is clear on principle that the doctrine of estoppel *in pais* should be applied to this defense. It would serve no useful purpose to review the authorities. This work has been performed in several well-considered cases in Maine, Indiana and Kentucky, and although these courts do not rest their decisions on the same ground, yet they all agree that the facts pleaded in this suit do not constitute a bar to the action. *State v. Peck*, 53 Me., 284; *State v. Pepper*, 31 Ind., 76; *Millett v. Parker*, 2 Metc., 608.

Judgment affirmed.

§ 512. *Signing conditionally.*—Two persons sign a distiller's bond as sureties, at the instance of the principal, and deliver it to him upon the condition that it is not to be delivered to the United States until it shall be signed by a third person as co-surety. The principal, notwithstanding this condition, delivers the bond without being signed by the third party. When the bond is delivered, it is in all respects regular upon its face, and the United States has no notice of the condition. The sureties are bound. *Dair v. United States*, 5 Ch. Leg. N., 477. See § 502.

§ 513. Where a surety refuses to sign a bond unless a fourth party also signs, and afterwards a bond is presented to him without the name of such fourth party being inserted, nor with any place left for him to sign, and the surety signs such bond without being influenced in any way by other parties, *held*, that he would not be heard to say that he signed only on the condition above stated, and especially as it was not proved that the obligee was present. *In re Mayo*,* 4 Hughes, 377.

§ 514. In an action on a distiller's bond, one of the sureties pleaded that he signed the bond and delivered it to the principal obligor, on condition that it should not be delivered to the obligee until one B. had signed it, and that, at the time of its delivery to the obligee, the obligee had notice of such conditional delivery to the principal. *Held*, the plea was sufficient. *United States v. Hammond*, 4 Biss., 283.

§ 515. A person who signs an internal revenue bond as surety, with a private understanding with the principal that the latter should fill up the blank for the amount of the bond with a certain sum, and should procure two additional sureties, who should both reside in a certain district and each be worth a certain amount, otherwise he (the surety) was not to be bound nor the bond delivered, cannot set up a violation of this agreement by the principal, in defense to an action on the bond. By leaving the amount of the bond and the names of the other sureties blank, he gave the principal apparent authority to fill them up, and is bound by the acts of the principal, notwithstanding his private agreement. *Butler v. United States*,* 21 Wall., 272.

§ 516. Where a witness was called in to attest the execution of a bond, and one of the obligors then sat down and inserted in the bond the names of other persons who, he said, were to join in the execution of it, and holding the instrument in his hands, in the presence of two other obligors, who said nothing, called upon the witness to take notice that "we acknowledge this instrument, but others are to sign it," *held*, that a jury would be warranted in finding that the bond was delivered as an escrow by all the obligors who were present. *Pawling v. The United States*, 4 Cr., 219.

4. *Signing as Principal.*

SUMMARY — *Party named as principal; estoppel*, §§ 517, 518.—*Not released by change of contract*, § 519.

§ 517. Where a party is expressly named in a bond as principal he is estopped at law from setting up that he is only a surety. *Sprigg v. Bank of Mount Pleasant*, §§ 520-522.

§ 518. In the absence of fraud or mistake, a person executing a bond as a principal will not be allowed to show in a court of equity that he executed it merely as surety. *Sprigg v. Bank of Mount Pleasant*, §§ 523-525.

§ 519. The rule that sureties are not responsible beyond their contract, and that any agreement with the creditor which varies essentially the terms of the contract, without the assent of the surety, will discharge him from responsibility, does not apply to a surety who has freely executed the bond as principal and applies to a court of equity to reinstate him in his character as surety in violation of his own express contract. *Ibid*.

SPRIGG v. BANK OF MOUNT PLEASANT.

(10 Peters, 257-268. 1836.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up from the circuit court of the district of Ohio upon a writ of error. It is an action of debt upon a single bill or obligation executed by the plaintiff in error and several others, bearing date the

20th of February, 1826, for the payment of \$2,100 sixty days after date. The declaration is in the usual form. The defendant pleaded the general issue and five special pleas. To the second and sixth pleas the plaintiff replies and the defendant demurs to the replications; and to the third, fourth and fifth pleas the plaintiff demurs. Judgment was rendered for the plaintiff in the court below on both demurrers. The material question in the case arises upon the second and sixth pleas and the replications to them; over of the obligation having been craved and spread upon the record. The second plea sets up in bar of the action that the \$2,100 mentioned in the writing obligatory was a loan made by the plaintiff to Peter Yarnall & Co. (the first named obligors), and for their accommodation; and that the writing obligatory was given to the bank for the sole and only purpose of securing the payment of the said loan at the expiration of sixty days from the date thereof, and that the defendant and Richard Symms, Alexander Mitchell and Z. Jacobs were sureties only, and were so received and treated by the plaintiffs; that Peter Yarnall & Co. received for their own exclusive benefit the entire amount of the said \$2,100, and were so entered and charged on the books of the bank; and it is then averred that when the writing obligatory became due the plaintiffs, on payment of \$22, as the discount for sixty days then next following, agreed with the said Yarnall & Co., without the knowledge and consent of the defendant and his co-sureties, to give a further credit of sixty days on the said loan and did give such further credit; by reason whereof the defendant alleges that he is discharged from all liability on said writing obligatory. The sixth plea is substantially the same, with an additional averment of a further extension of credit on the loan, and the insolvency of Yarnall & Co. To the allegation in the pleas that the defendant and the others named were sureties of Yarnall & Co., the plaintiffs reply that the defendant ought not to be permitted to plead the same, because they say that, by the said writing obligatory, the defendant and the other obligors, by the said writing obligatory, acknowledged themselves to be jointly and severally held and firmly bound, as principals, for the payment of the said \$2,100 to the Bank of Mount Pleasant. To this replication the defendant demurs; and the real question raised by these pleadings is, whether the defendant can set up in his defense that he was only surety in the obligation for Yarnall & Co., in direct opposition to his acknowledgment that he executed it as a principal. It is unnecessary to enter into the inquiry whether it would not have been more correct pleading for the plaintiff to have demurred to the defendant's pleas instead of replying. The defendant craved over of the obligation, and it is spread upon the record; and is to be taken as a part of the declaration. And if the replication should be considered bad, the plea is open to examination.

§ 520. *In case of a demurrer, judgment is given against the party whose pleading is first defective in substance.*

It is an established rule in demurrers, that although the pleading demurred to may be defective, the court will give judgment against the party whose pleading was first defective in substance. The question is therefore to be considered upon the validity of the plea. If the defendant can be let in to set up that he was surety only, the matter alleged is sufficient to exonerate him from liability in the present suit. It falls within the settled rule of law in relation to sureties, that extending to the principal further time of payment, by a new agreement, will discharge the surety. This, indeed, has not been denied on the argument.

§ 521. *An obligor to a bond, in which he is named as a principal debtor, is estopped to plead that he is merely a surety. (a)*

It has been contended that it appearing expressly on the face of the bond that the defendant acknowledged himself as principal did not vary the question; for that all joint and several obligors in a bond are, in judgment of law, considered principals. This is true as a *prima facie* presumption of law; but is not conclusive upon a party when drawn in question before a proper tribunal. But, as matter of estoppel at law, it may stand on a different footing; and is, at all events, as matter of fact, more conclusive. The doctrine of the law upon this point is plain and explicit. And it does not require the multiplication of authorities to show that the rule is well established. In *Huntington v. Havens*, 5 Johns. Ch., 26, it is laid down that a general recital in a deed will not conclude a party, though the recital of a particular part may estop him. *Coke Litt.*, 352, a; *Willes*, 9. And in *Stow v. Wyse*, 7 Conn., 220, it is said by the supreme court in Connecticut, that when a party has solemnly admitted a fact by deed under his hand and seal, he is estopped not only from disputing the deed itself, but every fact it recites. And in the case of *Carver v. Jackson*, 4 Pet., 83, this court, in speaking of the effect of recitals and their operation by way of estoppel, say that the recital of the lease in the deed was not only evidence between these parties of the original existence of the lease, but was conclusive evidence of that original existence. An estoppel has sometimes been quaintly defined, the stopping a man's mouth from speaking the truth; and would seem, in some measure, to partake of severity, if not of injustice. But it is, in reality, founded upon the soundest principles, as a rule of evidence. That a party has, by his own voluntary act, placed himself in a situation as to some matter of fact, that he is precluded from denying it; and in its application to the dealings and contracts of men in the affairs of human life, it is a salutary practical rule that a man shall not be permitted to deny what he has once solemnly acknowledged. In ordinary cases, when sureties sign an instrument without any designation of the character in which they become bound, it may be reasonable to conclude that they understood that their liability was conditional, and attached only in default of payment by the principal. And hence the reasonableness of the rule of law, which requires of the creditor that his conduct, with respect to his debtor, should be such as not to enlarge the liability of the surety, and make him responsible beyond what he understood he had bound himself. But when one who is in reality only surety is willing to place himself in the situation of a principal, by expressly declaring upon his contract that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself. As to that particular contract, he undertakes as a partner with the debtor, and has no more right to disclaim the character of principal than the creditor would have to treat him as principal if he had set out in the obligation that he was only surety. These observations are only made for the purpose of showing there is no hardship in the case; for it is most generally from the hardship of particular cases that attempts are made to innovate upon general principles. And courts sometimes too readily yield to considerations of this kind to attain what may be considered the abstract justice of the particular case before them.

§ 522. — *authorities reviewed.*

But admitting that, although the defendant has upon the face of the obli-

(a) Affirming the ruling in *Mount Pleasant v. Sprigg*,* 1 McL., 178. But it was there suggested that if a party binds himself generally, without specifying in what capacity, he may show that he is a surety.

gation become bound as principal, yet a court of equity might allow him to set up that he was only surety, and let him in to all the protections that are usually extended to sureties; the present case is to be governed by rules applicable to proceedings in courts of law; and upon this point the rule seems to be well settled, that where principal and surety are bound jointly and severally to a bond, although there is no express admission on the face of the instrument that all are principals, yet the surety cannot aver by pleading that he is surety only. In the case of *Rees v. Berrington*, 2 Ves. Jr., 542, Lord Loughborough held that when two are bound jointly and severally in a bond, they both appear as principals, and the surety cannot aver that he is bound as surety; but if he could establish that at law, the principle at law is that he has an interest in the condition; and if the time of payment is extended, that totally defeats the condition, and the consequence is that the surety is released from his engagement. This point is directly adjudged in the case of *The People v. Jansen*, 7 Johns., 337. The question there turned entirely upon the pleadings, and the court let in the defense which discharged the surety, upon the sole ground that it appeared upon the face of the bond that the ancestor of the defendant was surety only; otherwise the defendant would have been estopped by the bond from alleging that he was surety only. But the fact appearing upon the face of the bond, the defense might be set up at law as well as in equity. The case of *Paine v. Packard*, 13 Johns., 174, although the court admitted the surety to set up by plea at law matter in discharge of his liability, is very distinguishable from the present case. That was a suit upon a promissory note, and the court, upon demurrer, sustained a plea interposed by the surety, alleging a special request made to the plaintiff to prosecute the principal, and averring a loss of the debt by reason of his neglect to prosecute. The plea in that case was sustained on the ground that there was no conflict between the note and the averments in the plea. For, say the court, the averments and facts stated in the plea are not repugnant or contradictory to the note. That the fact of Packard having been surety only is fairly to be presumed to have been known to the plaintiff, and he was in law and equity bound to use due diligence against the principal, in order to exonerate the surety. The plea averred that Packard signed the note as surety and the demurrer admitted the facts. Had it appeared upon the face of the note that Packard signed it as principal, there is no reason to conclude that the court would have let in the defense then set up. It could not, in such case, have been said that there was no repugnancy between the averments in the plea and the note, which was the ground upon which the plea was sustained. But this case has not, under any view of it, relaxed the rule with respect to bonds or sealed obligations, which are not open to an inquiry into the consideration. The case of *Paine v. Packard* was a suit between the original parties to the note,—the payee against the makers. Packard, although surety, signed the note as one of the makers, and between the original parties to a note the consideration may be inquired into. In the case of *King v. Baldwin*, 2 Johns. Ch., 556, the chancellor says: "I do not understand the supreme court as holding, in the case of *Paine v. Packard*, that the averment would be admitted in direct opposition to the terms of the note; that such evidence would be entirely inadmissible." And as to this proposition, we do not understand there was any difference of opinion between the supreme court and the chancellor. The point of difference between the two courts related to the effect which a non-compliance by the creditor, with the request of the surety, to prosecute the principal, would have upon the liability of the

surety; the chancellor holding that, in order to discharge the surety, there must be some new agreement between the debtor and creditor, varying the contract by which the surety originally became bound. The court of errors, on an appeal (17 Johns., 384) from the decree of the chancellor, in the case of *King v. Baldwin*, may be considered in some measure as affirming, by a divided court (which very much weakens the authority of the case), the decision of the supreme court in *Paine v. Packard*, 13 Johns., 174. We are under no necessity, however, of expressing any opinion upon the point of difference between those courts. That point has no bearing upon the question now before this court. The case of *The Bank of Steubenville v. Leavitt*, 5 Ohio, 207, in the supreme court of Ohio, has been relied upon to support the pleadings and defense set up in this case. But that case differs from the present, essentially, in the main point. No copy of the bond is there spread upon the record, so that it does not appear upon the face of the bond that the defendant signed as principal. The plea alleged that the defendant signed as surety, and this the demurrer admits; and the fact of surety being assumed as admitted, the court only decided that, if any change be made between the creditor and the principal to the prejudice of the surety, that it discharges the surety, and that this defense may be set up at law as well as in equity. That such was the ground on which this case stood is evident from the manner in which the question is put by the counsel to the court. The plea, say they, alleges that the defendant signed and sealed the obligation as surety, and not as principal, and this is admitted by the demurrer; and therefore the inquiry is presented, free from all embarrassment, namely, is the surety discharged by the creditors giving the principal further credit or time of payment? And this would seem to be the light in which the case was viewed by the court. And this conclusion is strengthened by the circumstance that the authorities referred to in support of the decision go to show that a court of law, as well as a court of equity, can afford relief to the surety, when the facts upon which such relief rests are properly before the court. And in this view of the case, it is not at variance with the admitted rule in courts of law. But this does not meet the difficulty in the present case. The fact of the defendant's being surety is not only not admitted, but it is alleged that he is estopped from setting it up by his own admission in his obligation that he is principal; and we are not aware of any case giving countenance to such a defense at law under such circumstances.

The fourth plea is admitted to be bad, and the objections to the third and fifth are substantially the same as to the second and sixth. They attempt to set up that the defendant was only surety in the obligation. But this defense is equally precluded here by the estoppel as in the other pleas. The judgment of the circuit court is accordingly affirmed, with costs.

SPRIGG v. BANK OF MOUNT PLEASANT.

(14 Peters, 201-209. 1840.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up on appeal from the circuit court of the United States for the district of Ohio. The appellant filed his bill on the equity side of the court for an injunction, to enjoin all further proceedings on a judgment recovered against him by the appellees, on the law side of the court. The judgment was founded upon the same single bill now in question, and is as follows:

"\$2,100. Know all men by these presents, we, Peter Yarnall & Co., Samuel Sprigg, Richard Simms, Alexander Mitchell, and Z. Jacobs, as principals, are jointly and severally held and firmly bound to the president, directors and company of the Bank of Mount Pleasant, for the use of the Bank of Mount Pleasant, in the just and full sum of twenty-one hundred dollars, lawful money of the United States, to the payment of which said sum, well and truly to be made to the said president, directors and company, for the use aforesaid, within sixty days from the date hereof, we jointly and severally bind ourselves, our heirs, etc., firmly by these presents, signed with our hands and sealed with our seals, this twentieth of February, A. D. 1826.

"PETER YARNALL & Co., [SEAL.]
 SAM. SPRIGG, [SEAL.]
 RICH'D SIMMS, [SEAL.]
 ALEX. MITCHELL, [SEAL.]
 Z. JACOBS. [SEAL.]"

"Signed and delivered in presence of

The judgment at law came before this court on a writ of error, and is reported in 10 Pet., 257. There were in that case various pleas interposed, setting forth substantially that this bill was executed by the obligors, to be discounted at the bank; and that the defendant, Samuel Sprigg, was surety only for Peter Yarnall & Co., who had executed the bill with him; and that the bank had, by renewing or continuing the discount after the time first limited for the payment of the same, discharged the sureties.

The pleadings in the suit were very voluminous, and terminated in demurrers. The judgment of the circuit court was affirmed in this court; and the decision turned upon the point that the defendant and all the other obligors had, by the express terms of the obligation, bound themselves as principals, and were thereby estopped from setting themselves up as sureties for Yarnall & Co., and claiming to be discharged by reason of the extended credit given to Yarnall & Co.; and the present bill was filed on the equity side of the court, and relying substantially on the same ground for relief against that judgment. The bill states that Peter Yarnall and Samuel Mitchell were doing business as partners, under the firm of Peter Yarnall & Co.; and that the appellees were a banking company, doing business as a bank in the town of Mount Pleasant. That about the 20th of February, in the year 1826, the said Peter Yarnall & Co. borrowed from the bank \$2,100, and the single bill now in question was executed, and discounted at the bank in the usual course of business. That at the time of the loan the bank knew that Peter Yarnall & Co. were the principals, and so received, and accepted, and treated them; and that the other obligors were their sureties, notwithstanding the form of the obligation. That when the said obligation became due, to wit, on the 21st of April, 1826, the bank, on receiving \$22.40, paid by Peter Yarnall & Co. for the discount for sixty days, without the knowledge or consent of the sureties, gave a further credit and time of payment for sixty days. That the bank, at each consecutive day of discount, and payment of interest in advance, extended the payment of said bill in like manner, until September or October, 1828; until after the failure and insolvency of the said Peter Yarnall & Co., which happened about that time. That, between the time the said obligation first became due and the day when Yarnall & Co. failed, the bank, or the said appellant and his co-sureties, could have collected and realized the money secured by the said obligation. And that if the bank had not renewed said loan, and given new and

further time of payment, the obligation could have been collected from the said Peter Yarnall & Co. And the bill then charges that the bank, contriving and intending to impose upon the appellant a loss which has occurred to him in consequence of a confidence and bargain made by themselves with the said Yarnall & Co., and in fraud of the said appellant and his co-sureties; if at the time of bestowing such confidence and making such bargains it was intended to hold the appellant and his co-sureties liable, and more particularly in fraud of the appellant and his co-sureties, if such confidence and contract with the said Yarnall & Co. was, at the time of making the same, a mere personal confidence and contract with the said Yarnall & Co. The bill then sets out the proceedings at law, upon which a judgment has been recovered; and praying a perpetual injunction against further proceedings upon the judgment and execution.

The bank in their answer admit the discount of the single bill, and allege that it was so discounted at the request of the obligors, and the proceeds paid to Alexander Mitchell, one of the obligors. They positively deny having any knowledge of any transaction in relation to said obligation, until it was presented to them for discount; or that they had any knowledge of the relation in which said obligors stood to one another; or that they knew that the proceeds of the obligation was obtained for the exclusive benefit of the said Peter Yarnall & Co.; or that they were the principal debtors in said obligations. They deny that they received, accepted and treated them as the principal debtors; and they aver that the appellant and all the other obligors were principal debtors, and so contracted with and bound themselves to the bank, as will appear by reference to the said single bill. And they further aver that it was on the faith of this agreement alone that they discounted the obligation; and that, had not the obligors contracted and bound themselves as principals, let the relations among themselves be what it might, they would not have discounted the single bill; and that this agreement was made with full knowledge and fair understanding of the fact, and of the purport of the provision in said obligation. And they aver that the appellant, having bound himself as a principal debtor to the defendants, he is estopped from now alleging that he is only a surety. They deny that they ever gave the said Yarnall & Co. the further credit and time of payment as claimed in the bill or otherwise. They admit they used great lenity towards the obligors, in not requiring payment promptly when due; but aver that they did so because they had confidence in the honesty, integrity and solvency of the obligors, and considering them all as principal debtors. They admit the proceedings at law as set forth in the bill; and deny all manner of unlawful confederacy; and claim the same benefit of this defense as though they had demurred to the bill. To this answer there is a general replication; and the cause having been heard upon the bill, answer, replication, exhibits and testimony, it was adjudged and decreed that the complainant in the court below was not entitled to the relief prayed in the bill. Whereupon the injunction which had been allowed was dissolved, and the bill dismissed.

When this case was before the court on the writ of error, the effect and operation of the words "as principals," contained in the single bill discounted at the bank, were fully considered; and it was decided that they operated as an estoppel, and precluded the defendant from going into evidence to show that he was only surety in the single bill. And unless it shall be found that a different principle prevails in a court of equity, the same result must follow upon the present appeal.

§ 523. *Though there are no technical estoppels in equity, parol evidence is not admissible to contradict a written instrument.*

It is said, however, on the part of the appellant, that there are no technical estoppels in a court of equity. This may be admitted, but it will not affect the present question. For it is equally well settled as a rule of evidence, in courts of equity as well as in courts of law, that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement. And this rule is founded on the soundest principles of reason and policy, as well as on authority. This doctrine is fully recognized by this court in the case of *Hunt v. Rousmanier*, 8 Wheat., 211. The court say: It is a general rule that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony stating conversations or circumstances anterior to the written instrument; that this rule is recognized in courts of equity as well as in courts of law. But courts of equity grant relief in cases of fraud and mistake, which cannot be obtained in courts of law. In such cases, a court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention. This authority is so directly in point that it cannot be necessary to refer to any other. But the principle will be found in accordance with the highest authority, both in this country and in the English chancery. 1 Johns. C. R., 429; 6 Ves., 328 and note.

§ 524. *In the absence of fraud or mistake equity will not treat as a surety one who executes a bond as principal. (a)*

The bill does not charge that the words, "as principals," were inserted in the obligation by mistake, or under any misapprehension, on the part of the appellant, of their import and effect. But on the contrary, the bill states that the loan was made by the bank to Peter Yarnall & Co. in the usual way of making loans at that bank. From which it is fairly to be inferred that this obligation was, in form, according to the usage of the bank; with which usage the obligors must be presumed to have been conversant. Nor is there any direct charge of fraud on the part of the bank, but it seems to be stated, as matter of inference from the allegation, that the loan was for the sole benefit of Yarnall & Co., and that known to the bank. But whatever the charge may be, it is denied in the answer, and is entirely unsupported by the testimony. The charge of fraud rests altogether upon the allegations that the appellant was only a surety in the single bill, and that was known to the bank. All the parol evidence on these points seems to have been admitted, although objected to on the part of the bank, as inadmissible, on the ground that it contradicted the written instrument. The ruling of the court on this objection does not appear upon the record. But if the evidence was admitted, the appellant has no ground of complaint. It was his own evidence. And all that this evidence established was the simple fact that the appellant was only surety for Yarnall & Co. But that can have no influence against his direct admission in the obligation that he was a principal; and there being no pretense of mistake or surprise, there can be but one meaning attached to this admission; which is, that, as between the obligors and the bank, all were principals, whatever might be their relation between themselves. They had, undoubtedly, a right to waive their character and legal protection as sureties, and assume the character of principals. This admission in the obligation must have been for some purpose, and none can be reasonably assigned except

(a) Affirming the ruling in *Sprigg v. Bank of Mount Pleasant*, 1 Mc L., 384.

that it was intended to place all the obligors upon the same footing, with respect to their liability to the bank.

The evidence did not support the allegation that the bank had made any agreement to extend the loan or time of payment, other than continuing the discount, in the ordinary course of business at the bank. The form of the obligation dispensed with the necessity of giving any notice to the appellant, even considering him in the character of a surety, and extending the time of payment, and a mere delay in enforcing it will not discharge a surety, unless some agreement has been made injurious to the interest of the surety; nothing of which appears to have been done in this case. 9 Wheat., 720 (§§ 419–422, *supra*); 12 Wheat., 554. The cashier of the bank denies that he ever made any contract with Yarnall & Co. for the extension of the payment of the obligation discounted at the bank, on the 20th of February, 1826, for Peter Yarnall & Co., and others (referring to the single bill in question), after the same became due, for sixty days, or any other period, but discounted the same according to the custom of the bank; but the time or indulgence given was merely at the will of the bank. That he could not make any contract for the extension of payment, according to the rules of the bank, without an order from the board of directors; and that, on an examination of the minute-book, he found no such order, where, if it had been made, it would appear; and the inference attempted to be drawn, that Yarnall & Co. were considered and accepted by the bank as the principal debtors, because the account kept at the bank of this loan was in his name alone, was done away, and fully explained by the testimony of the cashier as to the custom of the bank, that the account is always kept with the first signer, unless otherwise especially authorized and directed. But, admitting that the bank knew Yarnall & Co. were the principal debtors, this would not exonerate the other obligors from their responsibility as principals, in violation of their express contract. If Yarnall & Co. were of doubtful credit, it might have been the very reason why the bank required all the obligors to bind themselves as principals.

§ 525. *A surety who assumes the character of a principal is not discharged by an agreement with the principal which varies the contract, even in equity.*

It is no doubt a sound and well settled principle, that sureties are not to be made responsible beyond their contract; and any agreement with the creditor, which varies essentially the terms of the contract, without the assent of the surety, will discharge him from his responsibility. But this principle cannot apply where the surety has, by his own act, exchanged his character of surety for that of principal, and then applies to a court of equity to reinstate him to his character of surety, in violation of his own express contract. This would be sanctioning a fraud upon the creditor. This case has been likened at the bar to that of a deed, absolute in its face, but which, by an independent agreement between the parties, was intended only as a mortgage. Courts of equity will permit such agreements to be set up against the express terms of the deed, only on the ground of fraud, considering it a fraudulent attempt in the mortgagee, contrary to his own express agreement, to convert a mortgage into an absolute deed. And it is equally a fraud on the part of a debtor to attempt to convert his contract as principal into that of surety only.

No attempt has been made in the present case to show that the bank had made any agreement with the appellant that he should be considered and treated as a surety only, contrary to the express terms of his contract to be

bound as a principal. If any such agreement had been shown, the analogy to the case put, of a mortgage, might hold. The allegation that the neglect of the bank to prosecute Yarnall & Co. has, by their insolvency, thrown the loss of the debt upon the sureties, might be of some weight if any measures had been taken by them to expedite the collection of the debt from Yarnall & Co., or no longer to continue the discount of the obligation. But no such measures appear to have been taken, and their solvency must be at the risk of the sureties, who have, by their express contract, assumed the character of principals. The decree of the circuit court is accordingly affirmed.

5. *Priority.*

SUMMARY — *Discharge of custom-house bond by surety, § 526.*

§ 526. A surety who discharges a custom-house bond acquires the same priority over the other creditors of his principal that the United States had, and the United States having an independent claim against such surety, may come in under the surety's priority to reach a debt due the principal. *Hunter v. United States*, §§ 527-531.

[NOTES.— See §§ 532-535.]

HUNTER v. UNITED STATES.

(5 Peters, 173-189. 1831.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.— This is a suit in chancery brought to this court by an appeal from the decree of the circuit court of Rhode Island. The material facts in the case are these: William Hunter, the defendant in the court below, is the surviving assignee of Archibald and Frederick Crary, who, in June, 1809, obtained the benefit of the insolvent law of Rhode Island. One Jacob Smith, as surety on a custom-house bond, had been compelled to pay to the United States, in May, 1808, for the Crarys, about \$2,125. In February, 1810, Smith filed his petition for the benefit of the insolvent law; and in August, 1811, Hunter, and one Littlefield, now deceased, were appointed assignees. On the 3d day of September following, Smith made to them an assignment of his property. Smith and one M'Gee were sureties for William Peck, as marshal of the Rhode Island district, who became a defaulter to the government, and against whom and his sureties, in August, 1811, a judgment was recovered for \$13,508. Upon his being afterwards committed to prison, on an *alias* execution issued in pursuance of this judgment, Smith petitioned the secretary of the treasury for relief, and stated that he was reduced to poverty, and had assigned all his property under the insolvent law. His insolvency, he alleged, had been accelerated, if not produced, by his having paid large sums as surety on certain custom-house bonds, and particularly the above sum for the Crarys. He was discharged by the secretary on the 17th day of October, 1811, on his making a formal assignment of all his effects to the United States. This assignment purports to convey the same property which he had previously assigned. In 1812, the United States imprisoned Peck, the principal, on execution, and in the month of June, in the same year, he was discharged by act of congress (6 Stats. at Large, 109).

In July, 1824, Hunter, as the assignee of the Crarys, obtained from the United States, under their treaty with Spain (8 Stats. at Large, 252), the sum of \$8,158.81. Out of this sum, Smith was entitled to the amount he paid for

the Crarys; and the United States claim the same from Hunter, as assignee, in part satisfaction of their judgment against Smith. Hunter claims this sum in behalf of the creditors of Smith, under his first assignment. By the original bill, the government rested its claim on the second assignment. This clearly cannot be sustained. Smith, under the insolvent law of Rhode Island, having assigned all his property for the benefit of his creditors, could not, by a subsequent assignment to the United States, affect the first transfer. The government can set up no right, under the second assignment, which might not be claimed by any other creditor. This ground is abandoned by the amended bill, and the claim of the government is placed on its priority, under the act of congress (1 Stats. at Large, 515). By this act a preference is given to a government debt over all others; and if the debtor be insolvent, such debt must first be satisfied. It is true, as the defendant insists, that the original bill still remains in the record, and forms a part of the case. But the amendment presents a new state of facts, which it was competent for the complainants to do; and, on the hearing, they may rely upon the whole case made in the bill, or may abandon some of the special prayers it contains.

§ 527. *A surety who has paid his principal's debt to the United States is subrogated to the priority of payment which the government has over other creditors of the principal debtor.*

The same right of priority which belongs to the government attaches to the claim of an individual who, as surety, has paid money to the government. Under this provision, Smith could claim a preference to other creditors for the money he paid as surety for the Crarys; and on his right the priority of the government is asserted. The defendant resists this demand on various grounds. He contends, in the first place, that the doctrine of priority is not applicable in this case. This prerogative of the government can only operate, it is insisted, on a debt due at the time; that it cannot reach a debt which depends upon a future contingency; and such was the claim of the Crarys, under the Spanish treaty. It was not realized until in June, 1824, nearly thirteen years after the benefit of the insolvent law had been extended to the claimants. It is also contended that the first assignment of Smith had relation back and took effect from the date of his inventory, which was prior to the judgment obtained against him by the United States. This being the case, the priority of the government could not attach, it is urged; for it can only act on a debt, and there was no debt in this case, as against Smith, until judgment was entered.

§ 528. *An assignment in insolvency takes effect only from the acceptance of it by the court and its decision thereon.*

The assignment, under the insolvent law, could only take effect from the time it was made. Until the court, in the exercise of their judgment, determine that the applicant is entitled to the benefit of the law, and, in pursuance of its requisitions, he assigns his property, the proceedings are inchoate, and do not relieve the party. It is the transfer which vests in the assignee the property of the insolvent for the benefit of his creditors. If, before the judgment of the court, the petitioner fail to prosecute his petition, or discontinue it, his property and person are liable to execution the same as though he had not applied for the benefit of the law. And if, after the judgment of the court, he fail to assign his property, it will be liable to be taken by his creditors on execution. The property placed upon the inventory of an insolvent may be protected from execution while he prosecutes his petition; but this cannot exclude the claim of a creditor who obtains a judgment before the assignment. If this

Spanish claim had passed into the hands of the assignee of Smith, and been distributed by him before the debt of the United States was established, or notice of its existence had been given to him, no controversy could have arisen on the subject. The defendant, as assignee, could not have been held responsible under such circumstances; nor could the creditors who received payment have been compelled to refund to the government.

§ 529. *A judgment preceding the assignment is entitled to priority of satisfaction.*

If the judgment of the government had not preceded the assignment of Smith, there might have been some ground to question the right of priority which is contended for. But the judgment preceded the assignment, which gave the government an unquestionable right of priority on all the property of Smith. Did not this right extend to the claim on the Crarys? It would seem that no doubt can exist on this subject. If the right cover any part of the property of the insolvent, it must extend to the whole until the debt be satisfied. It was proper for Smith to include in his assignment the claim on the Crarys. However remote the probability may have been at that time of realizing this demand, still, under the insolvent law, it was an assignable interest. If, at the time of the assignment, this claim was contingent, it is no longer so. It has been reduced into possession, and is now in the hands of the representative of the debtor to the government. If, under such circumstances, the priority of the government does not exist, it cannot be said to exist in any case. It would be difficult to present a stronger case for the operation of this prerogative. But it is contended by the defendant below that, if the doctrine of preference or priority be applicable to this case, the United States, by various acts, have waived it.

§ 530. *The release of a debtor from imprisonment by special act of congress, retaining the liability of his property, present and future, does not release his surety.*

The release of Peck from imprisonment by the act of congress, under the circumstances of the case, it is urged, was a release of Smith, the surety. This act was passed the 24th of June, 1812, and it provided that, before his discharge, Peck should assign "all his estate, real and personal, which he may now own or be entitled to, for the use and benefit of the United States." And it also provided "that any estate, real or personal, which the said William Peck may hereafter acquire, shall be liable to be taken in the same manner as if he had not been imprisoned and discharged." By the act providing for the relief of persons imprisoned for debt due to the United States, passed June 6, 1798 (1 Stats. at Large, 561), the secretary of the treasury is authorized to discharge in certain cases, and the individual so discharged, it is declared, "shall not be liable to be imprisoned again for the same debt, but the judgment shall remain good and sufficient in law." As in the act of 1798 there is an express provision that "the judgment shall remain good," which is omitted in the act discharging Peck, a doubt has been raised whether the judgment against him can be further prosecuted. If by this act the judgment be released against Peck, as a matter of course, his surety is discharged. This act specially provides "that any estate which Peck may subsequently acquire shall be liable to be taken in the same manner as if he had not been imprisoned and discharged." From this provision it clearly appears that the release from imprisonment was the only object of the statute, and a proper construction of it does not release the judgment. If the property of Peck may be taken "in the same manner as

if he had not been imprisoned," it may be taken under the same judgment. That the same rules of contract are applicable where the sovereign is a party, as between individuals, is admitted; but the right of the sovereign to discharge the debtor from imprisonment, without releasing the debt, is clear. And how can such a release discharge the surety?

Does it embarrass his recourse against the principal? In this case, if Smith had paid the debt to the government, he might have resorted to all the remedies against Peck which the law allows in any case. The recourse of the government against the property of Peck still remains unimpaired; consequently the judgment remains unsatisfied, and no act has been done to the prejudice of the surety. The cases in 2 Dane's Abridg., 155; 3 Serg. & R., 465, 466; and 2 Dall., 373, were cited to show that, while a defendant is charged in execution, the debt is considered as satisfied; and that a discharge of one co-debtor is a discharge of all. The imprisonment of a defendant is a means to enforce the payment of the judgment, and is only considered a satisfaction of it so far as to suspend all other process. If, by the operation of law, by an escape, or by any other means, without the assent of the plaintiff, the defendant be released from prison, the judgment still remains in full force against him. The imprisonment of Peck, the principal, was no bar to an execution against the body of his surety. In the case under consideration, Smith had been imprisoned and discharged before Peck was confined. These proceedings were all regular, however great the hardship may have been to the surety, and did not in any manner lessen the responsibility of either principal or surety. The authorities read in the argument going to show a release of the sureties, where the creditor without their assent enlarges the time of payment, etc., are not considered as opposed to the doctrines here laid down. The act of the government in releasing both the principal and surety from imprisonment was designed for the benefit of the unfortunate debtors, and no unnecessary obstructions should be opposed to the exercise of so humane a policy. If the discharge of the principal, under such circumstances, should be a release of the debt against the surety, the consequence would be that the principal must remain in jail until the process of the law were exhausted against his surety. This would operate against the liberty of the citizen, and should be avoided, unless required to secure the public interest. A discharge from prison by operation of law does not prevent the judgment creditor from prosecuting his judgment against the estate of the defendant. To this rule a discharge under the special provisions of a bankrupt law may form an exception. In the cases under consideration, the defendants were discharged under laws which expressly reserved the right to the government to enforce the judgment against the property of the defendants. In 1 Pet., 573 (§§ 679-681, *infra*), this court decided, on a full consideration of the case, that a discharge of the principal, under an act of congress, did not release the debt against the surety.

§ 531. *Although an officer of the government omitted to retain funds to which the government is entitled, the right of the government to secure that fund is not thereby abandoned.*

By an act of congress of the 24th of May, 1824 (4 Stats. at Large, 33), respecting payments under the Spanish treaty, it is provided "that in all cases where the person or persons in whose name, or for whose benefit and interest, the aforesaid awards shall be made, shall be debt and in arrears to the United States, the secretary of the treasury shall retain the same out of the amount of the aforesaid awards," etc. Under this provision it is contended that it was

the duty of the secretary to retain the amount of Smith's demand against the Crarys; and not having done so, the payment must be considered as an abandonment of the claim. That the secretary must have had notice of Smith's claim is insisted on, because it was stated on his schedule, which was assigned to the United States; and also in his petition to the secretary of the treasury, on which he was released from imprisonment. Having a knowledge of this claim of Smith's against the Crarys, it was in the power of the secretary, under the law, to withhold it, and appropriate it in part discharge of the judgment. The priority which first attached to Smith, and through him to the Crarys, would have enabled the government, without the aid of the other provision, to retain the money. But can the payment of it, under such circumstances, operate as a release to Smith? It might be dangerous to give the same effect to a voluntary payment by an agent of the government as if made by an individual in his own right. The concerns of the government are so complicated and extensive that no head of any branch of it can have the same personal knowledge of the details of business which may be presumed in private affairs. And if, in the case under consideration, some clerk in the treasury department, or even the secretary, did pay to the assignee of the Crarys the amount claimed by Smith, which might and perhaps ought to have been retained, is it an abandonment of the claim?

Where an officer of the government is in arrears, his salary is required to be withheld until the sum in arrears shall be paid. In such a case the books of the treasury would furnish its officers with notice of the delinquency; and yet would it be contended that a payment of the salary, which ought to have been retained, would release the debt? It cannot be admitted that an omission of duty of this kind, as a payment through mistake, by an officer, shall bar the claim of the government. If, in violation of his duty, an officer shall knowingly, or even corruptly, do an act injurious to the public can it be considered obligatory? He can only bind the government by acts which come within a just exercise of his official power. The payment to the assignee of the Crarys can in no respect affect the claim now set up against the assignee of Smith.

An objection is urged on the ground that the United States have failed to prosecute their claim with sufficient diligence, and that it is subject to the imputation of staleness. Until the sum of money in controversy was received by the assignee of Smith, in 1824, the United States could not be charged with a want of diligence in prosecuting their claim against Smith. They had obtained a judgment in 1811, and there was no property within the reach of any process in that judgment by which it could be satisfied. To subject the above claim to this judgment, the bill in the present case was filed in 1824. If, therefore, a want of diligence could, in any case, be charged against the government, there is no ground to make the charge in this case.

The last objection urged by the defendant is that there was full and ample relief to be obtained at law; and, consequently, chancery cannot take jurisdiction of the case. In his capacity as trustee, the government seeks to make Hunter liable. He bears the same relation to the creditors of Smith. It was proper in him, conceiving as he did that the fund in his hands should be paid to these creditors, to resist the claim of the government. Until its right of priority, under all the circumstances of the case, was judicially established, he, in the exercise of his discretion, might withhold the payment. The trustee can only be desirous of making the payment as the law requires. How is this liability to be enforced? What process at law would be adequate to give the

relief prayed for in the bill? It is the peculiar province of equity to compel the execution of trusts. In this case, it is conceived, the proceeding at law would not be adequate. The fund to be reached was in the hands of a trustee, and it was important that it should not pass from his hands to the creditors of Smith. The amount of the claim against the Crarys might be disputed; the trustee was entitled to his commissions, and other difficulties were likely to arise in the progress of the investigation which could only be fully adjusted at the instance of the United States by a court of chancery. No doubt exists, therefore, that a resort to the equity jurisdiction of the circuit court in this case was proper and necessary. The judgment of the circuit court must be affirmed, but without costs.

§ 532. *Priority.*—The obligor in a duty bond became insolvent, and the sureties paid the duties and brought suit under the act of March 2, 1799. *Held*, that the sureties were entitled only to the priority of payment out of the effects of the insolvent, not to trial at the first term. *Johns v. Brodhag*, * 1 Cr. C. C., 285.

§ 533. A collector being indebted to the United States made a deed of his property for their benefit, and deposited in a trunk \$10,000, the amount of his bond to the United States, and absconded. The sureties paid this \$10,000 to the United States, in satisfaction of the bond. On these facts being discovered a suit was brought against the sureties, on the ground that the United States were entitled to the money by right of priority. *Held*, that the sureties were not liable. *United States v. Cochran*, * 2 Marsh., 274.

§ 534. A. paid the United States a sum of money as surety of B. in a custom-house bond. B. became insolvent and assigned to C. C. received moneys from the estate of B. which he mixed with his own funds, became bankrupt and assigned to D., but no part of the estate of B. came to the hands of D. *Held*, that under 4 Stat. at Large, 886, A. was not entitled to priority of payment over the general creditors of C. *Pollock v. Pratt*, 2 Wash., 490.

§ 535. The sixty-fifth section of the act of March 2, 1799, enacts that, in all cases of insolvency, the debts due to the United States on duty bonds shall be first satisfied, and that any person representing such insolvent estate, who shall pay any other debt due from the estate before that of the United States, shall become personally answerable to the United States for the debt. And in actions against such persons special bail shall be required. It also enacts that any surety on such duty bond who shall pay the debt to the United States shall have the same advantage for the recovery of the debt as is secured to the United States. It is held that a surety who has discharged such a bond has no other advantage than the priority secured to the United States. He cannot call upon the collector to commence prosecution for the recovery of the money due. He cannot proceed against executors and assignees, personally, who had paid other debts instead of the debt of the United States. He may require special bail independent of the act. He cannot demand judgment on motion at the return term of the writ, nor bring his suit in the federal courts independent of citizenship. He cannot maintain his action in the name of the United States. *United States v. Preston*, * 4 Wash., 446.

6. Death of Surety.

SUMMARY — *Equity will not hold liable, when, § 536. — Joint judgment; death of surety, §§ 537, 538. — Joint obligation not declared joint and several, § 538. — Death before approval, § 539.*

§ 536. Except in cases of fraud, accident or mistake equity will not hold the sureties on a bond liable when they have been discharged by law. *United States v. Price*, §§ 540-549.

§ 537. Equity will not interfere to give a remedy against the personal assets of a deceased surety when the remedy at law has been lost by the election of the obligee to take a joint judgment on a bond of which the liability was joint and several. Equity will not interfere to extend the liability of the surety in such a case, though the discharge arises from a mere legal technicality. The law makes a part of every contract, and in the case of a joint and several bond the contract of the parties is that the estate of the surety shall be discharged by his death if the obligee elect to hold him jointly and not severally liable. *Ibid.* See §§ 536-560.

§ 538. A court of equity will not declare a joint obligation to be joint and several unless it clearly appears by independent testimony, or from the nature of the transaction itself, that such was the intention of the parties; and where a statute providing for a bond is silent as to

whether such bond should be a joint or joint and several obligation, either may be taken; and if a joint bond be taken a court of equity cannot declare it joint and several so as to charge the estate of a deceased joint obligor. *Pickersgill v. Lahens*, §§ 550, 551.

§ 539. The obligation of the official bond of a collector of customs begins at the time the bond is placed in course of transmission from the obligors to the comptroller of the treasury, for approval. And the death of a surety on such a bond, after it is sent to the comptroller, and before it is approved by him, does not destroy its binding force on the surety's estate. (*Campbell, J.*, dissented.) *Broome v. United States*, §§ 552-555.

[NOTE.—See §§ 556-560.]

UNITED STATES v. PRICE.

(9 Howard, 83-108. 1849.)

APPEAL from U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—As the decision of one of the points raised in these cases will rule them both, it will be unnecessary to notice the others. The complainant seeks a remedy in equity against the assets of a deceased surety in certain bonds given for duties. The bonds were joint and several, but a joint judgment had been recovered on them against all the obligors. The principal in the bond survives, but is insolvent.

§ 540. *Equity will not give a remedy against the estate of a deceased surety when a joint judgment has been taken on a joint and several obligation. (a)*

The question for our consideration will, therefore, be, whether a court of equity will interfere to give a remedy against the personal assets of a deceased surety when the remedy at law has been lost by the election of the obligee to take a joint judgment on a joint and several obligation. The obligation of suretyship arises only from positive contract. This contract is construed strictly both at law and equity, and the liability of the surety cannot be extended by implication beyond the terms of his contract. If he contracts jointly with his principal, it is a legal consequence known to all the parties that his personal estate will be discharged in case he should die before his principal. Such being the law, it may be considered as a part of the written condition of the bond. And equity will not interfere to extend the liability as against his estate on the ground that such discharge arises from the mere technicalities of the law. So where a surety enters into a joint and several obligation with his principal, the obligee and all the parties are supposed to be aware of the doctrines of law connected with such securities and to incorporate them therein as part of the contract. The obligee knows that this bond will entitle him to either a joint or several judgment at his election; he knows, also, that he cannot have both; that his bond is extinguished by his judgment, or merged in it, as a security of a higher nature, and he knows that if he elects to take a joint judgment and neglects to have execution levied in the life-time of the surety, his personal estate will be discharged at law. Assuming, as we have a right to do, that these known and established principles of law form a part of the written conditions of the bond, it is not easy to perceive how a chancellor could interpose in the latter case more than in the former, without disregarding the terms of the contract and extending the liability of the surety beyond the letter and spirit of his bond.

§ 541. *Equity will not hold a surety responsible when he has been discharged at law, except in cases of fraud, accident or mistake.*

It is true that, in cases of fraud, accident or mistake, equity will relieve as well against the surety as the principal. Thus, in case of a lost bond, equity

(a) See §§ 556 to 560 for opposing views of the circuit judges.

will set it up against a surety, or where a bond has been made joint, instead of joint and several, by mistake of a scrivener; but it will require a very clear and strong case where a surety is concerned. 3 Russell, 539. On the contrary, where the parties are joint debtors and there is no surety in the case, equity will reform the bond on the mistake presumed from the fact that both are bound in conscience to pay, and therefore intended to bind themselves severally. In the present case we have no allegation of fraud, accident or mistake. The bill assumes that the legal liability of the surety is gone by coming into equity for relief, and it shows affirmatively that the loss of legal recourse to the assets of the surety has resulted from the voluntary election of the obligee to extinguish the several remedy on his bond without any allegation of mistake or surprise. "If the obligee of a joint bond by two or more agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences, although the release was given under a manifest misapprehension of the legal effect of it in relation to the other obligors." *Hunt v. Rousmaniere*, 1 Pet., 1. If equity would not interfere in such a case to revive the legal obligation, even as against the principal debtor thus unwittingly released, it is difficult to perceive on what principle it should interpose to revive an extinguished remedy against a surety who is not bound beyond his legal liability and who has been discharged therefrom by the voluntary act of the obligee without any allegation of surprise or misapprehension of the law. That equity will not hold a surety liable where he is discharged at law seems to be well settled both in England and in this country, as a reference to a few of the decisions on this subject will fully show. In *Wright v. Russell*, 3 Wils., 530, it is said "that courts of equity are favorable to sureties, and where they are not strictly bound at law, equity will not bind them." And in *Simpson v. Field*, 2 Ch. Cas., 22, it was held "that, where a surety is not bound at law, he will not be made liable in equity." In the case of *Waters v. Riley*, 2 Harr. & G., 310, the court of appeals of Maryland say: "A surety is bound only by the bond itself, and is not under a moral obligation to pay; equity will not therefore interfere to charge him beyond his legal liability." The same doctrine is established by the court of appeals of Virginia, in *Harrison v. Field*, 2 Wash., 136, and by the supreme court of Pennsylvania, in *Weaver v. Shryock*, 6 Serg. & R., 262, and *Kennedy v. Carpenter*, 2 Whart., 361.

The only case which asserts a contrary doctrine is that of *United States v. Cushman*, 2 Sumn., 426 (§§ 557, 558, *infra*). Although, as a circuit decision, it is not binding in its authority upon this court, yet, proceeding from so eminent a judge, it is entitled to high respect. The case is precisely parallel with the present in all its circumstances, and the positions there assumed have been urged upon the court in this case as sufficient to entitle the appellant to a decree in his favor. The opinion of the court in that case, and the argument of the learned counsel for appellant in this, are based on the two following propositions, to neither of which is this court prepared to give its assent: 1. "That when a party enters into a joint and several obligation, he in effect agrees that he will be liable to a joint and several action for the debt; and if so, then a joint judgment can be no bar to a several suit; that by electing a joint suit, the obligee does not waive his right to maintain a several suit; and that a joint judgment is not *per se* a satisfaction of a joint and several contract." 2. "That even if the joint judgment could be treated at law as a merger of the several obligations, so far from that constituting a ground in equity to refuse relief against the

assets of the deceased party, it furnishes a clear ground for its interference; for it is against conscience that a party who has severally agreed to pay the whole debt should, by the mere accident of his own death, deprive the creditor of all remedy against his assets."

1. The first of these propositions proves too much for the case. For if the surety is still liable at law, the complainant has made no case for relief in equity. But the cases cited in support of it, namely, *Higgins' Case*, 6 Coke, 44, and *Lechmere v. Fletcher*, 1 Cromp. & M., 623, will not sustain the doctrine stated in this proposition. They establish this position, and nothing more, namely: "That, in case of a joint bond, a judgment against one joint contractor would be a bar to an action against another; but if two are bound jointly and severally, and the obligee has judgment against one of them, he may yet sue the other." The case of *Sheehy v. Mandeville*, 6 Cranch, 253, in this court, although sometimes criticised and doubted in other courts, goes no further than to decide that, where one partner is sued severally on a joint or partnership contract, and judgment obtained against him, it is no bar to a suit against the other, because this contract was not merged in the judgment, and because the first judgment was founded on a several, not a joint promise. But these cases give no countenance to the assertion "that a joint judgment is not *per se* a satisfaction of a joint and several bond." The law on this subject is too well settled to admit of a doubt, or require the citation of authorities, that, if two or more are bound jointly and severally, the obligee may elect to sue them jointly or severally. But having once made his election and obtained a joint judgment, his bond is merged in the judgment, *quia transit in rem judicatam*. It is essential to the idea of election that a party cannot have both. One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond. It no longer exists as a security, being superseded, merged and extinguished in the judgment, which is a security of a higher nature. The creditor has no longer a remedy, either at law or in equity, on his bond, but only on his judgment. The obligor is no longer bound by the bond, but by the judgment it has become the evidence of his indebtedness, and the measure of his liability.

§ 542. *Where a bond is joint only, the personal assets of a surety are discharged by his death, and it is the same in the case of a joint judgment taken upon a joint and several bond.*

2. The second proposition repudiates the doctrine of courts of equity, that, where a surety is not bound at law, he will not be made liable in equity. It does not controvert the well settled principle that, where the bond is joint only, the personal assets of the surety will be discharged by his death, but asserts that his conscience is affected because his bond was originally both joint and several. But if it is not against conscience that the estate of a surety should be released by his death, when his undertaking was originally joint only, it is hard to apprehend how it becomes so, when the obligee, having a choice of both securities, elects to hold the surety bound jointly and not severally. If a surety is under no moral obligation to pay, where he is not legally bound by his contract, his conscience cannot be reached when the law discharges him from his obligation. The law, as we have before stated, makes a part of every contract; and in case of a joint and several bond, the contract of the parties is that the estate of the surety shall be discharged by his death, if the obligee elect to hold him jointly and not severally liable. So that, in the present case, it is the obligee who is acting against conscience, because he seeks to hold the

surety liable, contrary to their contract. "No case can be found in the books," says a learned author (Pitman on Principal and Surety, p. 92, note), "where equity has varied the legal effect of the instrument so as to charge the surety." To give a remedy against the estate of a surety after it is discharged at law, and by the election of the obligee, would be varying the legal effect of his contract in a most material point.

The cases cited in support of the second proposition will be found on examination to have no bearing on the point now under consideration. They are too numerous to be severally noticed. They may all be found collected in 1 Story's Eq., § 162, in note, commencing with *Simpson v. Vaughan*, 2 Atk., 31, and ending with *Thorpe v. Jackson*, 2 Younge & Col., 553, and *Wilkinson v. Henderson*, 1 My. & K., 582. They chiefly refer to cases of partnership, and other joint debtors whose liability at law is joint only, but equity administers relief as against the estate of the deceased partner or joint debtor on account of the moral obligation of each to pay the debt, and because they have received a benefit from the transaction. The doctrine of these cases is clearly stated by Sir William Grant, in the case of *Sumner v. Powell*, 2 Meriv., 36. "Where," says he, "the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But there all the partners have had a benefit from the money advanced or the credit given, and the obligation of all to pay exists independently of any instrument by which the debt may have been secured; so, where a joint bond has been in equity considered as several, there has been a credit given to the different persons who have entered into the obligation. It is not the bond that first created the liability." "It is for this reason," says Mr. Justice Story (Eq. Juris., § 164), "that equity will not reform a joint bond against a mere surety so as to make it several against him, on the presumption of a mistake from the nature of the transaction."

When an obligee takes a joint and several bond, he has nothing to ask of equity; his remedy is wholly at law. If he elects to take a joint judgment, he voluntarily repudiates the several contract, and is certainly in no better situation than if he had originally taken a joint security only; equity gives relief, not on the bond, for that is complete at law, but on the moral obligation antecedent to the bond, when the creditor could have had no remedy at law. An obligee who has a joint and several bond, and elects to treat it as joint, may sometimes act unwisely in so doing, but his want of prudence is no sufficient plea for the interposition of a chancellor. Nor can the conscience of a mere surety be affected, who, having tendered to the obligee his choice of holding him jointly or severally liable, has been released at law by the exercise of such election. The decree of the circuit court is, therefore, affirmed.

§ 543. *At law the survivors of joint debtors alone are chargeable, but it is not always so in equity.*

Dissenting opinion by MR. JUSTICE WOODBURY, McLEAN, J., concurring.

The leading question in this case is, whether, after the recovery of a joint judgment on a joint and several bond, and the death of one of the obligors happening, who was a surety, a court of equity will sustain a remedy against his property in the hands of his executor. The safety of the government, having such numerous sureties on official bonds, depends so much on their liability in all proper cases, that the technical discharge of them on objections not reach-

ing the merits is a great and growing evil. The public, too, in the individual dealings of many on the strength of the security furnished by others than the principal debtor, have a deep interest in preventing their discharge without a full satisfaction of the debt.

I must be excused, then, for stating some of the reasons and authorities why it is not in my power to concur in the judgment just pronounced, discharging the executor of the surety to the government, without making any payment whatever of the debt. It is conceded by me that, in case of a debt entirely joint, if one of the obligors die, it is a rule in a court of law, that "his executor is totally discharged, and the survivor or survivors only chargeable." 2 How., 78; 2 Sumn., 368; Bac. Abr., Obligations, D., 3; Erwin v. Dundas, 4 How., 78; 2 Whart., 361, in Kennedy v. Carpenter, and cases cited there; 2 Harr. & Gill, 313; Rogers v. Danvers, 1 Mod., 165; 1 Freeman, 127. This, however, is the rule at law, and is not, in all cases, the same in equity. Even at law, the objection is purely technical, and arises only on account of the want of a remedy there against the estate of the deceased, and not because the debt itself has been satisfied; and so strong is the justice of still enforcing it at law without a resort to equity, that the statutes of many states have expressly made provision for collecting a debt against the estate of all joint debtors when it has never yet been paid by either. See United States v. Cushman, 2 Sumn., 312 (§ 557, *infra*), and 2 Gill & J., 316. But in time, without any statute, courts of chancery gave relief in this class of joint contracts by allowing a remedy in certain instances, and though this was at first refused (2 Brown Ch., 276), and was granted at last with some hesitancy, it has become the ordinary practice to allow it when the original indebtedness or liability, though now in form joint, was, on any account or in any just view, general no less than joint. Indeed, without relying on this distinction, the lord chancellor in Primrose v. Bromley, 1 Atk., 90, states a case where he decreed such relief to a certain extent on a joint bond against the estate of the deceased. He observes: "There was a case which I determined in this court, where there were two persons jointly bound in a bond, one of the obligors died; and to be sure at law, it might have been put in suit against the survivor; but, as I thought it extremely hard, I decreed the representative of the co-obligor should be charged *pari passu* with the surviving obligor in the payment of the bond."

§ 544. *Relief in equity against the estate of a deceased debtor on a joint and several obligation.*

But it seems uniform to grant such relief by a new remedy in chancery against the estate of the deceased whenever, as here, the original contract was several as well as joint. Towers v. Moor, 2 Vern., 99; 1 Pet., 16, and cases *post*; Rogers v. Danvers, 1 Mod., 165; Burr., 1190; Williams on Executors, 809, 811; 1 Freeman, 127. I doubt whether a single case to the contrary exists in either the American or the English books. One ground of relief, where the original contract was several no less than joint, is the admission in the undertaking that each signer and his estate should be separately liable for the whole to the obligee, so far as regards him, and hence raising in equity a liability to do this separately by his property after death, because the difficulty in any remedy to enforce it at law is merely technical, and the equity or conscience in paying an unsatisfied promise and debt stands still unimpaired. See further cases. United States v. Cushman, 2 Sumn., 426 (§§ 557, 558, *infra*); 1 Meriv., 563; Sumner v. Powell, 2 Meriv., 30; Devaynes v. Noble, 2 Russ. & Myl., 506. The chief difficulty in this class of cases is to settle whether the

contract was several as well as joint. It is the language of the contract, when several, which is the most decisive test as to its severalty. Sir William Grant says: "When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived." 2 Meriv., 36. A similar reliance on the words used being joint only, and not several, appears in *Harrison v. Field*, 2 Wash., 141. The court observes, too, in *Sumner v. Powell*, 1 Turn. & R., 425: "There can be no doubt in the world that, if this covenant had been a joint and several covenant, it would have done; and, therefore, any evil which might otherwise arise out of the case may be avoided by the addition of a single word." In *Towers v. Moor*, 2 Vernon, 99, it is said: "Where two are jointly bound, and one dies, you must sue the survivor, and cannot maintain an action against the executor or administrator of him that is dead; but, if bound jointly and severally, it is otherwise." So in *Lechmere v. Fletcher*, 1 Crompt. & M., 629, there had been a contract wholly joint, and a judgment on it jointly; but one of the promisors made also a several agreement to pay the amount, not as a substitute, but as an additional undertaking, and a remedy in equity against the representative of this last promisor was sustained on that separate agreement. But without pursuing this point further, it is placed beyond doubt, by the numerous cases hereafter cited, that courts of equity will give relief though the contract produced is on its face joint, if it be proved that it was originally agreed to be joint and several, and by mistake or ignorance was written joint alone. It becomes necessary, then, to consider next the only pretense urged for taking this case out of the general rule, namely, that a joint judgment had been subsequently recovered here against all the obligors, and that the deceased was a surety.

§ 545. *A joint and several obligation is not merged in a joint judgment taken thereon.*

1. It has been much pressed here that the remedy in this case is now at law only on the joint judgment, and hence should not be enforced severally in equity. But it is conceded that the original liability was joint and several; and it is laid down in some books that a several action at law could probably have been sustained here on the original demand, after the joint judgment. It has been adjudged by this court that on a joint and several promissory note, an action and judgment against the signers severally are no bar to a joint action against them. *Sheehy v. Mandeville*, 6 Cranch, 253 (BILLS AND NOTES, §§ 1406, 1407); 6 Coke, 44; 13 Mass., 148. And though a joint suit on a joint and several promise is a bar to another joint action on it,—*Higgins' Case*, 6 Coke, 45; *Gilman v. Rives*, 10 Pet., 298,—it is thought by Judge Story, after much deliberation and research, to be no bar to a several suit and judgment afterwards on the original joint and several promise. *United States v. Cushman*, 2 Sumner, 312, *semb.*, and 427; 1 Story's Eq. Jur., § 164 and note, and § 676; 7 Serg. & R., 355; *Lechmere v. Fletcher*, 1 Crompt. & M., 623. *Sed cited contra*, 13 Serg. & R., 288; 2 Watts, 204; 7 Serg. & R., 354; 2 Serg. & R., 280; 9 Watts & Serg., 88; *United States v. Thompson*, 1 Gilp., 622; 1 Pet., 16; 2 Wash., 136.

§ 546. — *authorities reviewed.*

On an examination of the opposing cases which have been cited, it will be seen that the weight of authority is against the technical merger or bar set up here by the joint judgment. The case cited from Gilpin against this is one at law; and the point in controversy was merely the validity of a release to one co-obligor, after a judgment against another, to discharge the latter also. The

case of *Williams v. McFall*, 2 Serg. & R., 280–282, is only sustaining a judgment separately against one co-obligor, who confessed it. The case in 1 Peters, 16, merely held one obligee to abide by the selection he had made of one kind of security over another, given by a single obligor. The case in 2 Washington, 136, was one of a joint contract originally, no less than afterwards. The case of *Reed v. Garvin*, 7 Serg. & R., 354, held, to be sure, that one joint judgment was a bar to another at law against the executors of one of the obligors deceased. Yet, at the same time, it maintained that a remedy existed against the real property, if not the personal, of the deceased, and at law, in Pennsylvania, wherever it existed in England in chancery (pp. 356, 357, 365). Duncan, J., at this last page, says what strongly applies here, though after a joint judgment on the bond against all the obligors: "That in some way the defendants, the executors of the deceased obligor, should be reached, or the lands of the testator, which are assets in his hands," and charged with the payment of judgment debts, "we all agree though we differ in the mode." The case of *Downey v. Farmers & Mechanics' Bank*, 13 Serg. & R., 288, is the only case cited which holds that after an action at law against two co-obligors, though judgment be obtained only against one, another suit separately will not lie against the other. But this was deemed by the court as illiberal and technical in principle, and applied only to another proceeding at law against one. There is another case, *Ex parte Rowlandson*, 3 P. Wms., 406, which has not been cited, but holds, as a collateral point or illustration, that a suit against all obligors, instituted on a joint and several contract at law, may, while pending, be pleaded in abatement to a several suit on the same contract, and *vice versa*. No decided case of this kind is cited, however, and this is not in all respects in point.

Nor is it in point that a joint judgment against two, apparently on a promise wholly joint, is a bar to a subsequent action at law against one of them, without averring the death or discharge of the other (see *Gilman v. Rives*, 10 Pet., 298), because the present promise was not joint alone. In no instance in this class of cases has it ever been held necessary, in order to sustain this proceeding in equity, that a judgment on the original indebtedness should be severally recovered first. See *post*; 1 Meriv., 539. Or that, if joint, it should be still open to a several remedy at law. Thus stands this point on the precedents. It will be apparent, therefore, that when this is a mere technical objection as to a remedy, and not any defense against the debt as still due, and is a very doubtful one at law on the present facts, it ought not to prevail a moment in a court of equity.

§ 547. *Equity looks at the original contract and deduces the liabilities of the parties from that.*

It is not to be overlooked that our present inquiries are not at law, but wholly in equity, and are to be governed by equitable, and not strict legal or technical, considerations. If, then, the joint judgment had been more clearly a technical merger of the joint and several debt here, and no several action would afterwards lie at law on the note, would it not be just and right on principle to grant this separate aid in chancery? So strong is this principle, we have already seen, that sometimes it is provided by express legislation that at law a suit may still be prosecuted against the surviving debtor and the executor of the deceased debtor together on a joint obligation, or, if existing in a judgment, be enforced against the property of either. See Sumner, and Harris & Gill, before cited. The justice of such a remedy, the debt against both being conceded still to exist unpaid, seems to be so apparent as to commend its sanction

and success in a court of equity without the aid of any statutory provision. 1 Story's Eq. Jur., § 164. One reason why the assets in the hands of the executor are charged in any of these cases is, that he is a trustee for all which can equitably be charged on them. 2 Williams on Executors, 1584. But was not the estate of the deceased charged equitably with a joint judgment against him on a joint and several promise, as fully as by that promise without any judgment? One prominent reason assigned against this relief here, under all the circumstances of the case, has been, that, by the joint judgment, there has been a release or *quasi* release of each obligor. But this cannot mean a release of the debt, or the joint judgment itself could not be enforced at all in any way, nor against either. So far from the debt itself being released, it is fixed and proved by a solemn record. Notwithstanding, too, the subsequent death of one, the debt still stands. He has never paid it, and his property, in every conscientious view, should also stand as liable as ever to discharge it, the obstacle at law reaching merely the remedy. The obligation on the estate to pay *in foro conscientie* being strong as ever, the moral duty on the representative of the deceased is still imperative, and is more to be weighed and enforced in chancery than elsewhere, that being the tribunal peculiarly designed to relieve against much of the strictness and technicality prevailing elsewhere.

It has been urged further that if the liability is enforced here in chancery, it will be without any equity existing between the obligors. But that is not the question; it is whether there was not an equity between the obligors and the obligee — one growing out of an absolute promise, an ample consideration both implied and hereafter shown, and, in this case, a judgment recovered. An executor is charged sometimes where a judgment has been recovered against the deceased when he would not be if there had been no such judgment, as the cause of action at times does not survive. *Whiteacres v. Onsley*, Dyer, 322, a; 2 Williams on Executors, 1366. Again, it is urged that, the joint judgment being a merger of the joint and several contract, and a several remedy at law afterwards not allowed, there is no ground in equity because none at law exists to charge the several estate of one deceased. But this proves too much. The principle in all these cases is not to discharge one in equity if not liable to a suit severally at law, but almost the reverse, because, in all cases except where the contract, on its face and in terms, was several, no several suit at law can be maintained. But still a proceeding is frequently sustained in equity, and the circumstance of there being no relief at law is one reason for rather than against it. Thus is it with a partnership debt, a common joint debt on a joint loan and bond, and a joint contract or bond not reformed, but which should have been written several. In none of these could a several suit at law lie when the co-obligor died, and yet in all a court of chancery will relieve. Those in each class have been or will hereafter be explained and need not be repeated. Again, on equitable grounds it seems obvious that after a joint judgment against joint and several obligors, which binds still the person and property of either as much as if the judgment had been several, the property of each should continue liable as much as if the contract had been never sued or had been sued severally. And *à fortiori* should this be the case in equity, where judgments form a lien on the property of all the respondents, and a joint judgment, as here, bound the estate of the deceased co-obligor. I am not aware of any case like this, even if it had been entirely joint in form, that equity would not pursue such a lien against all. Again, supposing that a several action would not lie here on the bond against one co-obligor after a joint judgment, though the promise was

joint and several rather than joint or several, or joint alone, it is far from decisive against this application in equity. There the court often looks to the circumstance whether the original contract of indebtedness was joint alone or joint and several, and if the latter, will aid a recovery.

§ 548. — *authorities reviewed.*

So paramount is this test, that, where the written contract reads joint only, equity will, on request, reform it, if it was originally agreed to be several, and, by mistake or fraud, was not so written, and, after reforming it, chancery will enforce it against the estate of one co-obligor deceased, as it was supposed to stand originally. 1 Story's Eq. Jur., § 164. Other cases seem to imply that an original indebtedness, though the bond be only joint, and no evidence offered of an agreement that it should be several also, will be regarded as several and enforced accordingly, if it was for an ordinary loan where all are partners or where all were benefited. See *post*; 1 Story's Eq. Jur., §§ 162, 676; 2 Russ., 196; 2 Meriv., 36. *A fortiori*, will relief then be proper, if it was, as here, originally written several, or even if it was agreed to be so? 2 Ves. Sen., 101, 106; *Ex parte* Symonds, 1 Cox Ch., 200. Indeed, the justice of this has seemed so strong that some legislatures, as in Maryland, have gone so far as expressly to enact that the same remedies shall be sustained on joint bonds against estates of one deceased as on those joint and several. See act of 1811, c. 161, in 2 Gill & Johns., 316; 7 Harr. & Johns., 466.

That I am right as to the practice in equity to look to the original contract, and not merely the face of the present debt, may be seen in the cases of partners and of ordinary joint contracts, where it is allowed to be proved that originally, in their essence, though not in form, they were several no less than joint, and after that to grant relief. See the illustration in *Hunt v. Rousmaniere*, 1 Pet., 16, and cases hereafter cited. It is a peculiar excellence in chancery, on many occasions, that it goes behind writings, and even sealed instruments and judgments, to ascertain how the original transaction stood, and what were its true obligations, in order to enforce them. The joint judgment here did not create the original liability to pay, and hence equity can as properly go back of it to see what the original liability was, and if several no less than joint, as it goes back of a joint bond when "it was not the bond which first created the liability to pay." 2 Williams on Executors, 1370. However, then, it may be at law as to the several liability of a joint and several contractor, after a joint judgment has been recovered, it seems that the principle and precedents in equity do not rest on that, but hold the estate of one after his death responsible, if the original obligation was several as well as joint. Here, the promise and duties were at first not only several, and have never been satisfied, and except technically at law in respect to the remedy, have never been extinguished; but to the original equities have been superadded a lien on his estate, by the joint judgment recovered before his death, and which it is equitable to have enforced after his death, on this no less than several other occasions.

There are two classes of cases which go to sustain further this view, where the contract is on its face joint, and not in form several as well as joint, and is not proved to have been originally agreed to be written several as well as joint; and yet where relief can be had, looking to the original severalty of the transaction, rather than to the mere technical law on it as now standing. One is, where the obligors acted as partners in business, and there, though the promise is in form only joint, a court of equity will charge the estate of the deceased partner in a bill against the executor or administrator. 1 Story's Eq. Jur.,

§§ 163, 676; Thomas' Case, 3 Ves., 399; 1 Meriv., 539; Devaynes v. Noble, 2 Russ. & M., 495, 506; Bishop v. Church, 2 Ves. Sen., 100, 371. This is also said to proceed on general principles of equity rather than on the *lex mercatoria*. 1 Meriv., 539, 562; 2 Younge & Col., 562. It goes back for a test to the original consideration and relation of the parties. So fully, however, even there, is the relief granted on the ground or theory of a several obligation or duty originally, though not so expressed in the writing, that the master of the rolls declares, in Wilkinson v. Henderson, 1 Myl. & K., 588: "All the authorities establish, that, in the consideration of a court of equity, a partnership debt is several as well as joint." The other class is, that in a joint loan or other transaction, if the obligation taken be in terms joint only, and not agreed in the writing or otherwise to be several, equity will still enforce it in many cases against the estate of either alone. 2 Meriv., 37; Thorpe v. Jackson, 2 Younge & Col., 553; Cowell v. Sikes, 2 Russ., 196; *Ex parte* Kendall, 17 Ves. Jr., 525, note; Waters v. Riley, 2 Har. & Gill, 310-313; 6 Serg. & R., 266; Primrose v. Bromley, 1 Atk., 89; Kennedy v. Carpenter, 2 Whart., 364, 365; 1 Myl. & K., 582; Simpson v. Vaughan, 2 Atk., 32; Bishop v. Church, 2 Ves., 101. Here, also, the idea of a several obligation originally is still looked to, and is sought outside of or behind the joint instrument, by examining the transaction as it took place at first.

Some rest the remedy here on the presumed receipt originally by each of a part of the loan or benefit; and others on the legal presumption, not the proved fact, that the contract itself was by mistake originally not written several as well as joint, and thus reforming it and deciding on it as if reformed and made several. See cases before cited, and Hunt v. Rousmaniere, 1 Pet., 16. And others put it on the probable legal intent, that all should be severally held responsible. 6 Serg. & R., 261; 9 Ves., 118. And this intent is the presumption in all mercantile transactions,—more obviously from usage there,—but is not confined to them. 1 Russ., 191; 2 Younge & Col., 562; Rawstone v. Parr, 3 Russ., 427; *Ex parte* Kendall, 17 Ves. Jr., 528, note. So strong is this equity regarded against the estate of one deceased, in either of these classes, that chancery will allow it to be pursued without a resort first to the survivor. Wilkinson v. Henderson, 1 Myl. & K., 588; Sleech's Case, 1 Meriv., 539, and 3 Meriv., 593. The reliance just referred to, on legal presumptions and probable intents originally, in order to find an original severalty in the case to help furnish or justify a remedy in equity, discloses another and the last ground I shall consider in favor of such a remedy here. It is this. If such presumptions will be made in point of law, as to the intent, and an error in the writing, so as to raise a several engagement originally, to charge the estate of one deceased, the reason for them here is much stronger, as here the original contract was expressed on its face to be several. We are not compelled to resort to mere constructions and inferences to show it to be several. And if equity will in these cases overcome the technical objection at law which prevents a proceeding there against the estate of one deceased obligor, when the contract is on its face joint, so may it equally well overcome the technical objection at law, when the judgment is on its face joint. Indeed, as before suggested, the equities in favor of this redress in all cases of joint contracts, and independent of statutory provision, are nearly as strong as in those joint and several,—and quite as strong in case of joint judgments, as these last generally constitute an actual lien on the estate of each obligor.

§ 549. *Equity affords a remedy against the estate of a surety in a joint and several bond upon which the obligee has taken a joint judgment.*

2. No ground remains for claiming an exemption of the estate of Archer from this liability in equity, unless it be that he was a surety in the bond. But if a surety promise severally as well as jointly, he seems as liable in equity on account of that written and express promise as a principal would be. And it is on that several promise he is here chargeable in the first instance. If it was necessary to show some original consideration, in connection with the surety, in such matters, the signers of a joint and several bond are as to the obligee usually to be regarded as all principals. 2 Sumn., 427; 6 Johns. Ch. R., 309; Boddam's Case, 9 Ves. Jr., 465; 1 Story's Eq. Jur., § 496. It has been adjudged by this court, that the consideration to charge the principal is good to charge the surety. Thus, in *The United States v. Linn*, 15 Pet., 290 (§§ 190-194, *supra*), it is said: "If Linn received a sufficient consideration to uphold the promise on his part, it was sufficient to bind the sureties. There was no necessity for any consideration passing directly between the plaintiffs and the sureties. It was one entire and original transaction, and the consideration which supported the contract of Linn supported that of his sureties." P. 314. Beside this, unless the obligee injures them by a new stipulation for further delay with the principal, which is not attempted to be proved here, and when here the delay benefited the surety alone, the principal being insolvent, then it will be seen that other good reasons usually exist for him to consider them as principals, and as promising for a good and valuable consideration to pay the sum named in the bond, and thus to raise a strong equity against them. Such a consideration, when they are liable by a sealed instrument, is in law always presumed or implied. 6 Johns. Ch., 302; 1 Vernon, 427; 1 Ves. Sen., 514; 15 Pet., 291. It is the usage, also, for sureties to be previously indemnified by a pledge of actual property of some kind, or to receive in money in advance two or more per cent. for their guaranty. It is to be recollected, also, that here the imported goods were, in consequence of their promise, allowed to be sold in this country by the owner, with no other payment of duties, and thus a most important pecuniary benefit conferred on their friend for their promise as sureties. One of Lord Bacon's proposed improvements in chancery was to treat sureties as justice and the law required, and their own conduct warranted; they, being anxious to obtain favors for friends or themselves by their promises, should therefore be made equally anxious to fulfil those promises. See 6 Johns. Ch. R., 309, a like view. The surety is also often the most responsible signer, and without whom the credit would not generally have been given.

An idea seems to have been entertained here, that chancery will do nothing to charge a surety which cannot be done at law, or when he is technically exonerated at law. But this is an error. It will often extend like relief against them as fully as against principals. Thus, passing by the cases that a surety will still be made liable in equity, though the bond is lost, as this may be done at law (*Skip v. Huey*, 3 Atk., 93; 6 Johns. Ch., 307; 1 Ch. Cas., 77; Boddam's Case, 9 Ves., 464; *Equity Cases Abr.*, 93; 2 Wash., 140), yet, in chancery, a contract will be reformed against a surety as well as a principal, where it is proved clearly that his name was, by mistake, omitted in the body of the instrument, though this will not be done at law. *Crosby v. Middleton*, Prec. in Ch., 309. So where, by mistake, the bond runs to a wrong person. *Wiser v. Blachly*, 1 Johns. Ch., 607. There are several cases, too, where in equity, but not at law, a bond only joint on its face will be reformed against a surety, and

made several also, if it was proved to be originally agreed to be several. 1 Story's Equity, § 164, and cases there. See cases before cited, and 3 Russell, 424, 539; *Weaver v. Shryock*, 6 Serg. & R., 262-265. And to go to the full extent of the present case, it has been deliberately settled that relief in equity to charge the estate of a deceased surety will be given as fully as against the principal, when the bond is, on its face, expressed to be joint and several. 6 Johns. Ch., 309; *Rawstone v. Parr*, 3 Russ., 427 and 539, *semb.*; *Wiser v. Blachly*, 1 Johns. Ch., 609; *Prec. in Ch.*, 309; *United States v. Cushman*, 2 Sumn., 426. In this class of cases, also, the relief is made to rest on the express form of the bond or contract being several as well as joint, and not on any joint benefit or partnership. These last are distinct and different grounds to charge either principals or sureties, when contracts are on the face of them joint. See *Pitman, Prin. & Sur.*, 91, note 1. So, in *Rawstone v. Parr*, 3 Russ., 427 and 539, S. C., it was held that, though the present contract appeared to be only joint, if it was agreed originally to be joint and several, as it was in truth here, a court of equity would aid a recovery against the executor even of a surety. *Prec. in Ch.*, 309; 1 Story's Equity, § 164; 1 Johns. Ch., 609. See cited *contra*, *Waters v. Riley*, 2 Harr. & Gill, 310; 6 Serg. & R., 246, *semb.*; *Kennedy v. Carpenter*, 2 Whart., 361. But, as already shown, these last were all cases of joint contracts, and not agreed to be several also; and cases where, likewise, no consideration was supposed to exist affecting the surety.

In 6 Serg. & R., 266, the court admit that cases may exist where the estate of a co-surety may be charged, and one of them is where it was originally agreed the bond should be several. P. 264. We have already cited a number of others to that effect, and consider this an authority for our proposition. The case of *Harrison v. Field*, 2 Wash., 136, is often cited against the position I have taken. But it was confessedly a joint bond, and there was no evidence of an original agreement to have it several. P. 138. And Judge Roane, p. 139, makes the same admission, that cases may exist where the estate of a co-surety is liable. All the doctrines in *Pitman on Principal and Surety*, 90 and 91, supposed to differ from this position, are cases where the written contract is joint, and not joint and several. Obscurity arises in some of the cases amidst these distinctions from their subtilty and variety, and this tends to mislead, unless cautious discrimination is made. This, and the collision between a few of the cases in the books, sometimes spring from the circumstance of not adverting to the ground that all the signers are principals as to the obligee, and that sureties are, as to him, to be made liable as if principals. See this error in *Waters v. Riley*, 2 Harr. & Gill, 310. And from not discriminating between cases where the written obligation was only joint, and where it was both joint and several. 3 Russell, 541. So, from not observing that the surety is estopped as to the receipt of a consideration in a sealed instrument, and more especially, as here, after a judgment against him and the principal.

Another cause of some confusion and mistake in some of the cases is the treating of them as if still at law, and on strict legal principles, rather than in equity and on equitable grounds. It is another source of error that several cases rest on more than one ground. Thus, in *Primrose v. Bromley*, 1 Atk., 90, the obligation was several as well as joint, and a benefit or consideration extending to the co-obligor deceased. So, in *Simpson v. Vaughn*, 2 Atk., 33, the court first reformed the contract, being a mercantile loan, so as to regard it as several no less than joint, and a full consideration to the deceased was apparent. Here one ground exists which is sufficient alone, namely, a written obligation,

several as well as joint; though, were it necessary to show a consideration also, reaching the surety, enough to raise a legal and strong presumption of one, is not difficult to be pointed out, as before done, and explained.

In conclusion, it may be useful, as a test of the real equity of the principle adopted by the court in this case, to examine for a moment and discriminate what is its character or extent. It is this. An original obligation, joint and several, after the death of one obligor, who was a surety, may equitably be enforced against his estate, if not sued at all, but cannot be equitably enforced against it if sued jointly, and the liability of all rendered more certain, and a lien against the estates of all fixed by the judgment recovered. Again, if an obligee sues each obligor separately, on a joint and several bond, before the death of either, it holds him entitled to relief against the estate of the deceased; but if he sues all together, he is not equitably to be relieved. In both cases the original contract was the same in form and substance, the consideration the same, the liens the same, and as to the deceased, the same in amount after, as well as before, judgment; and in both cases the debt itself is still unpaid, and still unreleased, and no remedy open at law against the estate. Yet it seems, in an equitable view,—in a court whose duty and business it is generally to adopt an enlarged, liberal and just policy, and to aid against the strictness and technicalities of law,—one of these cases is to be deemed entitled to its beneficent interference, but the other is not.

Again, as a consequence of this doctrine, all joint obligors will, of course, hereafter be burdened with much increased cost, instead of being aided by any principle in their favor really settled by the court in this judgment. Because all the ameliorating principle settled here is that, if each obligee is sued severally on a joint and several obligation, the obligor is entitled to the aid of a court of equity against the estate of one deceased; but if he brings only one action, and makes but one bill of cost against all of them, he behaves so as to be entitled to no equitable relief. Certainly this looks like a new attitude or version of what in a court of equity should be considered equitable; and it is likely to prove much more beneficial to the profession than to the parties concerned or the public. Whatever technical differences as to remedies may be created at law by the forms of judgments, it will be difficult in equity, and applying equitable principles, as in the present case, to discriminate against the present case on the merits and on grounds of substantial justice. The plaintiffs, therefore, seem to me entitled to recover, out of the estate of the deceased, the balance which is due.

PICKERSGILL v. LAHENS.

(15 Wallace, 140-146. 1872.)

APPEAL from U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Lahens was sued at law by Pickersgill, and filed a bill for relief against the cause of action, and applied for an injunction. A joint injunction bond was given, on which Lafarge was surety. The bond was conditioned to pay whatever was recovered in the suit at law. Judgment was recovered in that suit. Lafarge died, and Lahens became insolvent. A bill in equity was then filed against the executors of Lafarge.

§ 550. *Equity affords no remedy against the estate of a deceased obligor in a joint bond who was a mere surety.*

Opinion by MR. JUSTICE DAVIS.

It is very clear that the estate of Lafarge is discharged at law from the pay-

ment of the obligation in controversy on the familiar principle that if one of two joint obligors die the debt is extinguished against his representative, and the surviving obligor is alone chargeable. It is equally clear that in this class of cases, where the remedy at law is gone, as a general rule a court of equity will not afford relief, for it is not a principle of equity that every joint covenant shall be treated as if it were joint and several. The court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see, either by independent testimony or from the nature of the transaction itself, that the parties concerned intended to create a separate as well as joint liability. If, through fraud, ignorance or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been done where there is a previous equity which gives the obligee the right to a several indemnity from each of the obligors, as in the case of money lent to both of them. There a court of equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but through fraud, ignorance, mistake or want of skill failed to accomplish their object. This presumption is never indulged in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and consequently there is nothing on which to found an equity for the interposition of a court of chancery. If the surety should die before his principal, his representatives cannot be sued at law; nor will they be charged in equity. These general doctrines on this subject were presented at large in this court in the case of *The United States v. Price* (§§ 540-549, *supra*), and they are sustained by the text writers and books of reports in this country and in England. *Story, Eq. Juris.*, §§ 162-164; *Simpson v. Field*, 2 Ch. Cas., 22; *Sumner v. Powell*, 2 Meriv., 30; S. C., on appeal, 1 Turn. & R., 423; *Weaver v. Shyrook*, 6 Serg. & R., 262; *Hunt v. Rousmanier*, per Marshall, C. J., 8 Wheat., 212, 213; S. C., 1 Pet., 16; *Pecker v. Julius*, 1 P. A. Brown, 33, 34; *Harrison v. Field*, 2 Wash. (Va.), 136; *Kennedy v. Carpenter*, 2 Whart., 361; *Other v. Iveson*, 3 Drew., 177; *Jones v. Beach*, 2 De G., M. & G., 886; *Wilmer v. Currey*, 2 De G. & S., 347; *Waters v. Riley*, 2 Har. & Gill, 311; *Dorsey v. Dorsey*, 2 Har. & J., 480, note; *Bradley v. Burwell*, 3 Denio, 65; Mr. Cooper's Note to Justinian's Institutes, p. 462, and cases there cited; *Richardson v. Horton*, 6 Beav., 185; *Wilkinson v. Henderson*, 1 Myl. & K., 582; *Rawstone v. Parr*, 3 Russ., 539. The authority of the decisions on this subject we do not understand the appellant as questioning in a proper case; but he insists they are not applicable here.

§ 551. — *and this rule applies in the case of bonds required by law to be given in legal proceedings.*

His position is, that a statutory obligation like the bond in question is different in principle, and should be interpreted differently from a contract made by private parties between themselves, as the obligees in such a bond cannot direct the form it shall take, nor elect whether to accept or refuse it. The bond, which is the foundation of this suit, was given in 1846, under the order of the court of chancery of New York, to stay the proceedings in an action at law then pending in the superior court of the city, and it is argued, as the statute does not require bonds of this character to be "joint and several," in legal indentment they must be joint in form, and all the obligors, therefore, should be

regarded as principals. It is undoubtedly true, as words of severalty are not employed, that a joint bond is a compliance with the law, but it by no means follows that a joint and several obligation is not an equal compliance with its terms. It is certainly not forbidden, and as the statute is silent on the subject the fair intendment is that either was authorized, and that the court had the right to direct which should be given. If this be so, then it cannot properly be said that the party enjoined had no voice in the nature or sufficiency of the security to be taken, for the discretion of the chancellor was, necessarily, to be exercised in relation to both these matters, if his attention was directed to them, after both sides were heard. It is quite apparent, if this discretion had been invoked, that the instrument of security might have been different; and equally apparent that Lafarge, in case this had been done, might have been unwilling to assume the additional risks which a separate liability imposed on him. We must suppose, in the absence of any evidence on the subject, that he knew the legal differences between the different kinds of obligations, and became bound in the way he did because a joint liability was more advantageous to him. If this was his intention, it would be manifestly unjust for a court of equity, after the legal *status* was fixed by his death, to change the nature of the obligation which he executed in order to charge his estate. In the cases in which equity has treated the obligation as joint and several, although in form joint, the surety participated in the consideration. In this case Lafarge had no pecuniary interest in the litigation which was enjoined, and derived no personal benefit from the instrument of writing which he signed, and, therefore, no good reason can be furnished why his standing in a court of equity is not as favorable as if he were surety, without advantage to himself, in the borrowing of money. In neither case is there any obligation to pay independent of the covenant. In the one there is a liability for a debt; in the other, for a result in an action at law. Both are cases of contract, for, indeed, suretyship can exist in no other way; and we know of no principle of equity by which a contract of indemnity is to be construed so as to charge an estate, and an engagement to pay money to receive a contrary construction. The equities in both are clearly equal, and as the estate of Lafarge is not liable at law, it will not be held liable in equity. The demurrer to the bill was, therefore, properly sustained, and the decree is accordingly affirmed.

BROOME v. UNITED STATES.

(15 Howard, 148-159. 1853.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—Ambrose Crane was appointed collector of customs for St. Mark's in Florida, and signed, with his sureties, Swain and Macon, what was meant by them to be an official bond. The form of the bond is given in the statute. This conforms to it in every particular. 1 Stats. at Large, 705. Crane, the collector, became a defaulter. This suit was brought to recover the amount of the defalcation from the administrator of Macon, one of the sureties of Crane. The bond is dated on the 2d June, 1837. Two indorsements are upon it. One of them was made by the district attorney of the United States for Florida.

"Office of the United States' attorney, middle district of Florida, July 4, 1837. I hereby certify, that Peter H. Swain and Arthur Macon, Esqrs., who appear to have executed the within bond as securities, are generally esteemed

to be, and in my opinion undoubtedly are, good for the amount of this bond. They reside in Leon county, and I would take either of them, without hesitation, as security for a private debt of that amount. The signatures appear to be genuine.

CHARLES S. SIBLEY, District Attorney."

The other indorsement is as follows:

"COMPTROLLER'S OFFICE, July 31, 1837.—Approved in the above certificate.

"GEORGE WOLFE, Comptroller."

Macon died on the 24th July, seven days before the date of the comptroller's approval, and twenty-four days after the date of the district attorney's indorsement. The evidence in the case shows that in the year 1837 the mail time between Tallahassee and Washington was from eight to ten days. The distance might have been traveled by an individual in less time, but not in less than seven or eight days. This testimony was introduced by the plaintiff to prove that the bond, if it had not been delivered before the 24th of July, the day of Macon's death, that it must have been in the course of transmission from the obligors before that day, as the comptroller's approval is dated the 31st of the month. The act directing bond to be taken from collectors, with sureties, to be approved by the comptroller of the treasury of the United States, will be found in 1 Stats. at Large, 705. It is that every collector, naval officer and surveyor employed in the collection of the duties upon imports and tonnage shall, within three months after he enters upon the duties of his office, give bond, with one or more sureties, to be approved by the comptroller of the treasury of the United States, and payable to the United States, with condition for the true and faithful performance of the duties of his office, according to law. The condition of the bond is, that whereas the president of the United States hath, pursuant to law, appointed the said ——— to the office of ———, in the state of ———: Now, therefore, if the said ——— has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of said office according to law, then the above obligation is to be void and of none effect, otherwise it shall abide and remain in full force and virtue.

§ 552. *The obligation of a bond delivered to the obligee for acceptance, if approved and afterwards accepted by him, begins at the time of delivery.*

In this state of the case, a recovery upon this bond is resisted by an objection that it never had a legal existence as to Macon, the intestate of the appellant, because he died before it was approved by the comptroller. It is not denied — or, if it be, the evidence makes it altogether probable — that the bond had been delivered before Macon died. We cannot admit that the date of the approval can be taken absolutely as the time when the bond was accepted, without any relation to the time when it was delivered. A bond may not be a complete contract until it has been accepted by the obligee; but if it be delivered to him to be accepted if he should choose to do so, that is not a conditional delivery, which will postpone the obligor's undertaking to the time of its acceptance, but an admission that the bond is then binding upon him, and will be so from that time if it shall be accepted. When accepted, it is not only binding from that time forward, but it becomes so upon both from the time of the delivery. That is the offer which the obligor makes when he hands the bond to the obligee, and in that sense the obligee received it. Such is just the case before us.

§ 553. — *when and how official bonds may be accepted by comptroller, and how proved.*

The act requires the collector to give a bond, "with sureties to be approved by the comptroller;" it must be done in three months after he has entered upon the duties of his office; it must be retrospective to that time, and be for the future also. The comptroller may accept the sureties or reject them. He may call at any future time for other sureties, if circumstances shall occur or information shall be received which make it necessary that the United States should have a more responsible security. Or he may call, under the direction of the secretary of the treasury, for a new bond. He may decide upon the sufficiency of the sureties before they have made themselves so, or after they have signed the collector's bond. The first course is not the usual practice. The bond is commonly sent to the collector with such sureties as he can get. The comptroller receives it under the law, to be afterwards approved, upon such information as he has or may procure, concerning the responsibility of the sureties. The time is not limited for the use of his discretion for that purpose. He knows, and the collector knows, that the bond ought to be given in three months after the collector has begun to discharge the duties of his office. It is his duty to give the bond. It is the comptroller's to see that it is done. It is not necessary that it should be handed to the comptroller. It may be handed to an agent appointed by the comptroller to receive it, or it may be put into the possession of any person to deliver it, or it may be transmitted by mail. If done in any one of these ways, it is a delivery from the moment that the collector and his sureties part with it. It is from that moment in the course of transmission, with the intention that the law may act upon it through the comptroller's agency, and his subsequent approval is an acceptance with relation to the time beginning the transmission. The statute does not require the approval to be in writing. It may be so, and may be done verbally; or it may not be done in either way. Receiving the bond, and retaining it for a considerable time without objection, will be sufficient evidence of acceptance to complete the delivery, especially when the exception is taken by the party who had done all he could to complete it. *Postmaster-General v. Norvell*, 1 Gilp., 106-121. And we add that the retention of such a bond by the comptroller without objection, for a longer time than the statute requires it to be given, would be presumptive evidence of its approval and acceptance. This presumption of acceptance has been ruled in this court, in the case of *The United States Bank v. Dandridge*, 12 Wheat., 64. In that case an objection was taken in the circuit court to the admissibility of evidence to show a presumptive acceptance of a cashier's bond, because the charter of the bank required a bond to be given satisfactory to the directors. The circuit court sustained the objection, and ruled that the approval must be in writing to bind the cashier's sureties. This court ruled otherwise. Presumptive evidence, then, being admissible to prove the acceptance of a bond — such as its being in the possession of the obligee — having been retained without objection, and the obligor continuing to act under it, without having called for a more formal acceptance, it follows that a written acceptance, dated after a delivery, as was done in this case, is not to be taken as the time from which the completeness of the contract is to be computed; but that such an acceptance has a relation to the time of delivery, making that time the beginning of its obligation upon the parties to the bond. We remark, also, that there is no rule which can be applied to deter-

mine what constitutes the approval of official bonds. Every case must depend upon the laws directing such an approval. The purpose for which such a bond is required must be looked to. The character of the office and its duties must be examined. The time within which such a bond must be given and approved, and whether it is to be retrospective or for the future only, must be considered before it can be determined how and when the approval must be made. The differences suggested may be seen by comparing the terms of the statute of 1825 (4 Stats. at Large, 102), requiring bonds to be given by postmasters directly to the postmaster-general, and not to the United States, with the phraseology of the section of the act directing bonds to be taken from the collectors to the United States. The case of *Bruce v. State of Maryland*, for the use of Love, in 11 Gill & J., 382, which was supposed to have a bearing upon the case, will illustrate fully the differences of which we have spoken.

The forty-second article of the constitution of Maryland requires bonds from the sheriffs of that state, with sureties, before they can be sworn in to act as such. The act of Maryland carrying that article into operation (2d vol. Laws of Maryland, November, 1794) fixes the time within which sheriffs shall give bonds, and the manner of taking them is prescribed. It must be done in a county court, or before the chief justice or two associate justices, etc., but by whomsoever approved, the act directs that the official doing so shall immediately transmit it to the county court to be recorded. The case came before the court of appeals from a county court, which had decided that the bond of the sheriff operated from its date, that bond having been given without the approval in the manner prescribed. The court of appeals overruled the court below, saying that the bond had been irregularly taken, and that a sheriff's bond was only obligatory from the time of its approval. Under that statute, the question, when a sheriff's bond became operative, could not properly occur, it having made the delivery and approval of the bond simultaneous, that there might be a compliance with the constitution, which declared that no sheriff should act until he had given bond. The act which we have been considering does not require the comptroller's approval to be in writing. A collector may be permitted to discharge the duties of his office for three months before he gives a bond, if the secretary of the treasury shall think it safe to be done. But, if otherwise, he may require a bond before the collector enters upon the duties of the office. The statute means that the three months allowed for a bond to be given is an indulgence to the collector, and not a rule binding upon the government, when its proper functionary shall determine that a bond shall be given earlier.

§ 554. *The approval of collector's bonds by the comptroller seems not a condition precedent to their validity.*

We think, too, that the approval by the comptroller is directory, and not a condition precedent to give validity to the bond. The doctrine that deeds and bonds take effect by relation to the time they are delivered is well understood. The cases cited by the attorney-general in support of it are sufficient for the occasion. We need not add to them. It applies to this case. Macon was bound as the surety of Crane by the delivery of the bond before his death. The evidence in support of such a delivery was fairly put to the jury. We have compared the charge of the judge with the instructions which were asked by the counsel of the defendant upon the point we have been considering, and we think that it covers all of them correctly.

§ 555. *The sureties to a collector's bond are liable for moneys turned over to him by his predecessor or remitted to him by order of the government.*

Another objection against a recovery upon this bond remains to be disposed of. It is said that Crane, the collector, received money belonging to the United States out of the line of his duty, which has been improperly charged to make up the amount of the defalcation, which his sureties are now called upon to pay. The duties of collectors have been much multiplied by other acts since the act of 1799 (1 Stats. at Large, 627) was passed. Scarcely an act, and no general act, has been passed since, concerning the collection of duties upon imports and tonnage, without some addition having been made to the collector's duties. They are suggested from experience. The collector, too, has always been a disbursing officer for the payment of the expenses of his office, and may pay them out of any money in hand, whether received from duties or from remittances to him for that purpose, where the expenses are not unofficial, have been sanctioned by law, and have been incurred by the direction of the secretary of the treasury. For such payments he may credit himself in his general account against the sums which may have been received for duties. He may retain his own salary, or fees and commissions; pay the salaries of inspectors and other officers attached to the office; make disbursements for the revenue boats, lighthouse buoys, etc., and apply money collected for duties to all expenses lawfully incurred by himself or by his predecessors. For such as may have been incurred by his predecessor he may receive from him any money in his hands, when he is going out of office, belonging to the United States, and which has been retained by him for the payment of such expenses. When so turned over to a successor, he receives it officially, to be applied by him to the purposes for which it had been retained. Himself and his sureties are as much responsible for the faithful application of it as they are for his fidelity to his trust, for duties received by himself, or for other sums which may have been remitted to him by the order of the government. It has often been the case, and must be so again, as it now is, that the convenience of the government and the interest of its citizens require collection districts to be established, which do not and are not expected at first to pay expenses. Remittances then must be made for such purposes. They are made to the collector, because it is under his personal supervision that the work is done, or the goods are furnished for the government, at the point of his office where the law requires him to reside. What we have said covers all of the remittances which were made to Crane by Breedlove, the collector of Mississippi; and also the payment of \$1,279.92, received by him from Willis, his predecessor, when he was going out of office, and when Crane was coming in. It appears, from the accounts, that he received it as collector. It cannot be denied that there was then a debt due by the government, on account of the expenses of the office, to which that sum ought to have been applied. Had it been so he would have been credited with a sum in his next quarterly settlement. And if it was not so applied, it cannot be said that there was fidelity to his official trust in withholding it and applying other money of the government, subsequently collected or received, to the payment of its antecedent debt. In this instance, there is less reason for not exempting the securities of Crane from responsibility for the sum received by the collector from his predecessor, because the evidence in the case shows it was afterwards sanctioned by the government, and that it might have been applied by the collector to the liquidation of an official debt, as far as it would go, due by this govern-

ment to himself. What has been said covers every instruction which the court below was asked to give upon this point. We do not think that the judge erred in his general charge upon them to the jury, or that, in making the charge which he did, that there is any error of which the defendant can complain. We affirm the judgment below, and direct a mandate to issue accordingly.

MR. JUSTICE CAMPBELL dissented, holding that the comptroller's certificate of approval of a collector's bond is the best evidence of the time of its delivery as a valid obligation. Also, that the delivery of a bond is complete only when it has been accepted by the obligee.

§ 556. *Death of a surety.*—Equity will not hold a surety liable when he is discharged at law; and in the case of a joint obligation, and the death of the surety, the remedy at law is gone as respects the legal representatives of the surety. *Fielden v. Lahens*, * 6 Blatch., 524. See §§ 587, 588.

§ 557. Judgment was obtained on a joint and several bond, after which the principal became insolvent. On a proceeding in equity against the estate of one of the sureties, it was shown that the obligee had received a certain sum in debenture certificates from the principal. *Held*, that the amount of the certificates should be deducted from the judgment. *United States v. Cushman*, * 2 Sumn., 426; *United States v. Cushman*, 2 Sumn., 310.

§ 558. It is also held that the obligee (*United States*) was entitled in equity to satisfaction out of the deceased sureties' estate. A joint judgment on a joint and several bond will not bar a several remedy. *United States v. Cushman*, * 2 Sumn., 426.

§ 559. A joint judgment was obtained against the principals and sureties in a joint and several bond, after which the principals became insolvent and the surety died. A bill in equity was then filed to make the judgment out of the deceased surety's estate, but the relief was denied. *United States v. Archer*, * 1 Wall. Jr., 173.

§ 560. Equity will not give relief against a mere surety, when he has received no benefit, and his liability is discharged at law; nor can it make any difference in the liability of a surety that the *United States* is the obligee. *Ibid*.

7. *Expiration of Term.*

SUMMARY — *Treasury warrants drawn after expiration of term*, § 561. — *Suspension of bank cashier*, § 562.

§ 561. In order that the surety on an official bond shall be held liable for moneys charged against the principal in treasury warrants drawn after the expiration of his term of office, it must appear that the public moneys represented by such transcripts came into the hands of the principal either in point of fact or in judgment of law previous to the time when the term of office expired. *Bryan v. United States*, §§ 563-565.

§ 562. Where a resolution was passed on the 27th of the month for the suspension of a bank cashier, but notice was not given to the cashier until the 30th, *held*, that his sureties remained liable for his acts until he was actually suspended. *M'Gill v. Bank of United States*, §§ 566, 567.

[NOTES.— See §§ 568-572.]

BRYAN v. UNITED STATES.

(1 Black, 140-149. 1861.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the District of Columbia. The suit was brought by the United States upon the official bond of Samuel D. King, surveyor-general of the public lands of the state of California, against Joseph Bryan, one of his sureties, for moneys received by the principal in the course of the execution of

the duties of his office and which he has not accounted for. The bond was executed on the 29th of March, 1851. The plaintiff gave in evidence several treasury transcripts, by which it appeared that on 30th June, 1853, when King's term of office expired, which was the end of the second quarter of that year, there was a balance due him to an amount exceeding three thousand dollars, although at the end of the first quarter there was a balance against him of some \$14,000. But there appeared, also, on the debit side, charged to him, three treasury warrants, each dated July 9, 1853—one of \$10,000, another of \$6,500, and the third \$3,500, making an aggregate of \$20,000, and which sum, if properly chargeable against the sureties, would leave a balance due the plaintiff of \$10,531.43. As these warrants bore date on their face, after the expiration of the term of office, which was on the 30th June, 1853, unexplained, they were of course not so chargeable. The plaintiff assumed the burden of this explanation, and for that purpose gave in evidence a requisition by King upon the commissioner of the land office, dated San Francisco, May 30, 1853, giving in the communication a general estimate of the sums of money that would be required to meet his disbursements for moneys due in the first quarter of the year 1853, and to become due in the second quarter. These estimates correspond with the sums for which the three treasury warrants of the 9th July were drawn. A letter also accompanied the estimates and requisition explaining somewhat at large the grounds of the estimates and the necessity for the amounts required. They were received by the commissioner in this city on the 25th June following. The requisition of King contained a request that the drafts of the treasurer for the advance of the moneys called for should be made in favor of Charles D. Meigs, cashier of the American Exchange Bank in the city of New York. It was in pursuance of this requisition, and letter accompanying the same, that the three treasury warrants of the 9th July were drawn for the \$20,000; and on the 11th of the month the treasurer drew at sight upon the assistant treasurer in the city of New York three bills in favor of Charles D. Meigs, corresponding in amount with the treasury warrants. The plaintiff also proved that the commissioner of the land office, on the 30th June, had given notice to Meigs that he had on that day made a requisition in his favor at the request of King for the \$20,000. This referred to the requisition of the commissioner on the treasury department for the advance of the money, and in pursuance of which, doubtless, the treasury warrants and drafts in favor of Meigs, already referred to, were afterwards drawn. It will be observed that the treasury warrants were made out nine days, and the drafts drawn in favor of Meigs eleven, after the office of King had expired.

Upon this state of facts the court below instructed the jury if they should find from the evidence that King, the surveyor-general, prior to the 30th June, 1853, paid certain amounts due to himself and other creditors of the government upon the accounts and salaries, office rents and contingencies given in evidence, out of moneys raised by him upon orders or drafts drawn upon the government and by him made known to the government to have been drawn for the amounts to which the said payments were in fact applied, and that said drafts were paid and said amounts reimbursed to him by the government after the 30th June, 1853, then it is not competent for the defendant to apply the amount of those accounts thus by him paid and extinguished as a set-off against the amount due by him to the government upon the survey account prior to June 30, 1853, as given in evidence. In order to understand these instructions it is necessary to refer to some facts already stated, namely, that according to

the treasury transcripts given in evidence by the plaintiff containing a statement of the accounts between King and the government, debit and credit, down to the 30th June, 1853, when his office ceased, a balance appeared in his favor of some \$3,000; but a requisition had been made by him on the 31st May, 1853, during his term of office, on the commissioner for the \$20,000, and in pursuance of which the three treasury warrants were made and drafts drawn in favor of Meigs of New York, after the office had expired, and that at the end of the first quarter the balance was against King. Now, in view of these facts, the instructions are, if the jury find that King, prior to the 30th June, 1853 (the period when his office expired), paid the money for which credits were given in the treasury transcripts, out of money raised by him upon orders of drafts drawn upon the government, and which were made known by him to the government to have been so drawn, and that these drafts were paid and the money disbursed by the government after the 30th of June, 1853,—that is, after his office expired,—then it was not competent for the defendant, the surety, to apply the moneys thus paid by King as a set-off against his indebtedness to the government on the survey account prior to the 30th June, 1853, referring, doubtless, to the balance due by him at the end of the first quarter. In other and shorter words, if King drew on the government during his term of office, and notified the government of the fact, and raised money upon these drafts, by which he obtained the credits in the treasury transcripts, and the government paid the drafts even after King went out of office, then the surety could not claim these credits, and would be liable for all moneys in his hands at the expiration of his term not thus applied.

§ 563. *Instructions based upon a hypothesis unsupported by any evidence are cause for a reversal.*

The first observation we have to make upon these instructions is, that they were given to the jury upon a purely hypothetical case, unsupported by any evidence to which it could be applied. There is no evidence in the case to show out of what particular moneys King paid the expenses of his office during the period referred to, and obtained the credits, or that he raised any money for this purpose by means of drafts on the government, or that the government paid any drafts drawn by him before or after the expiration of his term of office. The only evidence relating to this subject is the requisition of King upon the commissioner of the land office, already referred to, dated the 31st May, 1853, and received the 25th June by the commissioner, five days before his office expired, and the treasury warrants of the 9th July, and drafts in favor of Meigs of the 11th for the \$20,000. These furnish all the evidence of any drafts upon or disbursements by the government in the case.

§ 564. *A surety is not chargeable with treasury drafts, sent at his principal's direction to a third person, and which are not shown to have been paid or the money received by his principal.*

The next observation we have to make is, that there is no evidence in the case that the government has advanced any portion of the \$20,000 to King, either during his term of office or since. It is true the treasury warrants were made out and charged to him, and drafts drawn in favor of Meigs by the treasurer upon the assistant treasurer in the city of New York for this amount on the 9th and 11th of July, 1853. But there is no evidence that these drafts ever came to the hands of Meigs, or that the assistant treasurer was ever called on to pay or ever paid them. For aught that appears the money may still be in the treasury. These are facts which, if material to charge the surety, should

have been proved and not left to presumption or conjecture; and even if we were to presume all this, and believe, without proof, that the government transmitted the drafts to Meigs, and that he received the moneys from the assistant treasurer, there is no evidence that the money came to the hands of King. We are not prepared to admit that the transfer of moneys by the government to the agent of the officer is equivalent to a transfer to the officer himself, so far as the liability of the surety is concerned. The fidelity or responsibility of the agent through whom the government may see fit to thus transfer the public money is not within the obligation assumed by the surety in the official bond. He is responsible only for all moneys which came into the hands of the officer while in office, and which he subsequently fails to account for and pay over. 12 Wheat., 505 (§§ 671–673, *infra*). The questions, therefore, put to the jury as to drafts drawn by King upon the government, and of moneys having been raised upon them during his term of office, out of which he had obtained the credits given in the treasury transcripts, and of the subsequent payment of the drafts by the government, were entirely hypothetical, unsupported by the evidence in the case, and, of course, whichever way found, laid no foundation for the inference stated in the instructions, that the surety could not claim these credits, and would be liable for all moneys in the hands of the officer at the expiration of his office not thus applied.

§ 565. *A surety on an official bond is only responsible for moneys which came into the hands of his principal before his term expired.*

As the case has been very imperfectly tried and must be set down for another trial, we shall make no observations concerning it in anticipation of the facts that may be proved on the part of the government, except to say that, in order to charge the surety for the default of the officer, it must appear from the evidence that the public moneys in question came into his hands, either in point of fact or in judgment of law, previous to the time when the term of office expired. Judgment reversed, *venire de novo*.

M'GILL v. BANK OF UNITED STATES.

(12 Wheaton, 511–515. 1827.)

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This cause comes up by writ of error from the circuit court of the United States, held for the district of Connecticut, in which the defendants here obtained a judgment against the plaintiffs, upon a penal bond, in which M'Gill was principal, the other defendants sureties. M'Gill was cashier of one of the branches of the Bank of the United States, and this bond was given in the penal sum of \$50,000, conditioned for the due performance of that office. The replication sets out a great variety of breaches, and the cause was decided below upon a special verdict, by which was found for the plaintiffs the sum of \$66,548, consisting of a variety of items, upon which interest is charged severally from the date of the embezzlement or other breach to the time of finding the verdict.

The verdict then finds two payments, one of \$20,000, made by one of the sureties on the 16th of December, 1820, the other of \$500, made by another of the sureties on the 22d of December, 1820, on which they also calculate interest to the date of the verdict, and, deducting the amount of principal and interest, strike a balance of \$43,182.50. It also finds the following facts: "That

the president and directors of the Bank of the United States, on the 27th of October, 1820, at Philadelphia, passed the following resolution, to wit: 'Whereas, it appears, by the report of a committee of the office of discount and deposit at Middletown, that Arthur W. M'Gill, cashier of that office, has been guilty of a gross breach of trust, in knowingly suffering overdrafts to be made by individuals; also, by making overdrafts himself; therefore, resolved, that A. W. M'Gill, cashier of the office at Middletown, be and he is hereby suspended from office till the further pleasure of the board be known. On motion, resolved, that the president of the office at Middletown be authorized and requested to receive into his care from A. W. M'Gill, the cashier, the cash, bills discounted, books, papers and other property in said office, and to take such measures for having the duties of cashier discharged as he may deem expedient.' "

Which resolutions were immediately transmitted by mail to the president of the Middletown office, who received them on the morning of Sunday, the 29th of the month, but did not communicate them to M'Gill until the afternoon of the 30th, between the hours of four and five in the afternoon. It then finds that all the breaches were incurred before the 30th, and goes on to find alternatively, so as to enable the court to give judgment, according to its views of the law, as between the parties. There appear to have been various questions argued in the court below, some of which were decided for the plaintiff, some for the defendant; but as the plaintiff below seeks an affirmance of the judgment, and has not sued out a writ of error, it follows that we confine ourselves to those points only which were decided against the plaintiff here. These were two, one of them going to the whole right to recover, the other to the application of the payments towards the discharge of the sum to be recovered.

§ 566. *Suspension from office is not removal. The sureties of an officer are not released from their obligation by a suspension of their principal, but by his actual removal. (a)*

The first of these was whether the sureties were not discharged *ipso facto* from further liability, by the resolution of the parent bank, on the 27th; or, if not on that day, then on the 29th, the day on which it was received at Middletown by mail. If discharged on either of those days, it would follow that the plaintiffs below could not have judgment, since the finding was up to the day following. We are unanimously and decidedly of opinion that the ground assumed by the defendants below cannot be maintained. What was there in the resolutions of the parent bank to discharge the obligors at all from their liability? The resolution was only to suspend, and this implies the right to restore. The cashier's salary went on, and had the board rescinded their resolution, what necessity would there have existed for a redelivery of his bond? But there is no necessity for placing the decision on this ground, since, notwithstanding the resolution of the board is expressed in the present tense, a future operation must necessarily be given it, from a cause that could not be overcome, the distance of the parties from each other. Time became indispensable to giving notice, and the day on which the communication reached the president of the Middletown Bank was a day not to be profaned by the business of a bank. There was, then, no obligation to deliver the notice and dispossess the cashier until the 30th, and the law makes no fractions of a day.

(a) Affirming the ruling in *Bank of United States v. Magill*, 1 Paine, 661. See § 572, *infra*.

§ 567. *Sureties are discharged from a judgment for the penalty of their bond upon payment of the debt equitably due, interest and costs.*

The court below, in applying the payments, directed them to be deducted from the penalty of the bond, and then gave interest upon the balance thus resulting. This, with the exception of the interest, was the most favorable application possible for the defendants below; and the interest on the balance having been only allowed from the date of the suit, and the sum thus ascertained falling short of the penalty of the bond, we think the defendant below has nothing to complain of. It will be discovered, by reference to dates, that the payments here made preceded the institution of the suit, and, although made by the sureties, they were made severally, for anything that appears to the contrary from the verdict. Technically, then, the judgment to be entered would have been a judgment for the penalty of the bond, and, in applying the partial payment, the court would have been governed by those principles which have been transferred in practice from the courts of equity to the courts of law, in deciding on what terms a party shall be released from the penalty of his bond. These always are, on payment of principal, interest and costs; and it can constitute no objection to the application of this principle to the case of these obligors, that no interest was allowed them during the short interval between the payment and the suing out of the writ, since the breaches were incurred long before, and interest for the same period is refused to the bank.

Judgment affirmed with six per cent. interest.

§ 568. *Expiration of term.*—A resignation by a public officer, to take effect when his successor shall be appointed, does not release the sureties on his official bond for liability for the acts of their principal for the time he actually remains in office thereafter. *United States v. Wright,* 1 McL., 509.*

§ 569. It was provided by the articles of an association, that directors should be chosen for one year, who should appoint an agent to hold office during the pleasure of the board, and give bond for the faithful discharge of his duties. It was held that the sureties were liable on such a bond for the defaults of the agent happening after the board appointing him had gone out of office. *Anderson v. Longden,* 1 Wheat., 85.*

§ 570. Under the tenth section of the act of congress of March 3, 1853, the sureties on the official bond of a register and receiver of a land office in Nebraska are liable for moneys received by their principal while holding over after his original term, and before his successor is appointed. *United States v. Jameson,* 3 McC., 620.*

§ 571. Where an officer is appointed for a definite term sureties on his bond are not liable for moneys coming into his hands after the expiration of such term. *United States v. Spencer,* 2 McL., 265.*

§ 572. The condition of the bond of a cashier of a branch bank was for the faithful performance of his duties during the time he should hold his office of cashier. On October 27th, he was suspended from office, by resolution of the board of directors of the parent bank, for misconduct, and the president of the branch bank was directed to receive from him the property of the bank and arrange temporarily for the discharge of the office of cashier. The resolution was transmitted to the president of the branch bank, and he received it on Sunday, the 29th of October, and communicated it to the cashier on October 30th, and on that day received into his own care the property in the bank. *Held*, that the sureties of the cashier were responsible for moneys embezzled by him between the 27th and 30th of October. *Bank of United States v. Magill,* 1 Paine, 661.*

8. Second Term of Principal.

SUMMARY—*Defalcation at time of execution of second bond, § 573.—Estoppel by recital of appointment, § 574.—Money in hand at time of reappointment, § 575.—Not liable beyond term, § 576.—Appropriation of payments, § 577.—Cashier re-elected, § 578.*

§ 573. Where an officer who is reappointed and gives a new bond has converted moneys received during the former term to his own use at the time of the reappointment and execu-

tion of the bond, the first set of sureties and not the second are liable for such defalcation; and in an action on the second bond the burden of proof is on the sureties to show that the misappropriation took place before the execution of the new bond. *Bruce v. United States*, §§ 579-588.

§ 574. The obligors in an official bond, which recites the appointment of the principal, are estopped to deny it, and the government need not produce the officer's commission. *Ibid.*

§ 575. If an officer, at the time of being reappointed and giving a new bond, has moneys in his hands which he received during the former term, he is bound to apply and account for such moneys under his second commission, and his sureties on his second bond are liable therefor. *Ibid.*

§ 576. Where a person is appointed to office for a fixed term, at the end of which the office becomes vacant and must be filled by a new appointment, though the principal, if reappointed, is liable for all moneys coming into his hands at any time, yet, so far as the liability of the sureties on his official bond is concerned, the different terms for which the officer may be appointed are as separate and distinct as if a different individual had filled each of them, and they are not bound for the acts of their principal, either prior or subsequent to the term for which the bond was given. *United States v. Eckford*, §§ 584-587.

§ 577. The general doctrine of the appropriation of payments does not apply in the case of payments made by a public officer to the treasury department, where the rights of sureties under distinct obligations intervene. Payments made of moneys accruing and received during the current term are to be applied to the indebtedness of the officer for that term, and moneys received from obligations arising from a prior term are to be applied to extinguish indebtedness then accruing. *Ibid.*

§ 578. A state statute provided that the officers of savings banks should hold office for "one year, and until their successors are elected and qualified." Under this law a cashier was elected and gave a bond. At the end of the year he was re-elected and continued to perform the duties of his office, but without giving a new bond. *Held*, that the cashier was elected for an annual term, and that his sureties were not liable for defalcations occurring after the expiration of the term for which the bond was given. *Harris v. Babbitt*, §§ 588, 589.

[NOTES.— See § 590.]

BRUCE v. UNITED STATES.

(17 Howard, 437-443. 1854.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—The writ of error in this case is brought upon a judgment obtained by the United States in the circuit court for the district of Missouri. It appears that Bruce, one of the plaintiffs in error, was appointed agent for the Sioux tribe of Indians, in 1844, and gave the bond on which this suit was brought for the faithful performance of his official duty. Franklin Steele, the other plaintiff in error, and John Atchison were sureties in the bond; and Atchison having died, pending the suit in the circuit court, it abated as to him, and the judgment in favor of the United States was rendered against the plaintiffs in error. The breach assigned is, that there was a balance in Bruce's hands on the 1st of July, 1848, of \$10,191.69, which he refused to turn over and pay to the United States when required to do so. Bruce had held the same appointment for four years before he received the one of which we are now speaking; and his account with government begins in May, 1840.

At the trial the United States offered in evidence a transcript from the books of the treasury department, stating the account of Bruce from the time of his first appointment. According to this account, the balance above mentioned was due to the United States, but Bruce claimed various additional credits, amounting altogether to \$6,931.68, which has been disallowed or suspended by the accounting officers, as appears by the closing account, usually called the statement of differences.

§ 579. *Transcripts of accounts in the war and navy departments are admissible in evidence, but not conclusive in an action on an official bond.*

The United States further offered the transcript of a letter from the second

auditor, whose duty it was to settle this account, addressed to Bruce, stating the balance due from him, according to the settlement in the auditor's office, and inclosing him the statement of differences above mentioned, and directing him to turn over to his successor in office the balance of the public money in his hands; and also offered the deposition of his successor, stating that he had made the demand, but that Bruce had failed to comply with it. The defendants, therefore, objected to the admissibility of this evidence, but the court overruled the objection, and this constitutes the first exception in the case. The objection is stated in general terms, and applies to the whole evidence offered by the United States, without pointing out the particular ground of the objection. But we understand from the argument here, that the defendants in the court below supposed that the transcript from the books of the treasury was not, of itself, evidence that he received the several sums of money charged against him, and that authenticated copies of his receipts ought to have accompanied the transcript. But this objection cannot be maintained. The act of 1797 provides that a transcript from the books and proceedings of the treasury, certified by the register, and authenticated under the seal of the department, shall be admitted in evidence. And the act of March 3, 1817 (3 Stats. at Large, 366), directs that all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the treasury department. The act makes the auditors and comptrollers, by whom the accounts in the war and navy departments are settled, officers of the treasury department. And the provision above mentioned in the act of 1797, in relation to transcripts from the books and proceedings in the treasury, is extended to the accounts of the war and navy departments; and the certificates of the auditors respectively charged with the settlement of these accounts are to have the same effect as that directed in the former act of congress to be signed by the register. The accounts in question belonged to the war department, during the period of Bruce's agency, and were adjusted and certified by the proper officers. There could, therefore, be no objection to the evidence on that score. Nor do we see how any valid objection can be made to the items charged against Bruce in the transcript. The books of the accounting officer necessarily contain the charges against, as well as the credits of, the disbursing officer. The accounts could not be adjusted on the books in any other manner; and the transcript, or, in other words, the copy of the entire account as it stands on the books (which must include debits as well as credits), is made evidence by the law. Nor do we see any reason for restricting the words of the acts of congress within narrower limits than the words plainly imply. The accounts are adjusted by public sworn officers, bound to do equal justice to the government and the individual. They are records of the proper departments, and always open to the inspection of the party interested. And, after all, the transcript is only *prima facie* evidence; and, if the party disputes any of the charges against him, it is in his power, by a proper application to the court, supported by sufficient evidence, to obtain the original vouchers on which he was charged, if necessary to his defense, and to show that the debit against him is erroneous.

§ 580. — *such transcripts are not evidence of charges outside of the ordinary and regular operations of government.*

If, indeed, it appeared on the face of the account that an item was charged against him which had not come to his hands in the regular and ordinary operations of the government, and of which, therefore, the accounting officers

could have no official knowledge, the transcript would not be evidence to support that charge. But no such debit is found in this transcript; for according to the regular and ordinary practice of the government, in cases of this description, the agent receives from his predecessor in the office the money and property remaining in his hands; and other funds, which it may be his duty to disburse, are sometimes sent through the general superintendent at St. Louis, sometimes by a treasury draft, forwarded directly to himself, and sometimes through the agency of a military or other officer of the government. And these advances pass through the proper offices of the treasury and war departments (now through the department of the interior), and the agent is charged upon his own receipts and warrants, issued in his favor. This appears to have been done in the case before us. Every payment or advance to him is separately charged, and the time when it came to his hands, as well as the name of the person from whom he received it. The copies of his receipts, or of the vouchers for the charge, would have given him no further information; and the acts of congress above referred to do not require them to be annexed to or accompany the account, but, in plain and unambiguous terms, make the transcript itself evidence.

Cases analogous to this have, on several occasions, come before the court, and have all been decided upon the construction of the acts of congress above stated. *Smith v. United States*, 5 Pet., 292; *Cox v. United States*, 6 id., 202 (§§ 401-404, *supra*); and *Hoyt v. United States*, 10 How., 109, are all in point. And the cases of *The United States v. Buford*, 3 Pet., 29, and *United States v. Jones*, 8 id., 376, which are sometimes supposed to maintain a contrary doctrine, are perfectly consistent with the other decisions and with the one now given. For in the case of *The United States v. Buford* (who was a deputy commissary), the money had been placed in his hands by Morrison, who was a deputy quartermaster, without authority and contrary to his duty, and the accounting officers refused to credit it in Morrison's account. Upon application to congress, however, a law was passed authorizing the accounting officers to allow the credit, upon receiving from Morrison an assignment to the United States of all his right to the money mentioned in the receipt, which he had taken from Buford when he advanced him the money. Morrison made the assignment accordingly, and thereupon an account was stated on the books of the treasury, charging Buford as debtor to Morrison for the amount advanced to him. And a transcript from this account was offered in evidence. It is set out in the report of the case, and it is evident that this account was not within the letter or spirit of the act of congress. It certainly could not prove the receipt of Buford, for the whole transaction was outside of the regular operations of the government, and the accounting officers could not be presumed to have any official knowledge of the unauthorized transactions between the parties. And so, again, as to the case of *The United States v. Jones*, who was surety in the bond of an army contractor. The transcript contained charges against the contractor for bills of exchange, drawn by him and paid to other persons. The court regarded this operation as not within the ordinary mode of proceeding in the department, and that the accounting officers could not be presumed to have any knowledge of the drawing of those bills, or of their indorsement to others, and thereupon rejected these items. It will be seen, therefore, that the cases of *The United States v. Buford* and *United States v. Jones* are distinguishable from the present case, as well as from the other cases above referred to, and stand on different ground. Indeed, none of the debits in the

transcript appear to have been disputed by the plaintiffs in error, and no exception was taken to any one of them. The statement of differences between the accounting officers and Bruce shows that there was no difference as to the amount with which he was chargeable. The difference consisted in a variety of credits which he claimed, and which had been suspended or refused at the treasury; and the testimony offered by him after his objection to the transcript had been overruled, and the document admitted in evidence was altogether directed to support the credits he claimed, and not to impeach any one of the debits against him. The circuit court were, therefore, right in overruling his objection to the testimony offered by the United States.

We proceed to the next exception. After the testimony on both sides was closed, the plaintiffs in error asked for the following instructions to the jury, all of which were refused and the direction which follows them given: "1. That unless they believe, from the evidence, that Bruce was legally appointed and commissioned as such Indian agent, they will find for defendant Steele; and they are further instructed that the commission, or a legally certified copy thereof, is the highest and best evidence thereof. 2. If the jury find, from the evidence, that Bruce was a defaulter at the time of the execution of the bond sued on, they will find for defendant Steele to the extent of such pre-existing default. 3. Defendant Steele is not liable for any defalcation existing on the part of Bruce prior to the 29th of August, 1844. 4. Defendant Steele is not liable, as the surety of Bruce, for any money received by Bruce before he was sub-Indian agent. 5. The original receipts of Bruce, or certified copies of the originals on file, are the best evidence of any moneys received by him, and the jury will disregard the transcript of accounts from the books, unless they believe it was out of the power of plaintiff to produce the receipts or certified copies thereof."

These instructions were all refused, and "the court directed the jury that if, when Bruce was reappointed agent, in 1844, he had moneys in his hands of the United States which he received as agent under his previous commission, then he was bound to apply and account for such moneys under the second commission, and his sureties are bound under the bond which is sued on. But if Bruce had appropriated the moneys received under the previous commission to his own use when this bond was given, then the first set of sureties are responsible for the moneys thus illegally appropriated, and these defendants are not liable, and the burden of proof is on the defendants to show that Bruce had illegally appropriated the moneys before the bond sued on was given."

§ 581. *Sureties in an official bond are estopped from disputing the legal appointment of their principal.*

We think the court were right in refusing the prayers and in giving this instruction. In relation to the first instruction asked for, it certainly was not necessary for the government to produce the commission of Bruce or a certified copy. The bond upon which the suit was brought recites that he was appointed Indian agent, and the obligors in the bond are, therefore, estopped from denying it. And as to the fifth, it is but a repetition of the objection to the transcript which we have already disposed of.

§ 582. *An officer having money of the government in his hands when re-appointed is bound to account for it under his last appointment.*

And as relates to the second, third and fourth, we think the court was right in refusing them, and giving the instruction as above stated. When Bruce

received his second commission, if any money or property which he received in his former term of office still remained in his hands, he was bound to apply and account for it under the appointment he then received.

§ 588. *Sureties in an official bond are responsible for moneys received by their principal in a former term and remaining in his hands when they become such sureties.*

The terms of the bond clearly require it, and his sureties are bound for it. It was so much money in his hands to be disbursed and applied under his second appointment. Indeed, if it were otherwise, the government would have no security for it. For, if it was not wasted or misapplied during his first official term, but still remained in his hands to be applied according to his official duty, the sureties in his first bond would not be liable. For there would in that case be no default or breach of duty in that term of office; and if afterwards wasted or misapplied, it would be a breach of duty in that official term for which Steele was one of his sureties. Undoubtedly the sureties in the second term of office are not responsible for a default committed in his first. But if any part of the balance now claimed from him was misapplied during that period, it was incumbent on the plaintiffs in error to prove it. No officer, without proof, will be presumed to have violated his duty; and if Bruce had done so, Steele had a right, under the opinion of the circuit court, to show it, and exonerate himself to that amount; but it could not be presumed merely because there appears by the accounts to have been a balance in his hands at the expiration of his first term. We see no error in the opinions of the circuit court, and the judgment must therefore be affirmed.

UNITED STATES v. ECKFORD.

(1 Howard, 250-264. 1843.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This action was commenced in the circuit court for the southern district of New York, against the sureties of Swartwout, late collector of the customs at that city. Swartwout was appointed collector by the president, the 1st of May, 1829, and continued to serve under such appointment until the 28th of March ensuing. On the 29th March, 1830, his nomination was sanctioned by the senate, and he continued to serve in the office of collector four years. On the 29th March, 1834, he was again appointed by the president and senate for the term of four years. Under each of the above appointments he gave bond and security, which, after reciting his appointment of collector, etc., provided: "Now, therefore, if the said Samuel Swartwout hath truly and faithfully executed and discharged, and shall continue truly and faithfully to discharge, all the duties of the said office according to law, then," etc. The bond on which this suit was brought is dated the 22d June, 1830.

A transcript of the accounts of Swartwout, from the commencement to the termination of his service as collector, was given in evidence, and also a transcript which purports to state the responsibilities arising under the second term of his service. At the commencement of his second term, a large balance was charged against him, arising under the previous term; and, at the commencement of the third term, a balance was charged as arising under the second term.

In the course of the trial the two following points were raised, on which the judges were opposed in opinion, and the questions were certified to this court: "1. Whether the said transcript from the books and proceedings of the treasury, given in evidence on the part of the United States to show the indebtedment of said Swartwout on the 28th of March, 1834, on which day the second term of office of said Swartwout expired, was in this case competent and legal evidence for that purpose. 2. Whether the payments made by said Samuel Swartwout subsequently to the said 28th day of March, 1834, should be applied to the discharge of his indebtedment existing on the said 28th day of March, 1834, or accruing during his said second term of office, or whether such payments should be applied to the discharge of his indebtedment accruing after that time."

By the act of the 2d of March, 1799 (1 Stats. at Large, 627), collectors of the customs are required, "once in every three months, or oftener, if directed, to transmit their accounts for settlement to the officer or officers whose duty it shall be to make such settlement." From the transcripts in this case and the deposition of the late comptroller, it appears that, until after 1838, the accounts of collectors of the customs were kept at the treasury in one continued series of debits and credits, without regard to the terms of the appointments or the different sureties involved. By the act of May 15, 1820, the term of appointment of collectors of the customs and other officers named was limited to four years. Prior to that act such appointments were made without any limitation as to time, except the pleasure of the president. The second section of the act of 3d March, 1797 (1 Stats. at Large, 512), provides that, "in every case of delinquency, where suit has been or shall be instituted, a transcript from the books and proceedings of the treasury, certified by the register and authenticated under the seal of the department, shall be admitted as evidence," etc. By the eleventh section of the act of the 3d March, 1817 (3 Stats. at Large, 367), the auditors of the war and navy departments were authorized to certify accounts the same as the register.

§ 584. *Sureties of a collector of customs are liable for money collected by him during his term of office for which they undertake as such sureties, but not for prior or subsequent defalcations.*

Before the points certified are examined, we will consider the principles involved in the case. Under the act of 1820, collectors can only be appointed for four years. At the end of this term the office becomes vacant and must be filled by a new appointment. And each collector is required to give bond and security on entering upon the duties of his appointment in such sum as shall be designated. That the collector is responsible for all moneys received by him and not accounted for, without reference to the official terms he may have served, or to any bonds he may have executed, is undoubted. But this is not the case with his sureties. They are responsible only for the faithful performance of his duties for the term of his appointment. The condition of the bond is that he hath performed his duties faithfully, and that he shall continue to perform them. But this condition does not extend to his delinquencies under any other appointment. The bond in question is dated the 22d of June, 1830, and relates to the 29th of March preceding, at which time the term of the collector commenced; and its obligation extends to the 29th of March, 1834. That the sureties are not bound beyond this period is too clear for controversy. As regards their liability, it is the same as if Swartwout had served only the term covered by their bond. For the faithful performance of his duties under

the executive appointment, which preceded the above term, Swartwout gave bond and security; and also under the new appointment for four years, which he served from the 29th March, 1834. So far as the sureties are concerned, these terms are as separate and distinct as if a different individual had filled each one of them. The extent of the obligation of the sureties being stated, we are brought to the inquiry, "whether the transcript given in evidence on the part of the United States to show the indebtedment of Swartwout on the 28th of March, 1834, was legal evidence?" The transcript is certified in the form required by the act of congress. In the argument, no objection was stated as to the mode of its authentication. But the restatement of the account by the treasury officers, showing the liabilities incurred by the collector during the term for which the defendants are bound as sureties, is objected to.

The collector is also a disbursing officer. He is charged with the bonds taken for duties, and is credited for sums paid into the treasury, and also for drawbacks and other disbursements incident to his office, or which have been made under the order of the treasury department. But, from the continuous mode of keeping his accounts, without regard to the terms he may have served, the defalcation within any one term does not appear. At the commencement of each term, an amount is charged against the collector, but it may be composed of bonds in suit, not due, and deposited specially, as is found by the items first charged in the general transcript, amounting to more than \$11,000,000. The balance charged, therefore, at the commencement of any quarter or term, does not show that the collector is in default. He may, indeed, stand charged with money actually paid into the treasury by him, but for which he has received no credit, as what is called a covering warrant has not been issued. Until this shall be done, the credit cannot, by the usage of the department, be given. To meet the necessary disbursements, a sufficient sum of money should always be under the control of the collector. And it is understood to be the usage of the collector, under the sanction of the department, to retain such sum. From this, it appears that the general transcript affords no sufficient data on which to charge the sureties for any term of office, where, as in the present case, the same person has served as collector several terms.

It is contended that the duties of the treasury officers, charged with the settlement of these accounts, are in their nature judicial; and that, when an account is once settled, it is conclusive on the government, and can only be opened for correction by a suit in court. That in the present case, as credits were given in the account current, which more than paid the moneys received within the four years under examination, the sureties must stand discharged of all liability. And that, although these payments were in part made from moneys received after the expiration of the above term, the credit must stand as entered. If this be a sound argument, by the mode of keeping these accounts in the treasury department, all sureties of collectors, except those for the last term, are discharged. And it is supposed that this construction would impose no hardship or injustice on the last securities; that, as the bond binds them for the past as well as the future conduct of the collector, they must inquire what amount is charged against him at the commencement of the term for which they are bound. Now, the retrospective obligation of the bond is as much limited by the term of the new appointment as the prospective. And in this view, it would be as logical and just to hold that the sureties are liable for defalcations after the expiration of the term as for those which occurred before its commencement. There is no such condition in the instrument. It recites the new

appointment, and, by consequence, limits the obligation to the term of office fixed by law.

§ 585. *Appropriation of payments made by an officer holding consecutive terms.*

The rule as to the appropriation of payments by debtor or creditor in the ordinary transactions of business is earnestly relied on as applicable to the present case. And all the leading authorities on this subject are referred to. In the case of *Devaynes v. Noble, etc.*, 1 Mer., 606, the doctrine which governs the application of payments was elaborately considered. But the applicability of this doctrine is not admitted. We think the rule established by this court in the case of *The United States v. January*, 7 Cranch, 572 (§ 595, *infra*), is the true one. In that case the court say: "The debtor has the option if he think fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application." But the court add: "A majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case where different sureties under distinct obligations are interested." The treasury officers are the agents of the law. It regulates their duties, as it does the duties and rights of the collector and his sureties. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government, without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy that it requires but little consideration. If the collector be in default for a preceding term, it is the duty of the treasury department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties for such term. The money in the hands of the collector is not his money. Without a violation of his duty, he cannot appropriate it as such. He pays it over in the performance of his duty,—the duty which the sureties have undertaken that he shall faithfully perform. And shall the sureties not be exonerated? The collector has done all that they stipulated he should do. How, then, can they be made responsible? It is contended that their responsibility arises, not from the default of the collector, but from the appropriation of his payments by the treasury. This, at least, is the fair result of the doctrine advanced. For, if such appropriation is properly made by the treasury, in payment of a defalcation of the collector, before the commence-

ment of the current term, it must follow that the sureties for such term are responsible for the amount thus paid.

§ 586. *The transcripts of treasury accounts are prima facie evidence against the surety.*

The government must show the amount of the defalcation of the collector during the term for which the defendants were sureties, to charge them; and this is not done on the face of the general transcript. It is necessary, therefore, to have a restatement of the account for this purpose. This restatement does not falsify the general account, but arranges the items of debits and credits so as to exhibit the transactions of the collector during the four years in question. Whether this be done by depositions, or in the form of a transcript, may not be material. We think that the transcript or restatement of the account, as explained by the depositions, was competent evidence to the jury. This statement, as appears from the deposition of Tarbutt, is defective in not giving all the credits to which the collector was entitled; but as it relates to the matter in controversy, it is evidence. The jury will determine what effect it shall have. The amount charged to the collector, at the commencement of the term, is only *prima facie* evidence against the sureties. If they can show, by circumstances or otherwise, that the balance charged in whole or in part had been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied. If the sum charged consists of duty bonds, the defendants may show that the bonds were never paid. These remarks apply to the sureties under every new appointment of the collector, and to the balance charged against him.

§ 587. *Appropriation of payments made by an officer holding more than one term with different sureties.*

On the 29th of March, 1834, a new official term of Swartwout commenced, and new securities were given. On that day a large apparent balance was due to the government by him. Now the inquiry should be, of what did that balance consist? Did it arise from a misapplication of the public money during the preceding term? If so, the sureties of the preceding term are liable for the amount thus misapplied. But if there was no misapplication of the public money by the collector, and he paid over to the government, or to its order, all the moneys he received during the official term for which the defendants were his sureties, however such payments may have been appropriated by the treasury, the sureties are discharged. In answer to the question: "Whether the payments made by the collector subsequently to the 28th of March, 1834, should be appropriated in discharge of his indebtedment on that day?" we say, that so far as such payments were made of moneys accruing and received in the subsequent term, they should not be so applied. But so far as payments were made in the subsequent term of moneys received on duty bonds or otherwise, which remained charged to the collector as of the preceding official term, such payments should be appropriated in discharge of the indebtedment of the collector for that term. The sureties are only responsible for a misapplication of the public money during the four years preceding the 29th of March, 1834. And of course the extent of this responsibility must be shown by the government. As before remarked, the court consider the official terms as distinct and separate in regard to the sureties, as if different persons had served in the three terms specified; that the legal responsibilities of the sureties are not and cannot be affected by any action of the treasury department. If liable, the sureties are made so by their contract;

and the government, being a party to that contract, cannot, without the consent of the defendants, change its legal or equitable effect.

Order. This cause came on to be heard, etc., on consideration whereof it is the opinion of this court:

1st. That the transcript from the books and proceedings of the treasury, given in evidence on the part of the United States, to show the indebtedness of Samuel Swartwout on the 28th day of March, 1834, on which day the second term of office of said Swartwout expired, was, in this case, competent and legal evidence.

2d. That the payments made by said Samuel Swartwout subsequently to the said 28th day of March, 1834, should be appropriated in discharge of his indebtedness on that day, so far as said payments were made in the subsequent term of moneys received on duty bonds or otherwise, which remained charged to the collector as of the preceding official term; but not where such payments were made of moneys accruing and received in the subsequent term.

Whereupon it is now here ordered and adjudged by this court that it be so certified to the said circuit court.

HARRIS v. BABBITT.

(Circuit Court for Missouri: 4 Dillon, 185-194. 1877.)

Opinion by DILLON, J.

STATEMENT OF FACTS.—This is an important case, alike in the amount and in the principles involved. It has been very fully argued by counsel, who, with commendable industry, on one side and the other, have brought before me all the authorities touching the question on which the case turns. If my engagements would permit, I would like to look into it further, and reduce my views to writing. As I may not get time at an early date to do this, and as it is not likely that further examination and reflection would change my views, I proceed to dispose of the case at this time.

The plaintiff below, Babbitt, is the assignee in bankruptcy of the Union German Savings Bank, and Harris and the other defendants, as his sureties, are sued in respect of the alleged liability of Harris, on his official bond, as the cashier of that bank. The sureties alone defend. The bank is a savings bank, incorporated under the laws of this state, and the statute contains a provision applicable to this controversy, to which I will refer presently. The sureties make defense, and the leading question in the case is, whether they are liable on this bond for the default of their principal, for breaches of its condition by him, after the term for which he was elected had expired; and that depends, primarily, on the question whether his election in 1872, and his term of office, are to be considered *as annual*. He was elected cashier on January 14, 1872, for one year, or, if the statute applies, for one year and until his successor is elected and qualified. On January 16, 1873, there was another election, and he was again elected by the directors his own successor, *but he never gave any new bond*. This suit is on the bond originally given, dated January 16, 1872. The by-laws of this institution provided for monthly meetings of the board of directors, and if these meetings had been held there would have been a regular meeting of the board of directors on the first Tuesday of February after this new election on January 16, 1873, and another such meeting in March. Several breaches of this bond are alleged, but all of

them were after the time fixed for the February, 1873, meeting. Now, the question is, whether the sureties on the bond, given in January, 1872, are liable for these breaches. The only provision of statute applicable to this question is section 3 of the act in relation to savings banks, which is as follows: "The affairs and business of any such association shall be managed and controlled by a board of directors, not less than five nor more than thirteen in number, from whom shall be designated by themselves a president, a *cashier* and secretary, *who shall hold their offices for one year, and until their successors are duly elected and qualified.*" There is no provision of statute, so counsel on both sides state, in terms requiring the cashier to give a bond, but there is a provision of statute authorizing the *directors* to make by-laws, and these by-laws were made by the directors, who elected the cashier, who were the managing officers of the institution, and not by the stockholders, or by the body of the corporation at large. Among other by-laws ordained by the directors was one to this effect: "The officers of the bank, before entering on the duties of their respective offices, shall execute to the bank an obligation, with two or more sureties, as follows: 'Cashier, \$25,000,' " etc.

The bond in suit, dated January 16, 1872, is in the penal sum of \$25,000, with this condition: "The condition of the above obligation is such, that, whereas the above named John S. Harris has been duly elected cashier of the Union German Savings Bank, of Kansas City, Missouri, now, therefore, if the said John S. Harris shall faithfully, honestly and impartially discharge all his duties as such cashier of the Union German Savings Bank, of Kansas City, Missouri, in accordance with the provisions of law and the charter and by-laws of said bank, then this bond to be null and void; otherwise to remain in full force." On the trial, the defendants, the sureties, asked the court to instruct the jury as follows: "That the office of the defendant Harris, as cashier, is *an annual office*, and if said Harris was elected cashier on the 16th of January, 1873, that is, after the year for which this bond was given, and if he was allowed to go on during the remainder of the said month, and in the months of February and March following, without giving a new bond, then these sureties are not liable for acts of said Harris after the said new election;" which the court refused, and gave this: "I instruct you that the bond sued on is governed by the statute of this state relating to savings banks, and that this bond, under the statute, should be so construed as to produce no interregnum in the office of cashier. I therefore instruct you, these sureties are liable for said acts of Harris, cashier, up to the commencement of the month of March, 1873."

§ 588. *Liability of sureties upon official bonds; authorities cited.*

Now, then, in the first place, as to the authorities in relation to the official bonds of public officers: Under the statutes of various states in this country, public officers are elected pursuant to statutory provisions, which fix their term of office, and in many cases they are elected annually. That is the case in all the New England states. In the New England towns there is an *annual* meeting, at which the officers are elected, where the citizens assemble, and elect their town officers in a government of pure democracy. They are elected annually at these annual meetings, and there is usually in these states a provision, to prevent an interregnum, that these officers shall continue to hold their offices not only for a year, but until their successors are elected and qualified. A great many years ago, in Massachusetts, the question arose which is presented in this case, whether, under such a provision, the sureties of an officer elected for a

year, but where the default in his official duties occurred after the year, but before his successor had qualified, were liable in respect to such default. It came before the supreme court of Massachusetts in *Bigelow v. Bridge*, 8 Mass., 275, and that court decided that there was no such liability. The same question arose afterwards in *Chelmsford v. Demarest*, 7 Gray, 1, when Chief Justice Shaw was on the bench, and a thorough examination of it was made. The court held the same way — that the office was annual, and that where the condition of the bond was that the officer should hold until his successor was elected and qualified, that such a condition did not cease to make it an annual office, so far, at all events, as the sureties were concerned. That ruling has been accepted, wherever it has come in question, by all the New England states. In New Hampshire (*Dover v. Twombly*, 42 N. H., 59), in a fully considered opinion, and in Connecticut (*Welch v. Seymour*, 28 Conn., 387), the views of the supreme court of Massachusetts have been followed, and they have been adopted in other states. See *Moss v. State*, 10 Mo., 338; *State Treasurer v. Mann*, 34 Vt., 371; *Mayor and Council v. Horn*, 2 Harrington (Del.), 190; *Insurance Co. v. Smith*, 2 Hill (S. C.), 590 [258]; *South Carolina Society v. Johnson*, 1 McCord, 41; *Committee of Public Acts v. Greenwood*, 1 DeSaus. (S. Car. Ch.), 450; *County of Wapello v. Bingham*, 10 Ia., 40; 38 New J. L., 254; *Insurance Co. v. Clark*, 33 Barb., 196. In some of the states, notably North Carolina, Indiana, perhaps Maryland, possibly Mississippi, where the same question has come up, the courts have decided the other way, and have held, under the clause that "he shall hold until his successor is elected and qualified," that there may be a liability on the sureties for a term extending beyond the year. *State v. Berg*, 50 Ind., 496; *Thompson v. State*, 37 Miss., 578; *Placer County v. Dickenson*, 45 Cal., 12; *State v. Daniel*, 6 Jones (N. C.), Law, 444; *Sparks v. Bank*, 9 Am. Law Reg., N. S., 365. But I must say, in regard to these decisions, that those courts do not seem in general to have had their attention called to the reasoning on the other side, and are not as fully considered, in my judgment, as the first line of decisions to which I have referred.

§ 589. *The sureties of a cashier whose office is to be held until his successor is elected, etc., are not bound for defaults occurring after the term for which he was elected, though the corporation is bankrupt.*

But, when we look at the peculiarities of the present case, I think it can be distinguished from even the latter line of decisions, and that if they were admitted to be correct in respect to *public* officers, still it could be possible, on just and solid grounds, to distinguish this case from those. Now, what is this action, when we get to the bottom of it? The plaintiff is the assignee in bankruptcy of this bank, and the legal rights of the parties are precisely the same, in my judgment, as though this bank had never been thrown into bankruptcy; as if this default had occurred, and the bank had continued to be solvent, and the bank itself had brought this same action instead of the assignee in bankruptcy. Nothing is clearer than that, under the Missouri statute, it is contemplated that these officers shall be elected annually, for such is the express provision that there shall be designated a cashier, who shall hold his office for one year, and until his successor is elected and qualified; and the provision is, there shall be an annual election, that the directors shall be elected annually, and the directors are annually to select their own cashier. A cashier that is satisfactory to one board of directors may not be to another, and they are to elect him each year. In accordance with this provision, they held their election January 16, 1873, and they elected a new cashier — that is to say, they elected Mr. Harris his

own successor, but neither he nor any of the other officers gave any new bond.

Now what is the object of the bond in suit? It is not like official bonds, which are intended to protect the public, and where, unless the provisions of the statute are complied with, the public are comparatively helpless. If a public officer gives an insufficient bond, a citizen may know it, but how can he help it? In this case, however, the bond is required for the indemnity of the private corporation. Who were managing the corporation? The directors. Where is the fault in this case? With whom rests the laches that led to this default? The retention of this cashier without giving a bond — whose fault is that? Who neglected their duty in that regard? It was the officers of this corporation — the men intrusted by the stockholders to manage its affairs. They are in fault for not requiring the bond. Now, then, as between the assignee representing this corporation, whose agents are to blame — who shall suffer? The sureties who engaged for Harris' performance of his duties for one year, or until his successor is elected and qualified, were blameless, and cannot reasonably be supposed to have intended to undertake an obligation of interminable duration; for if they can be held for what happened in March, 1873, they can be held for what happened in December, 1873, and so on indefinitely. Who is to blame? Who ought to suffer? It is to be observed in this case that the *statute* does not require a bond. It says, indeed, that officers shall hold their office until their successors are duly elected and qualified. How qualified? It was conceded in the argument that if this board of directors, in January, 1873, had passed a by-law or resolution, "we dispense with bonds," the bank would have been bound by it; and still it is perhaps true that this body, having enacted a by-law requiring bonds, they could not be dispensed with without a repeal of the by-law, although the question of *estoppel*, or waiver of the by-law, might arise where the directors are the very parties having full control of the matter; but it never could arise if the *statute* had in terms required a bond. Under these circumstances, whatever may be the true rule in respect to annual terms of public officers, where it is expressly required by the statute that there shall be qualification by giving of a bond, I am of opinion that, on the facts of this case, these sureties ought not to be held liable for defaults which happened at a time, in February, 1873, after a monthly directors' meeting had passed, and these men had failed to require the new cashier, he being his own successor, to give bond. The judgment of the district court is reversed and a new trial ordered.

§ 590. A bank teller continued to act for three days after the end of a year, at the end of which time he was reappointed for another year. *Held*, that his bond covered defalcations arising after his reappointment. *Union Bank of Georgetown v. Forrest*, * 3 Cr. C. C., 218.

9. Under Separate Bonds.

SUMMARY — Two successive bonds; application of payments, § 591. — Second bond not a satisfaction of a former bond, §§ 592, 594; does not release sureties, § 598.

§ 591. Where a collector of revenue has given two successive bonds with different sureties, payments indiscriminately made after the execution of the second bond, cannot be applied by the supervisor to extinguish a default arising under the first bond so as to extinguish the liability of the sureties thereon. The general doctrine of the appropriation of payments does not apply in such a case, where the party receiving the money receives it for the United States and not for himself, and different sets of sureties are interested. *United States v. January*, § 595.

§ 592. A second bond is not a satisfaction of a former bond, unless accepted in satisfaction; and a judgment on the second bond against one obligor will not bar an action on the first bond against all the obligors, although it is alleged that the breaches assigned in the two suits are the same. *United States v. Hoyt*, §§ 596, 597.

§ 593. The taking of a second bond from a postmaster, with new sureties, does not release the sureties on the first bond from liability for defalcations subsequent to the execution of the second bond. *Postmaster-General v. Munger*, §§ 598-601.

§ 594. A new security, of an equal or inferior degree, is not an extinguishment of a prior debt. *Ibid.*; *United States v. Hoyt*, §§ 596, 597.

[NOTES.—See §§ 602-618.]

UNITED STATES *v.* JANUARY.

(7 Cranch, 572-575. 1813.)

ERROR to U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE DUVAL.

STATEMENT OF FACTS.—In this cause the opinion of the court is required on a single point. The facts are these:

The supervisor of the revenue for the district of Ohio, in due form of law, appointed John Arthur collector of the revenue for the first division of the first survey of the said district. Arthur, on the 25th day of August, 1797, together with the defendants, his sureties, executed a bond to the United States in the penalty of \$4,000, with condition that Arthur should truly and faithfully execute and discharge all the duties of said office according to law. The supervisor, for greater security to the government, was in the habit of renewing the commission and renewing the office bond, and on the 23d day of March, 1799, Arthur executed another bond to the United States, with Robert Patterson surety, in the penalty of \$6,000, with this condition: "that if the said John Arthur has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of said office, and shall also render and settle his accounts according to law, then the obligation to be void," etc. Arthur proceeded to make the collections, and from the commencement of his duty to the 30th of June, 1802, was charged with the collection of \$30,584.99½. On the settlement of his account in the year 1803 he was in arrear \$16,181.15½, and suits were instituted on each of the bonds. The pleadings were the same in both actions. There was a plea of performance, to which the plaintiffs reply, and allege as a breach of the condition that the defendants have failed to collect and pay over the revenue arising within his district, etc., and are in arrear to the United States, etc., on which issue was joined. Pending the suits Arthur died, and they were prosecuted to judgment against the sureties only. The supervisor kept one general account only against the collector. On the trial the plaintiffs exhibited, on their part, the general account between them and the defendant, on which the balance, as before mentioned, is \$16,181.15½. They also exhibited the balance appearing to be due by terminating the account with the period when Arthur gave the second bond, at the time his first commission was revoked, which was \$6,483.59½.

The defendants, to support the issue on their part, offered the deposition of a witness who proved that James Morrison, the late supervisor of the revenue, informed him that Arthur had paid a sufficient sum to discharge the bond first given, and that what he had paid should be so applied. After reading the deposition the plaintiffs introduced the supervisor himself to contradict the defendants' witness. In his testimony he admits that the payments made by Arthur, if applied to the first bond, would discharge it, and that he might have

frequently told January and others that the whole of the bond would be paid off if the payments made by Arthur were appropriated exclusively to its discharge, and that he himself had entertained the opinion that they ought to be so applied. To repel the testimony of the supervisor, and to support that of their witness, the defendants produced a clerk in the supervisor's office, who proved "that the defendant January several times called at the office of the supervisor on the subject of his bond, expressed his uneasiness about its remaining out and his desire to get it up. That the supervisor assured him that Arthur had paid enough to discharge that bond, and that he might make himself easy, but refused to give up the bond because he thought that such bonds ought to remain as vouchers in his office." The plaintiffs, on this state of the case, moved the court to instruct the jury that the promise of the supervisor as to the application of the payments in discharge of the bond was not of itself an appropriation of the payments, unless it was followed by some act of appropriation. The court overruled the motion, and, at the instance of the defendants, instructed the jury that, if they believed that the supervisor had made the election and promise as proven, it was a declaration of his election how the payments made by Arthur should be applied; and that whether a formal entry in the books of their appropriation, corresponding with that election, were made or not, was immaterial, and that the jury ought to consider the application as made. To the opinion of the court thus given, the plaintiffs excepted, and this court must now decide as to the correctness of the opinion of the court below.

§ 595. *The rule allowing the debtor to direct the application of payments does not hold when the government is the receiver and sureties are interested.*

The law with respect to the application of particular payments when the debtor owes distinct debts has long since been settled. The debtor has the option if he thinks fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application. In this case a majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is; where the receiver is a public officer not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be generally admitted that moneys arising due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond without manifest injury to the surety in the second bond; and *vice versa*, justice between the different sureties can only be done by reference to the collector's books, and the evidence which they contain may be supported by parol testimony, if any in the possession of the parties interested. The court is of opinion that the circuit court erred in the opinion given, and that it be reversed.

Judgment reversed.

UNITED STATES v. HOYT.

(Circuit Court for New York: 1 Blatchford, 326-330. 1848.)

STATEMENT OF FACTS.—Hoyt was sued on a bond given by him as collector of the port of New York, for failure to pay moneys collected. He pleaded he had given a like bond subsequently and that judgment had been rendered upon it for the identical breach now assigned, and that said judgment was in full force.

§ 596. *Taking a second bond from an officer does not extinguish or discharge the first, unless accepted in satisfaction of the first.*

Opinion by NELSON, J.

The defense set up in the plea assumes that the second bond did not of itself operate as a merger or extinguishment of the first, but that the judgment recovered upon it did. The second being a security of no higher degree than the first, of course could not operate as an extinguishment of it. *Jackson v. Shaffer*, 11 Johns., 513; *Andrews v. Smith*, 9 Wend., 53. And, that a judgment recovered upon it would not have that effect, was the very point decided in *Drake v. Mitchell*, 3 East, 251. That was an action of covenant against three defendants. The defense was that Mitchell, one of the defendants, had given to the plaintiff, in satisfaction of the demand, his bill of exchange for the amount of it, upon which the plaintiff had recovered judgment. It was admitted by the counsel that the giving of the bill did not operate as a satisfaction of the debt; but it was insisted that, by reason of the judgment, the bill had become a security of a higher nature, and the covenant was thus extinguished. But the court held that the judgment operated only to extinguish the bill on which the suit was brought, not the covenant. *Grose, J.*, observed that the bill, not having been accepted as a satisfaction for the debt, could only operate as a collateral security; and that though a judgment had been recovered on the bill, yet no satisfaction having been produced by it, the plaintiff might still resort to his original remedy. And *Le Blanc, J.*, remarked that the giving of another security, which in itself would not operate as an extinguishment of the original one, could not operate as such by being pursued to judgment, unless it produced the fruit of a judgment. So here, the second bond not operating of itself as a satisfaction, being a security of no higher degree than the first, cannot operate as such by being pursued to judgment.

The case of *Holmes v. Bell*, 3 Mann. & G., 213, bears directly upon this question. It was there held, that, where a banker took a bond from B., his customer, with security, conditioned for the payment of all sums already advanced or thereafter to be advanced, the bond did not operate as a merger; and that a suit would lie against B. for the balance of his account, as upon a debt by simple contract. *Tindal, Ch. J.*, observed that the parties to the bond were not the parties between whom the original liability arose; and that the bond was evidently intended only as a collateral security. The same principle was decided in the case of *Bell v. Banks*, 3 Mann. & G., 258. That was an action upon a promissory note against two defendants. The defense was that one of them, at the request of the plaintiff, had executed a warrant of attorney to a third person in trust to secure the payment of the note, and that it was thereby extinguished. The court held that the plaintiff was entitled to recover. *Tindal, Ch. J.*, considered the case of *Drake v. Mitchell* as decisive of the question. The other judges regarded the fact that the new security was between different parties as conclusive against the merger and that it was intended as collateral. These cases, and others that might be referred to on the same point, are clear authorities against the defense in this case. There is no averment that the second bond was accepted in satisfaction of the first, and it cannot of itself operate as a satisfaction because it is a security of no higher nature than the first, and it is not made by or between the same, but between different parties. It is, therefore, but a collateral security, and, although it has passed into judgment, the original security remains unless followed by actual payment or

satisfaction. *Chipman v. Martin*, 13 Johns., 240; *Davis v. Anable*, 2 Hill, 339; *Day v. Leal*, 14 Johns., 404.

§ 597. *A judgment without satisfaction upon one collateral instrument does not work an extinguishment of another given for the same object.*

The second bond being collateral to the first, a judgment recovered upon it against Hoyt constitutes no bar to a joint action against him and his co-obligors upon the first, as separate suits may be brought jointly against all parties whose names are found on different instruments given as collateral security for the principal debt. Whether the obligations entered into in the different instruments given as collateral be joint or several makes no difference, because the forms of proceeding require that they should be sued jointly or individually, and the law allows the suit to be joint in all cases. Besides, a judgment upon one collateral instrument does not work an extinguishment of another given for the same debt or duty any more than it works an extinguishment of the principal debt. The remedies upon the different instruments are therefore independent of each other. The averment in the plea, that the plaintiffs seek to recover the same identical sum of money in this suit that they sought to recover in the other, and upon the identical breaches assigned in that, is entirely consistent with the fact that the one security was collateral to the other and does not necessarily import an extinguishment. The pleader should have gone further, and have averred that the one was given and accepted by the plaintiffs in satisfaction of the other, or that satisfaction had followed the judgment on the first bond. For these reasons I think the plaintiffs are entitled to judgment on the demurrer.

POSTMASTER-GENERAL v. MUNGER.

(Circuit Court for New York: 2 Paine, 189-199. 1827 ?)

STATEMENT OF FACTS.—Action on bond dated February 12, 1812. Penalty, \$500, for faithful discharge of duties as postmaster by David Nott. Nott neglected to pay over large sums of money received by him. On trial a balance due exceeding the penalty on the bond was found. The principal question was as to the effect of a subsequent bond given by him with other sureties, dated December 25, 1818. Penalty, \$1,500, conditioned same as first bond. Nott continued in office till December, 1820. There was a balance of about \$772 due from Nott when the second bond was given. Subsequent payments credited to general account, if applied, would have extinguished that balance, and no breach of first bond would be shown. Upon the trial the judge charged that the taking of the second bond was a waiver of the right to proceed upon the first bond for subsequent receipts; that the sureties in the first bond were not liable for default after the date of the second bond.

Opinion by THOMPSON, J.

I cannot concur with the defendants' counsel in his construction of the import of the judge's charge, but consider it as expressing an opinion that, as matter of law, the liability of the sureties in the first bond ceased upon the giving of the second bond for all defaults thereafter incurred. If the circumstances in evidence were such as to warrant the conclusion, as matter of fact, that there was a waiver of the continued responsibility of the first sureties, it was for the jury, and not for the court, to weigh these circumstances, and draw conclusions from them; and I cannot but think the manner in which the case would have been submitted to the jury would have been very different,

if the question had been considered by the court as a question of fact. That it was not so considered by the defendants' counsel, on the trial of the cause, is evident from the manner in which the bill of exceptions states the question to have been put to the court, viz.: the counsel for the defendants insisted to the court that the taking of said last-mentioned bond by the postmaster-general was a *waiver in law* of all right to proceed on the first bond for postages received subsequent to the date of the second bond; that the sureties in the first bond ceased to be liable at and from that date for any defalcation or neglect of duty of the postmaster. No circumstances are referred to and relied upon from which a waiver could be inferred as matter of fact; but that the second bond was such waiver, resulted as a conclusion of law from the mere fact of accepting the bond. And I the more readily conclude that such was the understanding of the question upon the trial, as I cannot discover, from the bill of exceptions, any circumstances tending to warrant a conclusion of any waiver in point of fact.

§ 598. *Taking from an officer a second bond as additional security does not extinguish liability upon the first bond.*

How far mere parol evidence of a waiver would be admissible and available is a point that does not arise here. The only question is as to the legal operation of the second bond upon the liability of the sureties in the first; and I am unable to discover any principle upon which it can be considered as exonerating them from their responsibility. There is no limitation as to time in the bond, the breaches assigned and proved are within the condition of the bond, and Nott, the postmaster, continued in office under the same appointment originally given him. It certainly cannot be pretended that the taking of a second bond could, in any sense whatever, be considered a new appointment. The second bond does not purport to be a substitute for the first; nor is there anything tending to show that such was the intention or understanding of the parties; and it can be viewed in no other light than as additional security, to the taking of which no possible objection could exist—it was for the benefit and not to the prejudice of the first sureties. As to the defaults incurred before the taking of the second bond, the defendants were alone responsible; and for those afterwards incurred, equity would probably consider the two sets of sureties as jointly responsible.

§ 599. *A new security of an equal or inferior degree is not an extinguishment of a prior debt.*

The second bond was not taken for any antecedent default, and was not, therefore, for any existing debt or claim; and if it had been, it would not have operated as a discharge or extinguishment of the first. A new security, of an equal or inferior degree, is not an extinguishment of a prior debt. This is a principle too familiar to require any authority in its support. The cases, however, here referred to, may serve to illustrate and show the extent and application of the principle. 8 Johns., 54; 11 id., 512; 13 id., 240; 14 id., 404; Cro. Car., 86; Cro. Eliz., 716, 727; 1 Bur., 9. And these cases also show, that if the second bond had been pleaded as a discharge of the first, the plea would have been bad on demurrer.

§ 600. *The omission of the postmaster-general to remove a postmaster did not discharge his sureties.*

The omission of the postmaster-general to remove Nott from office did not draw after it a discharge of the sureties. The doctrine of the supreme court in the cases of *United States v. Kirkpatrick*, 9 Wheat., 720 (§§ 419-422,

supra), and *United States v. Van Zandt*, 11 Wheat., 184, is entirely applicable, and settles this question. Although it might have been the duty of the postmaster-general to remove Nott, yet his neglect did not operate as a removal; this provision is only directory to the postmaster-general, and intended for the security and protection of the government by insuring punctuality and responsibility, but forms no part of the contract with the surety. So long as the officer remains in the legal exercise of the powers and duties of the office, the responsibility of the sureties continues. The case of *United States v. Nicholl*, 12 Wheat., 505 (§§ 671-673, *infra*), decided at the last term of the supreme court, has a strong bearing upon this case. In that case an act of congress had required new sureties to be given by the officer by a certain day therein mentioned. None were, however, given, and the responsibility of the old sureties was held to continue. The court say, the act nowhere directs the principals to be discharged from office upon failure to give new sureties; and if the act had so directed, they would have remained in office until actually removed. The law does not in terms declare the existing sureties shall be discharged after that day; it would require a very strained construction of the statute to discharge them by implication, while their principals were permitted to remain in office. Such construction would be against the manifest intention of the legislature.

§ 601. *An increase in the rate of postage after the execution of their bond did not discharge a postmaster's sureties.*

It was urged on the argument that the defendants were discharged from their responsibility by reason of the *increase* of the rate of postages subsequent to their having become sureties, and acts of congress were referred to for the purpose of showing such increase. It is not perceived how this can be made a question here; it does not arise upon the bill of exceptions, nor is it in any shape or manner whatever presented by the record. But was it properly before this court? It appears to me that it forms no objection to the right of recovery against the sureties. The undertaking of the sureties is general, that Nott shall pay over to the postmaster-general all moneys that shall come to his hand for the postages of whatever is by law chargeable with postage. It refers to no particular act explaining or limiting the rate of postage; and all moneys received as postage comes as well within the letter as the spirit and intention of the bond. Nor was the bond taken under any particular law defining its extent and operation, and must therefore be construed according to the fair and reasonable import of the language employed by the parties. The undertaking of the sureties is, from its nature, prospective, and is limited only by the terms of the bond that the money for which they are called upon to account must have been received by their principal as postages established by law. Had the acts of congress referred to enlarged the powers of the postmaster, or superadded any new duties, whereby he was made the receiver of other moneys than for postages, the sureties in this bond would not have been responsible therefor.

The defendants' counsel has supposed that the case of *The United States v. Kirkpatrick* sustains this objection. But in this I think he is mistaken. The court then considered the bond in question to have been given in reference to the objects of a particular act of congress, and that the condition of the bond referred principally to assessments of *direct* taxes; and that the subsequent acts of congress laying internal duties contained provisions enlarging the authority of the collectors; and that the sureties did not undertake for the faith-

ful execution of such enlarged powers. The court say there is nothing in the original act under which the appointment was made, which contemplates a permanent and continuing liability for all duties under all laws which might be subsequently passed; that the condition of the bond in its terms, as expounded by the other parts of the act, had a principal reference to the assessment of *direct taxes*. But there is nothing in this case to warrant a conclusion that, if the subsequent acts of congress referred to had simply *increased this direct tax*, the sureties would not have been held responsible. Upon the whole, I think the district court erred, in the opinion given to the jury, as to the legal effect and operation of the second bond upon the liability of the sureties in the first.

The judgment must, accordingly, be reversed, and a *venire de novo* issued returnable in this court.

§ 602. *Separate bonds.*—In the case of two bonds given by a public officer for his conduct during two successive terms in the same office, the government is not entitled to recover of the sureties in the first bond any balance which appears from the accounts to have remained undischarged in his hands at the expiration of the first term, unless it is satisfactorily proven that in fact such balance was not on hand, but had in some way been misappropriated. There is no presumption in such case that there has been an actual misappropriation. *United States v. Earhart*,* 4 Saw., 245.

§ 603. As between different sets of sureties on the official bond of an officer, the ordinary rules for the appropriation of payments do not apply, but the courts will apply the payments so as to avoid injustice. So where a default exists at the time of making a new bond, and the payment for the first quarter is in excess of the debits for that quarter, the balance will be applied to the reduction of the existing default. And where a general payment is made some years after the expiration of the term for which the bond was given, it will be applied to the general balance. *United States v. Linn*,* 2 McL., 501.

§ 604. It seems that in cases of official bonds executed by the principal at different times, with separate and distinct sets of sureties, the responsibility of the separate sets of sureties must have reference to and be limited by the periods for which they respectively undertake by their contract, and that neither the misfeasance nor non-feasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set may have made themselves answerable. *Jones v. United States*, 7 How., 681 (§§ 350, 351).

§ 605. Persons who are sureties on three successive bonds of a deputy postmaster are liable for all balances within the time covered by the bonds, except such as are barred by the statute of limitations, which is two years from and after any default. *Boody v. United States*, 1 Woodb. & M., 150 (§§ 433-438).

§ 606. — *new bond.*—A plea by sureties in the official bond of a receiver of public moneys, that after the making of the bond sued on, and before the commencement of suit, the principal gave a new bond, which the government accepted in discharge and satisfaction of the first bond, states no defense to breaches which occurred before the taking of the new bond. *United States v. Girault*, 11 How., 22.

§ 607. Where, at the time of the execution of a second official bond, the principal was in default, the sureties on such bond are not liable for the amount of such default, and it is improper to apply payments made by him after the execution of such second bond to the payment of the existing default. The general doctrine of the appropriation of payments does not apply as between successive sets of sureties on official bonds. *Myers v. United States*,* 1 McL., 498; *Postmaster-General v. Norvell*,* Gilp., 106; *United States v. Linn*,* 2 McL., 501.

§ 608. At the time a second bond was entered into by a public officer a balance was due from him to the government. Payments subsequently made by the officer were applied to the balance thus existing. *Held*, in an action against the sureties on the latter bond, that such application of the payments was improper, and that the sureties were not liable for the sum due from the officer at the time of their execution of the bond. *Postmaster-General v. Norvell*,* Gilp., 106.

§ 609. A postmaster, being required to do so by the department, entered into a new bond, which under the statute released the former sureties from liability for subsequent acts or defalcations of the postmaster with other sureties. At the time of the execution he was indebted to the government. *Held*, that in the absence of evidence to the contrary it would be presumed that the postmaster had the amount on hand at the time of the execution of the

new bond, and that the sureties on his old bond were not liable. *Alvord v. United States*, 13 Blatch.,* 279.

§ 610. The act of May 15, 1820, declared that the summary process therein provided against officers and their sureties should not affect such sureties as had become previously bound, and directed the officers specified to give new sureties. *Held*, that the new sureties were a substitute for the old, and that the latter were not liable for defaults occurring subsequent to the taking of the new bond. *United States v. Maurice*, 2 Marsh., 96.

§ 611. A navy agent being known to be a defaulter, a new bond was, for this reason, required of him before a settlement of such defalcation had been had. *Held*, that the sureties on the bond were liable for such past defalcations existing at the time the bond was given. *United States v. Brodhead*,* 8 Law Rep., 96.

§ 612. It seems that a substitute bond required of a collector discharges the sureties on the old bond, but that a strengthening bond does not have that effect. *Chadwick v. United States*,* 8 Fed. R., 750.

§ 613. The approval, by the secretary of the interior, of a new bond of a pension agent, without an accounting by the agent, is not such an acceptance of the new bond in lieu of the old as to release the sureties on the old bond from liability for a defalcation happening after the delivery of the new bond to the secretary. *United States v. Haynes*,* 9 Ben., 22.

§ 614. Where an officer had given two official bonds with different sureties during the time of his service, that given last being taken as a substitute for the one previously given, and the treasury account with him had run on for the whole time, charging him with advances and crediting him with disbursements, and balances had been struck from time to time and carried forward, *held*, in an action on the bond first given, that this was a case where there was no specific application of payments by either of the parties, and that the court would apply the credits in discharge of items antecedently due in the order of time in which they stood in the account. *United States v. Wardell*, 5 Mason, 82.

§ 615. By the thirty-seventh section of the act of July, 1836, ch. 270, payments made subsequent to the execution of a new bond by a deputy postmaster shall first be applied to the discharge of any balance which may be due on the old bond unless the debtor directs otherwise at time of payment. *Boody v. United States*, 1 Woodb. & M., 150 (§§ 433-438).

§ 616. — *additional bond*.—A collector of customs having given a bond for \$150,000, subsequently gave another bond for \$200,000, with the same sureties, which bond recited the expediency of giving additional security. *Held*, that under the second bond a surety was bound absolutely for the performance of the conditions of the bond, and not contingently on the failure or inability of the sureties on the previous bond. *United States v. Anderson*,* 1 Blatch., 330.

§ 617. Where, when a postmaster is called upon to give an additional bond, there is a balance due, his subsequent payments, made without specific appropriation by either party, are to be applied to the payment of the old balance, and relieve the sureties on the old bond to the extent thereof, and not those on the second bond. *Postmaster-General v. Furber*,* 4 Mason, 333.

§ 618. A public officer, being required to give additional security, gave a bond, conditioned that he had faithfully performed, and would thereafter faithfully perform, his duties. At the time of the execution of such bond the principal was considerably in default, and no statute required such additional bond to be retrospective, but only prospective. *Held*, that the sureties on the additional bond are not liable for the default existing at the time of its execution. A statutory bond must substantially conform to the requirements of the law, and it is void so far as it exceeds them. *Armstrong v. United States*,* Pet. C. C., 46.

10. On Miscellaneous Bonds.

SUMMARY—*Addition to duties of the office*, §§ 619-621.—*Money in hands at time bond is given*, § 622.—*Bond signed in blank*, § 623.—*Fraud; surrender of securities*, § 624.—*Location of distillery*, § 625.—*Distillery property not free from incumbrances*, § 626.—*Bond not construed by reference to contract, when*, § 627.—*Bond of insurance agent*, § 628.—*Death of a member of the firm*, § 629.

§ 619. Any substantial addition by law to the duties of the obligor of a bond, after the execution of the same, materially enlarging his liabilities, will not impose any additional responsibility upon his sureties, unless the words of the bond bring such subsequently imposed duties fairly within its provisions. *United States v. Powell*, §§ 680-684. See §§ 235, 647.

§ 620. A distiller's bond being conditioned that the principal shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, it was held the language was comprehensive enough to include duties subsequently imposed on distillers of a character corresponding with those required at the date of the bond, and that the obligors were bound for the performance of such duties. *Ibid.* See § 651.

§ 621. It seems that where the condition of a bond is limited to existing duties, or the appointment is a temporary one, to end with the next session of the senate, the rule as to the liability of sureties is that it must be strictly confined to the duties created by acts passed before the date of the bond. *Ibid.*

§ 622. The surety on the bond of an agent of an insurance company is liable for moneys in his hands at the time of the execution of the bond, which had been previously collected by him and improperly retained, where the obligee is ignorant of the agent's misconduct. *Mutual Life Ins. Co. v. Wilcox*, §§ 635-637. See §§ 591-618.

§ 623. The bond of an agent of an insurance company was signed in blank by the surety and given to the principal to be filled up and delivered. *Held*, that the surety was bound in such a case unless the obligee had notice of the irregularity, and that the knowledge of the principal could not be imputed to the company because in this transaction he was acting in his own behalf. *Ibid.*

§ 624. The agent of an insurance company, being in default, gave a deed of trust to secure such defalcation, and made payments periodically till it was extinguished. He then executed another bond with another surety and procured his former bond and the trust deed to be given up and canceled. No inquiries having been made by the second surety, it was held that there was no fraudulent concealment or relinquishment of securities on the part of the company that vitiated the second bond. *Ibid.*

§ 625. Where a distiller's bond, following the recitals of the notice required by law as to the place at which the distillery is to be carried on, locates it at a place different from that at which it is actually situated, there can be no recovery on the bond for delinquent taxes. *United States v. Boecker*, §§ 638-640.

§ 626. In an action against the sureties on a distiller's bond, it is no defense that the assessor who approved the bond did not make the distillery property free from incumbrances as against the claims of the government, as required by law, before approving the bond. *Osborne v. United States*, § 641.

§ 627. Where a bond and contract executed by an agent at the same time do not appear to be parts of the same transaction, parol proof is not admissible to show that the liability of the sureties, as expressed in the bond, was intended to be limited by anything contained in the contract. *Singer Manuf'g Co. v. Hester*, §§ 642, 643.

§ 628. An insurance agent gave bond to account for moneys, etc. He was at the time indebted to the insurance company, and moneys which he remitted after the execution of the bond were applied to such indebtedness. Judgment was obtained against the sureties before they had knowledge of these facts, and on bill to enjoin the judgment it was held that the sureties were not entitled to relief unless the money applied on the debt was money received in the current business of the agent, and was received by the company with knowledge of such fact. *Hecox v. Citizens' Ins. Co.*, § 644.

§ 629. Where a firm of insurance agents executed a bond, conditioned to pay over money collected, the sureties were not liable for moneys collected by the survivor after the death of a member. *Connecticut Mut. L. Ins. Co. v. Bowler*, §§ 645, 646.

[NOTES.—See §§ 647-663.]

UNITED STATES v. POWELL.

(14 Wallace, 493-504. 1871.)

ERROR to U. S. Circuit Court, Middle District of Tennessee.

STATEMENT OF FACTS.—This is an action on a distiller's bond. The condition of the bond was that the obligors should faithfully comply with all the provisions of law in relation to the duties and business of distillers. After the execution of this bond, congress passed a resolution requiring proprietors of internal revenue bonded warehouses to reimburse to the United States the expenses and salary of storekeepers, etc., in charge of such warehouses. After the passage of this resolution the defendants gave a second bond, with the same sureties, and conditioned the same as the first. The defendants deny any

liability under either bond for the expenses, etc., mentioned in the above resolution.

Opinion by MR. JUSTICE CLIFFORD.

Persons intending to engage in the business of a distiller are required to give notice in writing to the assessor of the district, stating their names and places of residence and the place or places where the business is to be carried on, and before proceeding with the business they are required to make and execute a bond in the form prescribed by the commissioner, with at least two sureties to be approved by the assessor of the district, conditioned that the principal shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, and that he will pay all penalties incurred or fines imposed on him for a violation of any of the said provisions. 15 Stat. at Large, 127. Pursuant to that requirement the two defendants first named in the declaration made and executed the two bonds therein described, conditioned in the very words of the seventh section of the act containing the requirement, as appears by the record.

Distillers are also required by the fifteenth section of the act to provide at their own expense a warehouse, situated on and to constitute a part of their distillery premises, to be used only for the storage of distilled spirits of their own manufacture; and the provision is that such warehouse, when approved by the commissioner, on report of the collector, shall be deemed to be a bonded warehouse of the United States and be known as a distillery warehouse, and that it shall be under the direction and control of the collector of the district and in charge of an internal revenue storekeeper assigned thereto by the commissioner. Provision is also made by the joint resolution of the 29th of March, 1869, that the proprietors of all internal revenue bonded warehouses shall reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses, and that the same shall be paid into the treasury and accounted for like other public moneys. 16 Stat. at Large, 52. Most of the material facts are either admitted or not controverted by the pleadings. It is conceded as follows: (1) That the principal defendants engaged in the business of a distiller for the periods mentioned in the declaration. (2) That they constructed warehouses for the storage of distilled spirits of their own manufacture. (3) That the warehouses were in charge of internal revenue storekeepers, assigned thereto by the commissioner. (4) That the plaintiffs paid the *per diem* wages of the storekeepers, and that they demanded of the defendants to be reimbursed the amount so paid for that service, and that the defendants refused to pay as requested, and that the bonds described in the declaration were duly executed.

Payment being refused, the plaintiffs brought an action of debt to recover the amount. Service having been made, the defendants appeared and pleaded as follows: (1) Performance. (2) That they were not bound to pay the wages of the storekeepers in charge of their distillery warehouse; that the storekeeper was an officer appointed and selected by the plaintiffs, and that he was placed by them in the distillery warehouse of the defendants, and that they, the plaintiffs, were bound to pay his *per diem* wages. (3) That the warehouse attached to their distillery is known as a distillery warehouse, and not as a bonded warehouse, as it constitutes a part of their distillery premises, and that the defendants are not bound to pay the wages of the storekeeper. (4) That the plaintiffs have no right to be reimbursed for the wages they paid to the storekeeper for service rendered, or work done on Sunday, or the Lord's

day. (5) Superadded is also the separate plea of the sureties — that the plaintiffs, at the time the first bond was executed, were bound to pay the storekeeper in charge of the warehouse, and that the subsequent act, even if applicable to distillery warehouses, cannot change or alter their liability as sureties, nor can it increase their responsibility.

1. Performance certainly is not proved as matter of fact, as it is not pretended that the defendants have reimbursed the plaintiffs for any part of the amount which the latter paid to the storekeepers for their *per diem* wages while they were in charge of the defendants' distillery warehouses, which is all that need be remarked in respect to that defense.

2. Undoubtedly the storekeeper is an officer appointed and selected by the plaintiffs, but the question whether the defendants are bound to reimburse the plaintiffs the amount paid for their *per diem* wages while in charge of their distillery warehouses is a question of law depending upon the construction of the joint resolution to which reference has been made. Argument to show that the question must be answered in the affirmative, if the joint resolution is applicable to the case, is hardly necessary, as the language is explicit that the proprietors of all internal revenue bonded warehouses shall reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses.

§ 630. *The term "bonded warehouse" in the act of March 29, 1869, includes "distillery warehouse," used in the fifteenth section of the act of July 20, 1868, imposing taxes on distilled spirits.*

3. Attempt is made to show that a distillery warehouse is not a bonded warehouse within the meaning of the joint resolution, but the proposition cannot be maintained, as the act of congress provides that such a warehouse, when approved by the commissioner, on report of the collector, shall be deemed a bonded warehouse of the United States; and it matters not that the act provides that it shall be known as a distillery warehouse, as the requirement of the act is that it shall be under the direction and control of the collector of the district, and be in charge of an internal revenue storekeeper assigned thereto by the commissioner. Beyond all doubt, therefore, the internal revenue bonded warehouse, referred to in the joint resolution, includes the bonded warehouse known as the distillery warehouse, described in the fifteenth section of the act imposing taxes on distilled spirits. 15 Stat. at Large, 130.

§ 631. *Duties imposed by law upon the obligor of a bond, after its execution, do not affect his sureties, unless embraced by the terms of the bond.*

4. Suppose that it is so, still it is contended by the defendants that they are not bound by the first bond to reimburse the plaintiffs for the amount paid to the storekeeper for that service, because the bond was made and executed before the passage of the joint resolution. It must be admitted that any substantial addition by law to the duties of the obligor of a bond, after the execution of the instrument, materially enlarging his liabilities, will not impose any additional responsibility upon his sureties, unless the words of the bond, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions. *Farr v. Hollis*, 9 Barn. & Cress., 332.

§ 632. *The condition in a distiller's bond is prospective in terms and covers similar duties imposed after its execution.*

Conceding that rule to be correct, it becomes necessary to examine the recitals and condition of the bond first described in the declaration, as the ques-

tion must depend very largely upon the construction of the language there employed. By the recital of the bond it appears that the principals therein named intended, on and after that date, to be engaged in the business of distillers within the fifth collection district of the state, and the condition of the bond is that they shall *in all respects* faithfully comply with *all* the provisions of law in relation to the duties and business of distillers, and that they shall pay all penalties incurred or fines imposed on them for a violation of any of the said provisions. Stronger language to signify an intention to stipulate that the principals in the bond should comply with duties subsequently imposed by law in relation to the business of a distiller could not well be employed, as the language of the bond is that they shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, knowing as all the obligors did that congress might at any time enact new provisions imposing new duties or vary those already imposed. *Bartlett v. Governor*, 2 Bibb., 586; *Minor v. Mechanics' Bank*, 1 Pet., 73 (BANKS, §§ 6-19). Both parties, it must be assumed, knew that changes might be made in that behalf at any time, and the defendants must have understood that it never could have been intended that a new bond should be required with every modification made in relation to the duties and business in which the principals in the bond were about to engage. Where a person was elected sheriff and executed a bond to the county conditioned that he would well and faithfully in all things discharge the duties of the office during his continuance in the same by virtue of his said election, the supreme court of Ohio held that the language of the bond was broad enough, not only to embrace any duty imposed at the date of the bond, but any also that might be imposed upon the officer by law during the term for which the bond was given. *King v. Nichols*, 16 Ohio St., 82; *United States v. Bradley*, 10 Pet., 343 (§§ 183-9, *supra*); *Cameron v. Campbell*, 3 Hawks, 285. Bonds in such cases, as well as in cases like the one before the court, are required to secure the faithful discharge of the duties ordinarily imposed upon the principal obligor, without reference to the time when the law was passed imposing the duty; and where, as in this case, the language of the bond is sufficiently comprehensive to embrace duties subsequently imposed, of a character corresponding with those required at the date of the bond, the construction which gives a prospective as well as a retrospective operation to the condition of the bond may well be adopted as both reasonable and just to all concerned. *White v. Fox*, 22 Me., 341; *United States v. Hodson*, 10 Wall., 406 (§§ 195-199, *supra*); *United States v. Tingey*, 5 Pet., 127 (§§ 181, 182, *supra*).

Exceptional cases may doubtless arise, as where the condition of the bond is, in terms, or by a fair and reasonable construction, limited to existing duties, or where the appointment is a temporary one, to expire at the end of the next session of the senate. Different rules are applied in the case of a temporary appointment, as the commission is for a different tenure, and unless there is something in the act under which the first commission issued showing that it contemplated a permanent and continuing responsibility under laws subsequently passed, the rule is that the liability of sureties must be strictly confined to the duties created by the acts passed antecedent to the date of the bond. *United States v. Kirkpatrick*, 9 Wheat., 730 (§§ 419-422, *supra*). Given, as the second bond was, subsequent to the passage of the joint resolution, the defense that the bond is not embraced in that provision is entirely without merit, and is accordingly overruled.

§ 633. *The United States is entitled to reimbursement for money paid for wages of storekeepers in charge of distillery warehouses on Sunday.*

5. Reimbursement for services rendered or work done by the storekeepers, or for money paid for their *per diem* wages on Sunday or the Lord's day, it is insisted, cannot be lawfully claimed because the law, it is said, did not contemplate their employment on that day. Storekeepers of the kind may be appointed by the secretary of the treasury, in such numbers as may be necessary, with such compensation, not exceeding \$5 per day, as shall be determined by the commissioner. They are required to take an oath faithfully to perform the duties of their office, and to give a bond to be approved by the commissioner for the faithful discharge of their duties, and they are to have charge of the warehouses to which they may be respectively assigned, under the direction of the collector controlling the same, which warehouse, it is provided, shall be in the joint custody of such storekeeper and the proprietor thereof; and the provision is that the warehouses shall be kept securely locked, and shall at no time be unlocked or opened, or remain open, unless in the presence of such storekeeper or other person who may be designated to act for him by the collector in case of absence from sickness or from any other cause. 13 Stat. at Large, 146. Safe custody of the articles deposited in the warehouse is one of the primary duties of the storekeeper, and it is clear that he is required to perform that duty on Sunday as well as on every ordinary working day of the week, as such custody is a work of necessity, and therefore is not unlawful, even in jurisdictions where worldly labor or business on the Lord's day is forbidden by law. *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How., 255.

§ 634. *The bond given by distillers was comprehensive enough to include the duty afterwards imposed to reimburse the United States for salary of storekeepers.*

6. Sufficient has already been remarked to show that the defense set up in the separate plea filed by the sureties cannot be maintained, as the language employed in the conditions of the respective bonds is comprehensive enough to bring the case within the duty imposed upon the proprietors of internal revenue bonded warehouses by the joint resolution which requires such proprietors to reimburse the United States for the expenses and salary paid to such storekeepers or other officers in charge of such warehouses. Diametrically opposite views were entertained by the presiding justice in the circuit court, and he accordingly instructed the jury that neither the distillers nor their sureties were liable to the plaintiffs under the first bond. (2) That the reimbursement to the plaintiffs by the distillers of the salaries of storekeepers was not one of the duties of the distillers for which the second bond was given. *White v. Fox*, 22 Me., 341; *State v. Bradshaw*, 10 Ired., 232. (3) That the plaintiffs could not recover the amount paid to the storekeepers for services performed by them on Sundays, as the law did not contemplate their employment on that day. Under those instructions the jury returned their verdict for the defendants, and the plaintiffs excepted and removed the cause into this court. Having determined that the instructions were erroneous, it only remains to remark that the judgment must be reversed, and the cause remanded with directions to issue a new venire.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. WILCOX.

(Circuit Court for Illinois: 8 Bissell, 197-208. 1878.)

Opinion by BLODGETT, J.

STATEMENT OF FACTS.— This is a suit upon a bond given by Cronkhite as principal, and signed by the other defendant, Sextus N. Wilcox, as surety, conditioned for the faithful performance by Cronkhite of his duties as agent of the plaintiff, and for the payment to the plaintiff of all moneys which might come into his hands, as agent, in the due course of his business, pursuant to the rules and regulations of the company. The proof shows, and in fact it is admitted, that Cronkhite was a defaulter to the amount of something over fourteen thousand dollars on the 12th of January, 1876, and suit is brought upon the bond to recover the amount of this defalcation.

The defenses set up are: First. That the bond was executed in blank by the surety, Mr. Wilcox. Second. That the bond as it now stands is in blank in regard to the location or place in which Cronkhite was agent. Third. That Cronkhite had been for many years prior to the execution of this bond an agent for the plaintiff in this city, and was a defaulter to the company at the time the bond was executed, and that the company obtained the bond in question by fraudulently concealing from Wilcox the fact that Cronkhite was a defaulter at the time. Fourth. That some seventy-eight hundred dollars of the alleged defalcation was incurred before the bond was given.

In reference to the defense that the bond was executed in blank and is not the deed of Wilcox, the evidence shows this state of facts: The company sent to Cronkhite a blank form of the bond used by them, the only written portion of the bond being the amount of penalty, \$20,000, with directions to Mr. Cronkhite to have it filled up, signed by his surety, and returned. Mr. Cronkhite took the bond to Mr. Wilcox, who signed it in the condition in which it came from the hands of the company; that is, without being filled up. Cronkhite then filled up the bond, and it was forwarded to the company. It was filled and returned to the company in precisely the condition in which it is now offered in evidence. There is no claim or pretense that it has been altered or changed since it came into the possession of the company. Cronkhite filled up the bond, putting in his own name, the name of the surety, and the date, perhaps, but left blank the name of the place where Cronkhite was agent.

§ 635. *That a bond is executed in blank by a surety does not affect the liability of the surety unless the obligee is aware of the irregularity.*

I am satisfied that this does not vitiate the bond in any particular. The authorities upon that point (16 Wall., 1, and 21 Wall., 273) go to show that, unless this irregularity is brought home to the knowledge of the principal to whom the bond is payable, the company will not suffer from it. There is certainly no evidence that it was brought home to this company, that this bond was not precisely as it now is, when Mr. Wilcox wrote his name for the purpose of giving this bond and having it properly placed in the hands of the company. Cronkhite was not the agent of the company in this transaction, but was acting in his own behalf; and if Mr. Wilcox saw fit to deliver a bond signed in blank to Mr. Cronkhite, he must suffer if there has been any irregularity.

§ 636. *The cancellation of a deed of trust executed to secure past deficits will not affect a subsequent bond to secure existing and subsequent deficits.*

It is further claimed that this bond was obtained by fraudulent concealment of the condition of Cronkhite's account, and that the company surrendered cer-

tain securities which they had, and of which the sureties should have had the benefit, whereby the contract is vitiated. The facts bearing upon this branch of the defense are simply these: Cronkhite, as has been stated, had been for several years the agent of the plaintiff in this city. In 1873 he was found to be behind in his accounts, and making explanations that his deficiency had grown out of his giving indulgences to parties here in Chicago, who had suffered by the fire and various other reasons, he was continued in his office and an arrangement made that he should pay up from month to month this defalcation; and between the time that this defalcation was discovered, which, I think, was in September, 1873, and the time this bond was given in 1874, the deficiency was all paid up. About the time that Cronkhite had made, or was making, the last payment, at the time he remitted the drafts which, as he supposed, liquidated his former defalcation, he stated to the company that Mr. Warner, who had been his surety upon his bond as agent for the company here, had made an arrangement with his copartners by which they had mutually agreed not to make indorsements or become surety for any person, and asked that Mr. Warner's bond be canceled. He said that a wealthy man—without naming him—of this city, who would be entirely satisfactory to the company, was willing to become surety for him, and by the return mail, or shortly afterwards, in acknowledging the receipt of the remittances, the company sent this blank bond, and stated that when a new bond, satisfactory to the company, was returned, the Warner bond would be surrendered.

In accordance with this arrangement the bond in question was executed and forwarded to the company and the Warner bond surrendered. At the time the defalcation of 1873 was discovered, Cronkhite, in order to secure it in addition to his bond signed by Mr. Warner, gave a trust deed upon certain property here in Chicago for the nominal sum of \$20,000, but for the real purpose of securing this defalcation, and at the time, or shortly after the Warner bond was surrendered, a small balance of some \$600 for interest upon this defalcation having been paid, Mr. Cronkhite wrote to the company that he wished this old trust deed surrendered to him, and it was accordingly canceled and returned. It is alleged that this was in bad faith to Mr. Wilcox. But the evidence is conclusive to my mind that this old trust deed had reference only to the old defalcation; that whenever that defalcation was paid up, Cronkhite could enforce the cancellation of that deed; that there was no understanding or agreement that it was to stand as security for the future transactions or dealings between Cronkhite and the company, but only for this single defalcation; and in accordance with that understanding on the final adjustment of that defalcation this security was canceled. Now with reference to the concealment of the condition of Cronkhite's affairs, there is no evidence that any inquiry in the first place was made by Mr. Wilcox or anybody else as to the condition of Cronkhite's accounts. There is no evidence that any statement was made to Wilcox by any person connected with the company, except Mr. Cronkhite, and he, of course, was an interested party and making his own explanations, and the company was not bound by them, as it was simply a business relation between Cronkhite and Wilcox.

§ 637. *A surety is bound for defalcations existing at the time the bond is signed, unless they were known to the obligee of the bond.*

There is some evidence in the case that at the time this bond was executed, Cronkhite was in default to the company, but the defalcation was concealed, and concealed in this way: the chief business of Cronkhite consisted in the placing of

policies of insurance or the obtaining of new risks and in the collections of the annual or semi-annual payments upon past policies. The renewal receipts were forwarded to Cronkhite from New York, and it was his duty to collect the premiums and return them during the month, or return in time so that he could get them in the succeeding month's business. It was his duty to forward them or return the money in his report of that month's business, but instead of doing so he got into the habit of returning a certain portion of his receipts as not paid, and carrying them over into the next month and collecting the money the next month, and applying it upon them and reporting them as paid, and so lapping over the business of one month into the next. There is no evidence whatever that the company at this time had any knowledge of this course of dealing on the part of Cronkhite. They supposed him to be conducting his business entirely in accordance with the rules of the company and in a correct manner, but it is now attempted to defeat the claim of the plaintiff on the ground that this irregularity had been going on with the knowledge of the officers of the company for some time before this bond was given. I am satisfied that this irregularity on the part of Cronkhite was not known to the officers or general agents of the company, and that it supposed that Cronkhite's accounts were square. At the time this bond was given it was given in substitution of another bond which had been standing for several years, and I have no doubt that the understanding of all the parties was that the new surety stepped into the place of the old one; but if it were not so, I should consider that by the terms of this bond, if there were any moneys in the hands of Cronkhite at this time which he had not paid over and not reported as collected, they come within the spirit, intention and letter of the bond. That is to say, suppose that this bond was given on the first day of April, and that Cronkhite had money remaining in his hands which he ought to have remitted as part of his March collections, but had not remitted, I have no doubt that such money would come within the obligation of this bond. This consideration disposes substantially of all the objections to the claim of the plaintiff upon this bond. The finding will be, the issues for the plaintiff — debt, \$20,000; damages, the amount of \$14,982 and six per cent. interest, being in all to date, \$17,041.82.

UNITED STATES v. BOECKER.

(21 Wallace, 652-659. 1874.)

ERROR to U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—This was an action on a distiller's bond, which was taken under the act of July 20, 1863. The bond described the place at which the obligor intended to carry on the business of a distiller as the corner of *Hudson Street and East Avenue*, in the town of Canton, county of Baltimore, etc. On the trial it was proved that the principal was indebted to the United States for taxes assessed against his business as a distiller, carried on by him at the corner of *Hudson and Third Streets*, in the town of Canton, etc. The jury found for the defendants under an instruction that the plaintiff could not recover if the jury should find from the evidence that Boecker never carried on the business of a distiller at the corner of Hudson street and East avenue.

§ 638. *Sureties on a distiller's bond are only liable for taxes upon business carried on by him at the place named in the bond, where such bond follows the notice required to be given by the distiller.*

Opinion by MR. JUSTICE SWAYNE.

The several provisions bearing on the subject in the act of July 20, 1868, under which the bond sued on in this case was taken, show the importance attached by the statute to the place as designated in the notice required to be given by the distiller before commencing business. Here the bond, it is to be presumed, followed the notice. The designation of the place is made important to the distiller, to his sureties, and to the government, in several respects. If the place be not as designated in the notice, the distiller is outside of the law and liable to the penalties denounced by the sixth section. If it be within six hundred feet of premises authorized to be used for rectifying, he is liable to suffer as prescribed in the eighth section. The premises having been specified in the notice, the surety, before executing the bond, and the assessor, before taking it, may examine and determine how far, in the event of liability on the part of the principal, the property would be available as security for the government and indemnity for the surety. If the proposition of the counsel for the United States were sustained, the designation of the place, as in this bond, instead of affording a limitation and a safeguard to the surety, might prove but a delusion and a snare, and subject him to liabilities which he could not have foreseen, and to the hazard of which he would not knowingly have exposed himself. In such cases, the United States having a lien, the surety is entitled to the benefit of it. He might be willing to bind himself where the lien was upon one piece or parcel of property, and unwilling where it was upon another. His ultimate immunity or liability might depend wholly upon the value of the premises. He had the option to assume the risk or not. This element may have controlled the exercise of his election.

Viewing the subject in the light of these considerations, we cannot assent to the view expressed by the counsel for the government. On the contrary, we think this term of the bond is of the essence of the contract. It is hardly less so than the amount of the penalty. One defines the place where the liability must arise, the other the maximum of that liability for which the sureties stipulated to be bound. The former can no more be held immaterial than the latter. No distillery having been carried on at the place named, the contract never took effect. The event to which it referred did not occur. There could consequently be no liability within the letter or meaning of the contract. It was as if the agreement had been for the good conduct of a clerk while in the service of B., and the clerk never entered his service, but entered into the service of another. Distilling begun and carried on elsewhere was no more within the obligation of the sureties than if it had been begun and carried on there or elsewhere by a person other than Boecker. No other place than that named is, under the circumstances of this case, within the letter, spirit or meaning of the bond. The specification has no elasticity. It cannot be made to extend to the locality where the distillery here in question was placed.

§ 639. *The liability of a surety is not to be extended beyond the terms of his contract.*

In *Miller v. Stewart*, 9 Wheat., 703 (§§ 729-735, *infra*), this court said: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances

pointed out in his obligation he is bound, and no further. . . . It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal." To the same effect is *Ludlow v. Simond*, 2 Caine's Cas., 1. There is no more learned and elaborate case upon the subject. The leading English case is *Lord Arlington v. Merricke*, 2 Saund., 402. These authorities are conclusive of the case before us. It is needless to analyze and discuss them. Others, without number, maintaining the same principle, might be referred to. Many of those most apposite to this case are cited in the argument of the counsel for the defendants in error. The rules of the common law upon the subject are as old as the year books. Those rules were doubtless borrowed from the earlier Roman jurisprudence known as the civil law. They obtain throughout the states of our Union. The adjudications everywhere are in substantial harmony. The question here was not as to the law in the abstract, but as to its application to the facts of the case. A careful examination has satisfied us that the learned judge, upon the trial below, instructed the jury correctly.

Judgment affirmed.

§ 640. *The liability of sureties in a distiller's bond extends to business carried on at places other than those named but within the same assessor's district.*

Dissenting opinion by MR. JUSTICE BRADLEY, JUSTICES CLIFFORD, DAVIS and STRONG concurring.

I dissent from the opinion of the court in this case. It seems to me that it has a tendency to cast every burden on the government and to unduly relieve the sureties of the distiller from responsibility for his acts. By the sixth section of the act of July 20, 1868, every person intending to be engaged in the business of a distiller is to give notice in writing to the assessor of the district within which such business is to be carried on, stating his name and place of residence and the place where said business is to be carried on; and if in a city, the residence and place of business is to be indicated by the name and number of the street. He is then, by the seventh section, to execute a bond with at least two sureties, to be approved by the assessor. Such a notice and such a bond were given in this case. The bond recited, in the preamble to the condition, the fact that the distiller intended to be engaged in the business of a distiller within the second collection district of the state of Maryland, to wit, at the corner of Hudson street and East avenue, situate in the town of Canton, county of Baltimore. Then followed the terms of the condition, namely, that the distiller should in all respects faithfully comply with all the provisions of law, etc., and not suffer the lot on which the distillery stood to be incumbered, etc. Now the sureties contend that if the distillery is actually established on a different lot from that suggested in the recital, though only across the street, or even the adjoining lot on the same side, they are not bound. It seems to me that it is for them, and not for the government, to see that the distiller pursues his business on the lot which he gives notice to the assessor that he will use for that purpose. They are the guarantors of his conduct to the government, and not the government to them. If, after starting his distillery, he changes its location, or, after giving notice of the location, he changes his mind and commences business on another lot, the sureties ought to be bound for the regularity of his conduct. If he should not carry on business in the designated district, but in a different one, subject to the jurisdiction of

another assessor, to whom the bond was not given, the result might be different. But if he establishes it in the same district the sureties ought to be liable. The condition is not that he shall comply with the law only on that particular lot. That can only be claimed as an inference of law. But does such an inference arise in this case? The fact that the distiller intended to pursue his business on that lot is mentioned, it is true, in accordance with his notice. But this is no part of the substance of the condition. The substance is that he was going to engage in the business of a distiller in that district, and the sureties guaranteed his compliance with the law. Where a sheriff or marshal is elected or appointed for a particular term, a bond given for the faithful discharge of his duties relates, by implication of law, to that term alone; and the sureties are not bound for a subsequent term in case of his re-election or reappointment. This is so, whether the condition recites the term of office for which the appointment was made or not. This is the reasonable inference from the whole transaction. But, in the case under consideration, the implication of law and the reasonable inference is that the sureties are bound for the conduct of their principal though he should change the location of his distillery to any other place within the district. Otherwise the government is liable to be subjected to great frauds. It is the duty of the sureties, rather than that of the government officials, to see that no change is made without the distiller's pursuing the formalities required by the law. If it is made without those formalities there would be stronger reason for holding that fact of itself as constituting a violation of the bond than for holding that it discharges the sureties from all obligation whatever.

OSBORNE v. UNITED STATES.

(19 Wallace, 577-581. 1878.)

ERROR to U. S. Circuit Court, Eastern District of Pennsylvania.

STATEMENT OF FACTS.—This was an action upon a distiller's bond, given under section 7 of the act of July 20, 1868. The eighth section of the same act provided in substance that no such bond should be approved unless the distiller was the owner in fee, unincumbered, etc., of the land on which the distillery is situated, or unless he files with the assessor the written consent of the owner of the fee, and of any lien-holder, that the premises may be used for the purposes in the act specified, and that the government shall have a prior lien, etc., etc. The bond in question was approved while the premises were incumbered, and without any release as required by said section 8. These facts were set up in a plea, to which the United States demurred. The demurrer was sustained below, and the case brought to this court by the obligors.

§ 641. *The failure of the assessor to require the release of prior liens upon premises occupied by a distillery does not exonerate the sureties in the distiller's bond.*

Opinion by WAITE, C. J.

The circuit court did not err in sustaining the demurrer to the plea of the plaintiff in error. The object of the eighth section of the act of congress was to protect the government, not the sureties upon the bond. By that section the assessor was not permitted to approve a distiller's bond unless the distillery property was unincumbered as against the United States. If he did, he made himself liable to the government for his default, but he violated no duty he owed the sureties. He was under no obligation to protect the signers of the bond. If the sureties insisted upon a release of the incumbrances as a con-

dition to their becoming bound, they should have taken care to see that the bond was not approved until all the requirements of the statute in favor of the government had been complied with. The assessor was in no respect called upon to act for them. If they failed to secure all the indemnity they might have had, it was their fault, and not that of the United States. As to them certainly this section of the act is directory to the assessor and not mandatory. But it is directory also to the United States. The assessor is a ministerial officer. He is directed not to approve a distiller's bond until the distillery property is made free from incumbrances as against the claims of the government. He ought to insist upon this. If he fails to perform this duty the government will lose a part of the security it was entitled to have, but this will not prevent it from availing itself of so much as it has obtained.

It is not averred in the plea that the bond was delivered to the assessor as an escrow, to be approved and made binding upon the obligors only when the incumbrances were released. It is not even averred that the assessor, when he approved the bond, had actual knowledge of the existence of the alleged incumbrances. But the theory of the plea is that the act of congress made the United States a guarantor to the surety that the distillery property was free from incumbrances at the time of the approval of the bond. In our opinion such is not the law.

Judgment affirmed.

SINGER MANUFACTURING COMPANY v. HESTER.

(Circuit Court for Missouri: 2 McCrary, 417-421. 1881.)

STATEMENT OF FACTS.—Motion for a new trial. The verdict of the jury, under the instruction of the court, had been for the plaintiff. The action had been brought on an agent's bond, and the sureties contended that they were released by a subsequent agreement made by the plaintiff and the agent, by which the obligations of the latter were greatly changed. This subsequent agreement was fully set out in the original answer, and was to the effect that the machines, under the new contract, were to be consigned to the agent, not sold to him as before. A demurrer to this answer was sustained, and defendants answered that by the new contract they were released. On this issue was joined.

§ 642. *Where a bond and contract, on their face independent, are considered together, parol proof to limit the liability of sureties is inadmissible.*

Opinion by McCRARY, J.

1. It is insisted that the bond sued on, and the original contract by which defendant Joel Hester was appointed as agent for plaintiff to sell sewing machines, were entered into at one and the same time, and are parts of the same transaction, and that therefore they should be construed together as constituting one contract; and it is said that, being so construed, the liability of the obligors upon the bond should be limited to the transactions embraced within the contract. That the two instruments were intended to be and were parts of the same transaction does not appear from anything contained in either. So far as we can gather from the contents of the papers themselves, they were separate, distinct and independent. It is more than doubtful whether, in such a case, it can be shown by parol that the parties intended anything more or less than appears from the terms of the writing. If, however, it were competent in this way to explain this writing, it certainly would be a violation of long settled rules to admit parol proof to add to or vary the terms

of the written instrument, and this was in effect what was attempted. The bond binds the obligors "to pay, or cause to be paid, any and every indebtedness or liability now existing or which may hereafter in any manner exist or be incurred on the part of said Joel Hester to the said Singer Manufacturing Company." The contract contains nothing to the contrary of this. The effort is, therefore, to show by parol that which is in contradiction of the bond, viz.: that it was to secure not all debts contracted by Hester of any and every kind, past or future, as it plainly says, but only to secure such as might grow out of the contract of agency. To admit such proof would be to vary by parol the terms of a written instrument. *Bast v. Bank*, 101 U. S., 93; *Sewing Machine Co. v. Webster*, 47 Ia., 357; *Insurance Co. v. Sedgwick*, 110 Mass., 163; *Frank v. Edwards*, 8 Exch., 214.

2. Even if we read the two instruments together as one contract, the terms of the bond are not varied or modified. The two instruments can stand together, and the provisions of each can have full effect. Because in the contract Hester was appointed agent for plaintiff, with certain powers, duties, rights and liabilities, it does not follow that it was not the purpose to make the bond sufficiently comprehensive in its terms to cover that as well as other transactions. The terms of the bond are too plain to be misunderstood. They are not ambiguous, and, in the absence of an allegation of fraud, accident or mistake, we must give them effect according to their usual and ordinary acceptation. It follows from these considerations that the demurrer to the original answer was properly sustained.

§ 643. *The expression of an opinion by an agent that sureties are released by a new contract is not a release.*

3. It only remains to consider the question whether the instruction given by the court to the jury to find for plaintiff was proper. It is insisted by defendants' counsel that the question whether the plaintiff agreed to rescind the bond in consideration of the execution of the second contract by the agent, Hester, should have been submitted to the jury. There was testimony tending to show that an agent of plaintiff was present at the time of the execution of the second agreement between the company and Hester, and that he expressed the opinion that the effect of it would be to release the sureties of the bond. There was no testimony tending to show that the agent agreed or stipulated that the sureties should be released, nor was there any testimony tending to show that he had any authority from the company to make such an agreement. The expression by the plaintiff's agent of the opinion that the legal effect of the new agreement would be to release the sureties on the bond did not (especially if not acted upon by the sureties so as to change their legal rights) amount to a release. There was, therefore, no evidence upon which a verdict for the defendants could have been sustained. In such a case an instruction to the jury to find for the plaintiff is proper. *Pleasants v. Fant*, 22 Wall., 116. The motion for a new trial is overruled.

KREKEL, District Judge, concurs.

HECOX v. CITIZENS' INSURANCE COMPANY.

(Circuit Court for Illinois: 9 Bissell, 421-428. 1890.)

Opinion by DYER, J.

STATEMENT OF FACTS.—On the 6th day of April, 1877, and for several years prior thereto, one Pottle was the agent in Chicago of the defendant insurance

company, whose principal place of business was at St. Louis, in the state of Missouri. On the day mentioned, by requirement of the defendant company, Pottle executed a bond in the sum of \$5,000, conditioned that, as the agent of the insurance company, authorized to receive sums of money for premiums, payment of losses, salvages and collections, he would pay over such moneys correctly, and in every way faithfully perform his duties as agent, in compliance with the instructions of the company through its proper officers. Complainants in the present bill, Hecox and Briggs, joined in the execution of this bond as sureties for Pottle. In 1878, the insurance company sued complainants, impleaded with Pottle, in this court upon said bond in a plea of debt, and recovered judgment against complainants for the sum of \$5,000. At the time of the execution of this bond, Pottle was indebted to the insurance company, on account of past transactions for the company, in the sum of \$5,223.80, and between the date of the execution of the bond and September 19, 1877, there became due to the company from Pottle, on account of business done by him between those periods, \$4,114.70. From April 6, 1877, the date of the bond, to September 19th of the same year, Pottle remitted to the company \$3,370, all of which was, by his direction, applied upon his indebtedness to the company which accrued prior to the execution of the bond. The purpose of the present bill is to obtain an injunction restraining proceedings for the collection of the judgment at law against complainants, for an accounting to ascertain what is justly due to the defendant company on account of the defalcations of Pottle, and to avoid the legal effect of the judgment recovered against complainants as Pottle's sureties on the bond. The material allegations of the bill are that, at the time of, and prior to, the making of the bond, Pottle was informed by the company that, if he would give a bond with good sureties, he should be at liberty to deposit the moneys of the company in bank with his other moneys to his own credit and in his own name; that all of Pottle's remittances after the execution of the bond should be applied upon his old accounts on which he was in arrears to the insurance company, and that Pottle then understood from the company, that, if he would give such a bond and apply his collections afterwards made to the payment of his former deficits, he would be allowed to go on as previously and act as the agent of the company; that Pottle, at the time of the making of the bond, understood from the insurance company that by giving the same he would be allowed to continue in business as agent, and to deposit moneys collected for the company in bank with his own funds and in his own name, and would be required out of such account to make remittances and to allow the same to be applied on account of his prior defalcations, and that he acted upon this understanding with the company in remitting and directing the application of the moneys afterwards collected by him, supposing that in so doing he was carrying out the understanding between himself and the insurance company. It is further alleged that complainants did not, until after the recovery of the judgment at law, become cognizant of the alleged agreement and understanding between Pottle and insurance company, nor of the mode in which business was transacted between them, but were advised by Pottle of the facts, after the recovery of the judgment and when execution was in the hands of the defendant Marshal, and that they executed the bond in ignorance of the fact that Pottle was at the time a defaulter to the company.

The answer of the defendant company denies the material allegations of the bill, and it is unnecessary to state in detail the denials and affirmative allega-

tions contained in the answer. The contention on the part of complainants is, that for a long time previous to the execution of the bond Pottle had been in the habit of depositing moneys which he received as agent of the insurance company, in bank in his own name and to the credit of his individual account, thereby converting the same to his own use; that remittances to the company were made by his individual checks upon such account, and that while pursuing this course of dealing he became a defaulter; that being required to give the bond in question, he was allowed by the company, thereafter, in pursuance of previous methods of business, to convert the moneys which he thereafter received to his own use, and then to apply those moneys in satisfaction of indebtedness which accrued before and existed at the time of the execution of the bond; that all this was permitted under an implied if not express understanding between the insurance company and Pottle; that the application of moneys received by him upon current business transacted after the execution of the bond, to his previous defalcations, operated constructively if not actually as a fraud upon the sureties; that therefore they have an equitable right to satisfaction of the bond to the extent of the moneys remitted on account of the current business accruing after the execution of the bond. In other words, that as against the sureties, it was a breach of trust on the part of Pottle to put the moneys which he received from accruing business after the execution of the bond, on deposit in his own name, and then to direct his remittances to be applied in satisfaction of his former indebtedness, and that the defendant company was cognizant of this course of dealing on Pottle's part, and adopted and ratified it.

§ 644. *Under what circumstances sureties of an insurance agent will be discharged by the application of payments to past deficits.*

The testimony in the case, in my opinion, fails to meet the point upon which the case must turn, and which it is essential to establish to give complainants the relief they ask. The bond was wholly prospective in its terms and operation. It was intended only to secure the payment by Pottle to the insurance company of such moneys as he should thereafter receive as agent for the company. Of this there can be no doubt. Neither can there be doubt that if there was a conspiracy or actual agreement between the company and Pottle, made or existing at the time the bond was executed, by virtue of which the bond should be obtained and the moneys thereafter received by Pottle as agent should be applied upon prior defalcations, and if such a conspiracy or agreement was carried out and not discovered by complainants until after the trial of the action at law, they could then ask the interposition of a court of equity for their relief. But the testimony fails to show such a state of case, and indeed upon the argument the learned counsel for complainants was not understood to insist that such conspiracy or actual agreement was proved. The facts seem to be that during his agency and up to the time of giving the bond, Pottle deposited the moneys of the company, as fast as collected, in the bank where he kept his account, to his own credit, and that he made remittances by his personal check on his banker. He was, both before and after the execution of the bond, agent for other insurance companies, and all moneys received by him as such agent were, as it would appear, mingled in a common fund and deposited and remitted in manner before indicated. After giving the bond he made collections, deposits and remittances in the same way, and his remittances both before and subsequent to the execution of the bond were, by his direction, applied upon all such of his unpaid monthly accounts as were earliest due. To

illustrate, subsequent to the execution of the bond, he from time to time directed by letter, that remittances then sent in the form of check should be applied on a designated account, and his remittances were so applied, thus reducing the amount of his default existing at the time of the execution of the bond. It does not appear that complainants were induced to become Pottle's sureties by any act or upon any solicitation of the company. They signed the bonds as friends of Pottle, at his request and on his assurance that they should never suffer.

Now while there is force in the view urged by counsel, that the appropriation of moneys which Pottle received upon current business and remitted, after the execution of the bond, to the satisfaction of old indebtedness, operated to the injury of the sureties, I am of the opinion that complainants' right to the relief they now seek, even admitting that the facts would not constitute a defense to the action at law, depends upon the fact of knowledge on the part of the insurance company, at the time it received such remittances, that they were the moneys which Pottle received from current business accruing after the execution of the bond. This, I think, is the decisive and turning point in the case, and, in my judgment, upon this point the proofs are inadequate. The officers of the insurance company were resident at St. Louis. Their business transactions with Pottle were conducted wholly by correspondence, and this correspondence is in evidence. It is not proven that it was agreed between the company and Pottle that if he would procure a bond he might deposit in his own name the moneys which he should receive as agent. There is no proof that the insurance company knew that he thus dealt with their moneys, except as such knowledge may be inferred from the fact that his remittances were in the form of his individual checks. The case is devoid of satisfactory evidence that the company knew that the remittances which they received after the execution of the bond were part of the moneys received by him from current business, or that the company was a party to any agreement or understanding that remittances should be made from such moneys to apply upon old indebtedness. The company seems to have received remittances in the ordinary course, with directions on the part of its debtor to apply them in a certain way, and they were so applied. Indeed it cannot, upon the evidence, be found that the moneys which Pottle received from current business after the execution of the bond were the moneys remitted by him to the defendant company. For aught that appears he may have used those moneys on his personal account, and remitted other moneys received from other insurance companies or from other sources to the defendant company. Pottle, in his testimony, says that he cannot testify that he was requested to remit as usual after giving the bond. He does say, however, that the reason he directed his remittances to be applied on the old account instead of the current months for which collections were made, was because it was his understanding, at the time the bond was given, that he should remit on account of subsequent collections as he had remitted before. But the proofs do not bring home to the insurance company such understanding, and he states that when the bond was mailed to the defendant company he had no talk with any of the company's officers as to the manner in which he should keep his bank account or the company's funds, and that he had never shown his account to the officers of the company. So far as any understanding in relation to deposits and remittances is concerned, it rests in inference and seems to have been solely the understanding of Pottle without evidence of participation therein by the insurance company. It is true that in

the letter which the secretary of the company wrote to Pottle requesting the execution of the bond, reference is made to indebtedness of Pottle then existing, and it is stated that it is the wish of the company to have security against any contingency, and it may have then been thought that the bond which Pottle was required to give would secure past as well as any future liability; but the bond which was subsequently executed plainly informed the company that it was wholly prospective in its terms and legal effect. If enough were established by the testimony to show a fraud upon the sureties in the application of payments, and that the company was knowingly a party to the transaction, there would be, as I conceive, difficulty in perceiving why such a state of facts would not be a defense maintainable in an action at law on the bond. However that may be, my conclusion is that in this suit in equity, to entitle complainants to relief against the judgment already recovered, it must appear that the moneys remitted by Pottle after the execution of the bond were in fact the moneys which he received as agent from current business, and that the defendant company had knowledge, when it received such moneys and applied them in the manner directed by Pottle, that they were moneys which he received from business accruing after the execution of the bond, and in this regard the proofs do not meet the requirements of the case. The bill must therefore be dismissed.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. BOWLER.

(Circuit Court for Maine: 1 Holmes, 263-266. 1873.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.—This is an action at law against the defendant Bowler as surety in a bond, given to secure the faithful performance of their duty, as agents of the plaintiff corporation, by the firm of B. Plummer & Sons, composed of Patience C. B. Plummer and Watson E. Plummer. The condition of the bond is as follows: "Now, therefore, if the said B. Plummer & Sons shall promptly pay to said company the amount received from time to time, and shall well and truly perform all and singular the duties as agents of said company, as directed, according to the provisions of the charter, by-laws, rules and regulations of said company, now existing, or which may be adopted by said company for and during the time he officiates as said agent, and shall deliver all the property which he may receive and hold as agent to his successor in said office, or to such other person as the said company or its authorized officers may direct, then this obligation shall be null and void; otherwise remain in full force and virtue."

On the 18th of March, 1871, Watson E. Plummer, one of the firm, died suddenly at Quebec, leaving Patience C. B. Plummer sole surviving partner of said firm. The firm of B. Plummer & Sons, among other things incumbent on them as agents, received from the plaintiff company receipts for moneys to be paid by parties insured in the company, as premiums upon the renewal of policies. These receipts were forwarded monthly to meet the premiums falling due the succeeding month. On the 18th of March, when Watson E. Plummer died, the firm had collected, on renewal receipts for that month of March, the sum of \$2,933.96, from which they were entitled to deduct as commission \$346.35, leaving due to the company the sum of \$2,587.61. This amount, not having been paid to the company, and having been collected by the firm prior to the decease of Watson E. Plummer, is unquestionably covered by the bond; and

for this amount, with interest from the 18th of March, 1871, the company is entitled to judgment against the surety. On the 18th of March, the company forwarded to the address of said firm at Bangor, Maine, the renewal receipts for the month of April. These in due course were received at the Bangor office on the 22d of March, four days after the death of Watson E. Plummer. Patience C. B. Plummer continued to transact the business of the agency at Bangor in the same manner as it had been previously conducted by the firm, until the last day of April, 1871, when the agency was revoked, and F. S. Coffin was appointed agent in place of said firm, and the business was conducted by him from that time forward, Patience C. B. Plummer receiving the premiums on the renewal receipts for the time previous to the month of May.

The collections of premiums upon the April renewal receipts were made during the months of April, May, June and July; and on the 24th day of August, according to a final account rendered to the company, there was due to said company for such collections, after deducting charges and commissions, a net amount of \$29,955.70, for which sum demand was made on the defendants, and, on refusal, an action was brought against Bowler, the defendant in this suit, and another against the surviving partner. The sum of \$29,955.70 includes the sum of \$2,587.61, due for collections prior to the death of Watson E. Plummer. It also includes the collections on the April renewal receipts, received after the death of Watson E. Plummer, and also some money (the amount of which does not appear) which was collected by subagents on receipts which came into the hands of the firm prior to the 18th day of March, 1871, and had been transmitted to the subagents, and not returned to the Bangor office until after that day. For these collections the company claims that Bowler is responsible to the extent of the penal sum in the bond.

§ 645. *The liability of a surety on the bond of a firm of insurance agents does not extend to the business continued by a survivor after the death of one partner.*

Upon the facts agreed and proved in the case, it seems clear, upon careful examination of the facts and application of the law, that the liability of Bowler cannot justly be extended beyond the sum of \$2,587.61, due from the firm at the time of the death of Watson E. Plummer. When he died, the partnership, for whose acts and omissions alone Bowler had become surety, was dissolved, and his liability was terminated. All subsequent payments to a surviving member of the firm by policy holders or subagents, whether on receipts transmitted by the firm for collection before the decease of one of the partners, or by the surviving partner after the decease, were payments to parties other than the firm of B. Plummer & Sons; they were not received by that firm "from time to time" during the agency or existence of the firm, nor received "for and during the time he officiates as said agent." All such collections were acts to which the surety was a stranger, and respecting which he had assumed no responsibility. On the death of Watson E. Plummer, the subagents ceased to be subagents of the copartnership. If they ever stood in that relation to B. Plummer & Sons, as subagents of theirs rather than of the company, the death of one of the principals would have terminated the agency. Watson E. Plummer's representatives clearly were not responsible for the moneys collected by the surviving partner after his decease; and Bowler, the surety, could have no claim upon the estate of Watson E. Plummer for any sum he might be compelled to pay as surety for the faithful application of funds which did not come into the hands and possession of the

firm before his decease. Bowler might have entered into the contract of suretyship, relying solely on his knowledge of the business capacity and personal integrity and pecuniary responsibility of Watson E. Plummer. Whether he did so or not, he is entitled to the benefit of that, so far as it is a protection to him; and when death deprives him of that, his liability for subsequent acts is terminated *eo instanti* with the dissolution of the partnership.

§ 646. *No notice of dissolution is necessary when a partner dies.*

Where a copartnership is dissolved by the death of one of the copartners, no notice of the dissolution is necessary; and the surviving members are not bound by any new contract entered into by one of the firm in the copartnership name after such dissolution, although it is made with a person who had previously dealt with the firm, and who had no notice or knowledge that it was terminated by the death of one of the members. Nor can the estate of the deceased partner, nor his heirs or personal representatives, be held on a contract entered into in the name of the firm subsequently to his death, although no notice of the dissolution of the firm has been given. *Marlett v. Jackman*, 3 Allen, 290; *Washburn v. Goodman*, 17 Pick., 526; 3 Kent Com. (6th ed.), 67; *Griswold v. Waddington*, 15 Johns., 57; 16 Johns., 438.

It is claimed that Bowler is liable on the ground that funds in the hands of the subagents on the 18th of March, 1871, are to be treated as constructively in the hands of B. Plummer & Sons, so as to charge the surety. There is nothing in the case tending to show that, in the absence of default of payment, or embezzlement by agents, B. Plummer & Sons were liable to pay to the company until they received the money of the subagents. These subagents were appointed by them to be subagents of the company, and acted under their instructions; but the appointment was made, and the instructions were given, by them as agents of the company. Even if they were personally responsible for any default of the subagents, the case does not find any such default occurring before the death of Watson E. Plummer or afterwards. If, after they had ceased to have any relation of agency to B. Plummer & Sons, they paid money to the surviving partner, it would not be on the responsibility of Bowler, especially when such surviving partner, as in this case, was recognized as the agent of the company, so that a payment to her was, so far as the subagents were concerned, a payment to the company itself. The damages in this case, according to the agreement of the parties, are assessed at the sum of \$2,587.61, with interest from the 18th day of March, 1871. In the case of *Connecticut Mutual Life Ins. Co. v. Plummer*, the damages are assessed at the sum of \$29,955.70, with interest from August, 1871. This sum includes the sum for which Bowler, the surety, is also liable on the bond given by Plummer & Sons.

Judgment accordingly.

§ 647. *Liability not extended.*—The law will not create a liability against the sureties which they never intended when they entered into the bond. Thus, a bond was conditioned for the prosecution of a *certiorari*, and if the judgment of the justice should be affirmed, or if more should be recovered, then the obligor should pay the judgment. The judgment was reversed. *Held*, that the sureties were not liable. *Swanson v. Ball*,* Hemp., 89. See § 619.

§ 648. Sureties are not bound beyond the terms of their bond. So where a bond given by A. on the release of certain vessels attached under process of foreign attachment was conditioned that the obligees should "abide by and perform the decree of the court," it was held that the sureties were not bound to pay a decree rendered against B., the husband of A., the libel as against A. having been dismissed, although it had appeared on the trial of the libel that the vessels released were really the property of B. *Jaycox v. Chapman*, 10 Ben., 517.

§ 649. A surety in a stipulation in a specific sum, given to procure the release of property in admiralty, conditioned to pay such sum as should be awarded, is not bound beyond the amount named in the stipulation. *Brown v. Burrows*, 2 Blatch., 840.

§ 650. A surety in a warehouse bond, conditioned for the withdrawal of the goods within a time stated, on payment of the duties, etc., "to which they shall then be subject," is not liable for a deficiency found on a reliquidation made after the goods were regularly withdrawn, and the duties paid, as liquidated at the time of withdrawal, and after the lapse of the period specified in the bond for payment. *United States v. Campbell*, 10 Fed. R., 816.

§ 651. Distiller's bond.—The condition of a distiller's bond was that the principal should "in all respects faithfully comply with the provisions of the law in relation to the duties and business of distillers." By the law then in force storekeepers in charge of warehouses, to be provided by distillers, were paid by the United States. Subsequently congress passed a joint resolution, providing that proprietors of such warehouses should reimburse to the United States the expenses and salary of storekeepers in charge thereof. *Held*, that the sureties were not responsible for such expenses and salary: 1st, because the resolution was prospective; 2d, because the reimbursement of salaries, etc., paid storekeepers was not so connected with or naturally belonging to the business of distillers as to have been reasonably contemplated by the parties when the bond was executed. *United States v. Singer*, 15 Wall., 111, distinguishing *United States v. Powell*, 14 Wall., 498. See § 619.

§ 652. In an action on a distiller's bond to recover the tax on a quantity of spirits distilled, it is no defense for the sureties that the collector, without their knowledge or consent, permitted the removal of a quantity of spirits from the bonded warehouse without payment of taxes thereon, of sufficient value to have more than paid the delinquent taxes. The government is in no way responsible for the wrongful acts of its agents, and such acts cannot discharge sureties on bonds running to the government. *Hart v. United States*,* 5 Otto, 816.

§ 653. Bank teller.—A bank teller and the sureties on his bond are liable for all losses caused by his negligence which could have been prevented by any amount of care on his part. *Union Bank of Georgetown v. Forrest*,* 3 Cr. C. C., 218.

§ 654. A state statute, enacted after the execution of a bond, cannot affect the liability of the surety to his prejudice. *Fielden v. Lahens*,* 6 Blatch., 524.

§ 655. Appeal bond.—The issue of execution against the principal and taking him in execution does not release the sureties on an appeal bond. Debt is the proper action on such a bond, and the action must be brought against all or one, where the principal and his sureties all enter into the bond. *Dowlin v. Standifer*, Hemp., 290.

§ 656. A default will be opened at the instance of a surety, who has received no notice of the entry of the decree against the principal, but only in cases in which he shows a meritorious defense. This rule applied to a case upon the following facts: An action was brought against property under the revenue laws. A. appeared as claimant and gave stipulation, with B. as surety, in which C. was named as proctor of A. Judgment in district court for the government. A. took the case on error to the circuit court, giving his personal bond, which was approved by the judge; the decree was affirmed, and the case taken on error to the supreme court; and A., with the consent of the district attorney, gave his personal bond, approved by the judge. Case affirmed in supreme court, final decree, and order that notice be given sureties on first stipulation, to perform their stipulation or show cause, etc. Other proctors had, during the progress of the cause, been substituted for C., and notice was served upon them, and they had agreed to notify B. They failed to do so; B. had no notice, and execution issued. B. applied to open the default, claiming that taking appeal bonds without surety, by consent of the district attorney, had discharged him, and that A. had given to plaintiff \$75,000 in government bonds as further security, which bonds had been stolen. *Held*, that these facts furnished him no defense, and the application was refused. *United States v. A Quantity of Manufactured Tobacco*,* 10 Ben., 9.

§ 657. Paying surety commissions.—A bond given by an executor to one becoming his surety, that he will pay the latter one-half of his commissions as executor, is valid. The surety is entitled to his share of the commissions as they accrue from time to time, before the estate is finally settled. The premium paid to a new surety, when additional security is required by the court, is not a legal set-off in an action on the bond. Counsel fee, paid by the executor, is a legal credit against the surety's claim, in proportion to the share of commission to which the surety is entitled. A separate agreement, made between the executor and the surety, that the latter will not claim his share of the commissions during the life-time of the testator's widow, not being under seal, can have no effect as a release in law. *Culbertson v. Stillinger*,* Taney, 75.

§ 658. Payment of debt.—Where a surety for a consignee on a custom-house bond pays the debt, he has no remedy against the owner of the goods for the amount, if such owner did

not request the surety to sign the bond, but the remedy of the surety is against the consignee. *Knox v. Devens*, 5 Mason, 380.

§ 659. *Governed by contract.*—A bond with sureties, to be responsible for advances, made on account of supplies to be furnished pursuant to a particular contract, will not embrace advances made, not on account of that contract exclusively, but on account of that and other contracts, as a common fund for supplies, where accounts of the supplies, the expenditures and the funds had all been throughout blended indiscriminately by both parties, and no separate portion had been designated or set apart for the contract referred to in the bond. *United States v. Jones*, 8 Pet., 399.

§ 660. *Breach by third persons.*—The sureties in a bond conditioned that the principal should not remove certain property beyond the jurisdiction of the court pending litigation are only bound for the acts of their principal and not liable for a breach committed by a third person after his death. *Lenox v. Notrebe, Hemp.*, 225.

§ 661. *Not bound by judgment.*—A contractor for a public school house gave a bond conditioned for the faithful performance of his contract. Judgment was obtained in the state court against the principal on a number of mechanics' liens, and this fact was alleged as a breach of the bond. In an action in the federal courts against the surety it was held that he was not bound by the judgments against his principal to which he was not a party, and that he could deny the validity of such judgments on the ground that under the law of Missouri there can be no lien on a public school building. *State of Missouri v. Tiedermann*, 3 McC., 401.

§ 662. *Notice.*—In an action against the sureties on a bond to perform a decree of court, it is not necessary to first give notice of the decree to the principal. *White v. Swift*, 1 Cr. C. C., 442.

§ 663. *Scire facias.*—In case of a judgment on a bond, upon a *scire facias* suggesting breaches, the merits of the judgment cannot be inquired into for the purpose of furnishing a defense to the *scire facias*. *Pennock v. Gilleland*,* 1 Pittsb. R., 37.

V. RELEASE OF SURETIES.

1. In General.

SUMMARY—*Failure to furnish new sureties*, § 664.—*Commissions to be applied on debt*, § 665.—*Change in compensation*, § 666.—*Bond for transportation of tobacco; fraud*, § 667.—*Release of principal from arrest*, § 668.—*Taking other security*, § 669.—*Failure to renew license*, § 670.

§ 664. The law of 1820 required certain officers to furnish new sureties by a certain time, and provided "that nothing contained in this act shall be construed to take away or impair any right or remedy which the United States may have, by law, for the recovery of taxes, debts or demands." *Held*, that a failure to furnish the new sureties did not release the old sureties from liability for acts subsequent to the time limited for furnishing the new sureties. *United States v. Nicholl*, §§ 671-678.

§ 665. In a suit on the bond of an agent, the sureties pleaded in defense that, at the time of executing the bond, an agreement was made between the obligees and the agent that all commissions earned by him should be applied to a debt due from him to the obligees; that the agreement was without the knowledge of the sureties, and that the obligees knew that the agent had no property or other means of support. No fraud was shown. *Held*, that the sureties were not released. *Magee v. Manhattan Life Ins. Co.*, §§ 674-676.

§ 666. At the time an agent gave a bond it was agreed that he should receive a fixed salary and a commission on each machine sold, the obligee to pay expenses. Afterwards it was agreed that he should receive his pay wholly in commissions and pay all expenses. *Held*, that this change released the sureties. *Victor Sewing Machine Co. v. Langham*, § 677. See § 750.

§ 667. Sureties who sign a bond for the transportation of tobacco from one collection district to another are not released by the fact that their principal failed to fill the boxes with tobacco; nor by the failure of the officers to discover the principal's fraud in substituting other articles in the boxes, which were submitted for examination to the inspector after being closed. *Ryan v. United States*, § 678.

§ 668. The United States obtained a judgment on a bond, and the principal was arrested, but afterwards released on his conveying all his property to the United States. *Held*, that this did not release the sureties. The rule at common law is that the release of the debtor

releases the judgment, but not so under the act of congress for the relief of persons imprisoned for debts due the United States. *United States v. Stansbury*, §§ 679-681. See § 700.

§ 669. A bond was given conditioned to pay over moneys collected. An account was rendered for so much money collected, and a deed of trust was taken to secure its payment, under an agreement to surrender the bond. *Held*, that the taking of the deed of trust was a release of the sureties as to the sum embraced in the account rendered, but not as to an additional sum which was not accounted for in the account. *Hopkirk v. McConico*, §§ 682-684.

§ 670. Where a manufacturer of tobacco takes out a license and executes a bond to the United States, the sureties are not discharged by his failure to renew his license; they are liable for breaches occurring after the expiration of the license. It seems that his failure to renew his license is a breach of the bond; and it is held not to be the duty of the collector to notify him of the expiration of his license and to require him to renew it. *United States v. Truesdale*, §§ 685, 686.

[NOTES.—See §§ 687-700.]

UNITED STATES *v.* NICHOLL.

(12 Wheaton, 505-511. 1827.)

Opinion by MR. JUSTICE TRIMBLE.

STATEMENT OF FACTS.—The questions to be decided in this case arise out of a bill of exceptions, taken by the plaintiffs, to the charge and instructions of the circuit court to the jury upon the trial of the cause. The suit was founded on the official bond of Robert Swartwout, as navy agent, and with whom the defendant had become bound as one of his sureties. The bond bears date the 22d day of February, 1819, and is in the penalty of \$20,000, with the usual condition, to be void if Swartwout should faithfully perform the duties of his office, and account for and pay over, when required, the public property and money placed in his hands. The declaration alleges, as a breach of the condition of the bond, that Swartwout's accounts had been settled by the proper accounting officers on the — day of —; and that, upon that settlement, a large balance had been found against him, which he had failed and refused to pay over to the United States when required. The pleadings having been made up, according to the practice of New York, so as to put in issue the matters in controversy between the parties, the plaintiffs gave in evidence to the jury the bond, with its condition, and Swartwout's settled account, duly certified from the treasury department; and the defendant gave in evidence a letter from the secretary of the navy to Robert Swartwout, dated the 25th day of February, 1819; two commissions to Swartwout as navy agent, the one dated the 16th day of October, 1818, and the other the 30th day of November, 1818, and the following letter, dated the 8th day of December, 1823, from Mr. Pleasanton, agent of the treasury, to Mr. Tillotson, the district attorney, which will be more particularly noticed hereafter:

“TREASURY DEPARTMENT, FIFTH AUDITOR'S OFFICE,

“December 8, 1823.

“SIR: From the best information I can obtain, it seems pretty certain that if we foreclose the mortgage given to the United States by General Robert Swartwout, and expose the property to sale, subject to a previous mortgage given to Mr. Coster, we shall lose the whole or nearly all of our debt, this property being our only reliance, if the sureties should be discharged by due course of law from their responsibility for the payment of it. Under these circumstances, the only alternative which presents itself for securing any considerable portion of the debt is to allow General Swartwout time within which to make an advantageous disposition of the property. He expresses a confident belief that in seven years he would be enabled, by connecting it with a banking institu-

tion, for which a charter has already been granted by the state of New Jersey, not only to pay off the first mortgage, but our mortgage also.

"It has been recommended by the navy department to allow this time; and I have, accordingly, instead of three years, as intimated to you some time ago, determined to allow him seven years, provided the first mortgagee will pledge himself in writing not to molest him for the same space of time; and provided, also, that the bank with which the property is to be connected shall go into operation on or before the 1st of October next. Should the banking capital not be made up by the time mentioned, and the bank fail to go into operation, this agreement is to be considered wholly null and void. You will be pleased to take such steps as will give this arrangement effect.

"As the sureties on General Swartwout's bond dispute our right to recover the penalty from them, it will be your duty forthwith to institute suits against them in the circuit court, and judgment going against us there, you will remove the cause to the supreme court, it being very desirable that the law should be settled in relation to bonds so situated.

"I have the honor, etc.,

(Signed)

"S. PLEASANTON, Agent of the Treasury."

The circuit court decided, and accordingly instructed the jury, first, "that the defendant, Francis H. Nicholl, was not responsible for any defalcation that took place on the part of Robert Swartwout, as navy agent, subsequent to the 30th day of September, 1820, when, in and by the act of congress, passed the 15th of May, 1820, new sureties were required by law to be given by the said Robert Swartwout." Secondly, "that the defendant was not responsible for any deficiency of public money reported on by the account officers of the United States subsequent to the 30th of November, 1822, when it appeared in evidence that the appointment of Robert Swartwout as navy agent expired by its legal termination." Thirdly, "that he left it to them to decide whether the letter from S. Pleasanton, Esq., addressed to Robert Tillotson, Esq., which had been read in evidence before the jury, did give further time to Robert Swartwout for the payment of the debt due the United States; and that if, in the opinion of the jury, the letter in question did give time to the said Robert Swartwout until October, 1824, or any subsequent period, that then the defendant was discharged from his liability, and their verdict should be rendered for the defendant. And lastly, that the said several matters so produced and read in evidence, on the part of the said Francis H. Nicholl, were sufficient in law to maintain the issue on his part, and that the United States ought not, upon all the matters produced in evidence, to maintain the said action," etc.

§ 671. *The act of May 15, 1820, requiring new sureties to be given by public officers by September 30, 1820, did not discharge sureties of officers who failed to give the new security.*

These several opinions and instructions are brought before this court for re-examination by the present writ of error. Upon looking into the act of congress passed May 15, 1820, entitled "An act providing for the better organization of the treasury department," which is the one referred to in the first instruction, we are satisfied it was misconstrued by the judge. The second section of the act provides a new and summary process against public defaulters and their sureties, after the 30th of September, 1820. The scope and design of the act, in requiring new sureties to be given by that day, was in order that, if such new sureties should be given, the summary process might operate upon them as well as upon the principal, if the treasury department should elect to

pursue such summary process. This is manifest from the provision in the act that the summary process shall not affect the existing sureties. The act nowhere directs the principals to be discharged from office upon failure to give new sureties; and if the act had so directed they would have remained in office until actually removed. The law does not, in terms, declare the existing sureties shall be discharged from and after the 30th of September, 1820. It would require a very strained construction of the statute to discharge them by implication, while their principals were permitted to remain in office. Such construction would be, we think, against the manifest intention of the legislature. The ninth section enacts "that nothing in this act contained shall be construed to take away or impair any right or remedy which the United States now have by law for the recovery of taxes, debts or demands."

The cases of *The United States v. Kirkpatrick*, 9 Wheat., 720 (§§ 419-422, *supra*), and the *United States v. Vanzandt*, 11 id., 184 (§§ 772, 773, *infra*), are, in principle, undistinguishable from this case. They decide, 1. That laches is not imputable to the government. 2. That the provisions of the law requiring settlements by its officers to be made at short periods are designed for the security and protection of the government, and to regulate the conduct of those officers; that they are merely directory to those officers and form no part of the contract with the sureties. And the last case decides, 3. That where the act expressly directs a defaulting officer to be recalled at the expiration of six months from the time of his default, his sureties are not discharged but remain liable for his defaults thereafter until he is actually recalled.

§ 672. *Liability of surety for money coming into hands of officer.*

If the second instruction given to the jury was intended to inform them that the defendant, as surety of Swartwout, was not legally responsible for money placed by the government in his hands, after the legal termination of his office, it was unquestionably correct; and this is the sense in which we suppose the court meant to be understood. But if it was intended to convey the idea that he was not responsible for money which came to Swartwout's hands while in office, but which he afterwards failed to account for and pay over, it was clearly incorrect.

§ 673. *Taking collateral security, without suspending the right to sue, not a bar to an action on the bond.*

In deciding upon the third instruction given, as to the effect and operation of Mr. Pleasanton's letter to the district attorney, it is not intended to give any intimation of what would be the opinion of this court, if it had appeared from the letter that the government had made any arrangement with Swartwout, without the assent of his sureties, whereby the right of the government to sue upon the bond had been suspended to the 1st day of October, 1824, or to any subsequent time. Nothing of the kind appears from the letter. It speaks of a mortgage which had been given by Swartwout, upon property subject to a former mortgage to Mr. Coster; but it does not appear that by the terms of the mortgage the right to sue on the official bond was suspended; and the taking of a collateral security, without suspending the right to sue on the bond, could not bar the action on the bond. The letter speaks of an intention formed of giving time upon the mortgage, upon specified conditions and contingencies; but none of those conditions or contingencies are shown to have been complied with or to have happened. The letter contains no contract and gives no time *per se*, upon any consideration binding on the government; and that the letter did not intend to suspend the right of the United States to sue on

this bond is palpable, because it directs suit to be brought thereon immediately. As no fact connected with the letter was proved by evidence *abundante*, the construction of the letter upon its face was matter of law, and the circuit court ought to have decided and instructed the jury accordingly, that nothing on the face of the letter constituted any defense to the action. There was nothing but the construction of the letter to be left to the jury, and the court ought to have informed the jury that, according to its true construction, it did not give time so as to bar the action against the surety. After the observations already made it cannot be necessary to go into any further reasoning to show that the circuit court erred in its concluding instruction, that upon the whole matter the law was for the defendant. It was a conclusion drawn by that court from the premises it had assumed in the former instruction given, and the error of these premises having been shown the error of the conclusion necessarily follows. Some observations were made by the defendant's counsel in argument, as to the manner in which the debits and credits in Swartwout's account had been adjusted by the accounting officers; and he seemed to suppose that credits which ought to have been applied towards the extinguishment or lessening of the debits, for money placed in his hands before the 20th of November, 1822, had been improperly applied to the transactions of Swartwout with the government after that day.

The case of *The United States v. January*, 7 Cranch, 572 (§ 595, *supra*), is in point to show that, as to any disbursements of money after the 30th of November, 1822, for which Swartwout was entitled to credit, it was at the election of the government to apply them to either account. But there is no necessity for the application of the principle to this case; for, upon looking into the account, we find that after crediting Swartwout with all his disbursements up until the 30th of November, 1822, there remained on that day a balance in his hands unaccounted for much beyond the penalty of the bond, so that no injustice is done to the surety in the manner of settling the account. Judgment reversed, and a *venire facias de novo* awarded.

MAGEE v. MANHATTAN LIFE INSURANCE COMPANY.

(3 Otto, 98-101. 1875.)

ERROR to U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The defendant in error sued the plaintiffs in error upon a bond, which recited that Henry V. H. Voorhees had been appointed an agent of the insurance company, and was conditioned for his paying over to the company all moneys belonging to it which he should receive. The breach alleged was that he had received such moneys, which he had failed to pay over.

The defendants pleaded three pleas: (1) That Voorhees had paid over all moneys belonging to the company which he received after the execution of the bond. (2) That, at the time of the execution of the bond, Voorhees, as such agent, was indebted to the company, and that there was an agreement between him and the company that all moneys received by Voorhees should be credited upon this indebtedness; that these facts were concealed from the defendants, and that all the moneys so received were so credited. (3) That the plaintiffs required the giving of this bond as a condition on which only they would retain Voorhees in their employment as such agent; that they required, further, an agreement by Voorhees that all his commissions thereafter earned should be

applied to his past indebtedness to the company; that they were so applied; that the defendants were ignorant of the indebtedness and of this agreement; that, if they had been informed of them, they would not have executed the bond; and that the agreement as to the commissions and its execution were a fraud on them, and that the bond, as to them, was thereby avoided.

The third plea was demurred to, and the demurrer was sustained. Issue was taken upon the first and second pleas. The jury found for the plaintiff, and the court gave judgment accordingly. The only question presented for our determination is as to the sufficiency of the third plea. The demurrer admits the substantial facts which the plea avers. Do the agreement, as to the commissions, and the circumstances that it was unknown to the sureties and not communicated to them by the company, exonerate the sureties from liability upon the bond?

§ 674. *The slightest fraud by the creditor, touching the contract, annuls the obligation of a surety.*

A surety is "a favored debtor." His rights are zealously guarded both at law and in equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract exactly as made is the measure of his liability, and, if the case against him be not clearly within it, he is entitled to go acquit. *Ludlow v. Simonds*, 2 Caine's Cas., 1; *Miller v. Stewart*, 9 Wheat., 681 (§§ 729-735, *infra*). But there is a duty incumbent on him. He must not rest supine, close his eyes, and fail to seek important information within his reach. If he does this, and a loss occurs, he cannot, in the absence of fraud on the part of the creditor, set up as a defense facts then first learned which he ought to have known and considered before entering into the contract. *Kerr on Fraud and Mistake*, 96. *Vigilantibus et non dormientibus jura subveniunt*. Where one of two innocent parties must lose, and one of them is in fault, the law throws the burden of the loss upon him. *Hearne v. Nichols*, 1 Salk., 289.

§ 675. — *fraud; authorities collated.*

It may be well, before examining the question arising upon the plea, to advert to some of the points bearing upon the subject which have been adjudged in authoritative cases. A fraudulent concealment is the suppression of something which the party is bound to disclose. *Kerr, supra*, 95. To constitute fraud, the intent to deceive must clearly appear. *Spofford v. Newson*, 9 Ired. Law, 507. The concealment must be wilful and intentional. *De Gol. on Guar. and Sur.*, 366. The test is, whether one of the parties knowingly suffered the other to deal under a delusion. 2 Kent's Com. (Comst. ed.), 643. The mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases. The same rule as to disclosures does not apply in cases of principal and surety as in cases of insurance on ships or lives. *North Brit. Ins. Co. v. Loyd*, 10 Exch., 533. In this case a former guarantor was discharged, and others taken in his place. The fact of the prior guaranty was not disclosed. The subsequent guarantors made no inquiry, and they were held to be liable. If the surety desires information, he must ask for it. The creditor is not bound to volunteer it. An undisclosed prior debt will not affect the validity of the contract. *Hamilton v. Watson*, 12 Clark & F., 119. If the creditor be applied to, he must make a full and frank communication. *De Gol., supra*, 367. One took a note from another whom he knew to be insolvent, and did not disclose that fact to a person who became surety. It was held that the

surety was bound, and that the payee had a right to presume he was aware of the insolvency of the principal. *Ham v. Greve*, 34 Ind., 18. To render the general allegation of concealment sufficient in a pleading, it is necessary also to aver that the creditor either procured the surety's signature, or was present when the instrument was executed, and then misrepresented or concealed essential facts which should have been disclosed; otherwise the allegation of fraud is only the pleader's deduction. *Burks v. Wonterlein*, 6 Bush, 24. In this case the court said, "The principal may have presented her" (the payee) "the note, signed in her absence, when she could have made no communication to the surety, and could, therefore, have been guilty of neither misrepresentation nor concealment; and the general allegation of concealment does not negative the idea of her absence." *Id.* In such circumstances, the creditor is under no obligation, legal or moral, to search for the surety, and warn him of the danger of the step he is about to take. No case has gone so far as to require this to be done. *Wyethes v. Labouchere*, 3 De G. & J., 609. The creditor is not bound to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage. *Id.*

§ 676. *Sufficiency of a plea of fraud discharging a surety.*

It appears by the record in this case that the plaintiff was a corporation of the city of New York; that Voorhees was the agent of the company at Mobile, in the state of Alabama; and that the parties to the bond were all of that city. The plea does not set forth any of the circumstances attending the execution and delivery of the bond. It does not aver that there was any misrepresentation, anything fraudulently kept back, or any opportunity to make disclosures on the part of the company, or any inquiry by the sureties, before the bond was delivered. Nor is it averred that the company was aware that the sureties were ignorant of the facts complained of. It is, perhaps, to be inferred from the plea that the fact was—as the record, aside from the plea, shows it to have been—that the bond was executed at Mobile, and sent by Voorhees by mail to the company in New York. If this were so, the company, upon receiving it, was under no obligation to make any communication to the sureties. The validity of the bond could not depend upon their doing so. The company had a right to presume that the sureties knew all they desired to know, and were content to give the instrument without further information from any source. Under these circumstances, it was too late, after the breach occurred, to set up this defense.

There is another objection to the plea. There was nothing fraudulent in the agreement. The obligation of the agent was simply to pay over the money of the company which he should receive. This the sureties guaranteed that he would do. To do it was a matter of common honesty; not to do it was a fraud. The agreement of the agent to apply money belonging to him derived from any source in payment of a pre-existing debt to the company had no such connection with what the sureties stipulated for as gave them a right to be informed on the subject, except in answer to inquiries they might have made. They made none, and there was no obligation on the part of the company to volunteer the disclosure. On both these grounds the plea was bad, and the demurrer was properly sustained.

Judgment affirmed.

VICTOR SEWING MACHINE COMPANY v. LANGHAM.

(Circuit Court for Wisconsin: 9 Bissell, 188-187. 1879.)

STATEMENT OF FACTS.—Action on an agent's bond. The defense was that the bond was rendered void by the fact that, after its execution, the compensation of the agent was by contract changed from a salary to a commission. The case was heard upon demurrer.

Opinion by DYER, J.

The answer alleges full performance of the contract by Adams up to June 3, 1873, and a settlement and payment of all moneys due to that date; further, that without the knowledge or privity of the defendant sureties, the contract was by agreement between Joslin and Adams altered as follows: that it was then and there agreed between them that the agreement by which Adams was to receive a stated salary as compensation for his services, and by which Joslin was to pay the rent of office and other necessary expenses of the business, should be, and the same was, then and there abrogated and annulled, and instead thereof, it was agreed between them that Adams should thereafter pay all the expenses of the business, and should receive a commission of forty per cent. upon the retail prices of all machines sold; all without the knowledge, privity or consent of the defendant sureties or either of them, and that thereafter the business was carried on under such changed and modified contract, and not otherwise, and that all deficit, if any, in the accounts of Adams, and all failure on his part to account for property of Joslin or any other party, under any contract made between said Adams and said Joslin, if any such failure occurred, did in fact arise and accrue after the change and alteration of said contract.

§ 677. *A change in the compensation of an agent, made after the execution of his bond, from a salary to a commission, discharges the sureties on such bond.*

Thus it is charged that the agreement was changed by the principal parties, so that Adams should pay all the expenses of the business, and should in lieu of a salary receive a commission on his sales, and that the default of Adams, if any, occurred after this alteration; and the question raised by the demurrer is, whether this was a material alteration, affecting the liability of the sureties. I am of the opinion that it was. By the contract before the alteration complained of, Adams was to receive a salary and the expenses of the business were to be borne by Joslin. Now it might well be that the sureties would be willing to become obligated for the performance of such a contract by Adams, and unwilling to assume liability upon a contract under which Adams was to defray expenses and sell on commission. The contract, as altered, would throw upon Adams expenses and risks that he would be free from under the contract not so changed. And it would seem that, when the contract was altered, the agency became, in some respects, essentially changed, and the risk of the sureties was increased.

The case of *Amicable Mutual Life Ins. Co. v. Sedgwick*, 110 Mass., 163, is relied upon by counsel for plaintiff. In that case an insurance company appointed an agent to be paid by commissions. The agent gave bond faithfully to conform to all instructions of the company and to remit to them all sums received, less his commissions. The sureties on the bond knew the terms of the appointment. Subsequently the company and the agent agreed, without the knowledge of the sureties, that he should receive increased commissions, but give up all claim on a certain guaranty previously given by the company that the

commissions should amount to a specified sum monthly. It was held that this change in the mode of compensation did not discharge the sureties. It is evident here that the change in the agreement imposed no new duties or obligations or expenses upon the agent. He was still to collect and remit moneys and to receive his compensation in the form of commissions, as under the original agreement. The change was merely in an increase of his commissions and a relinquishment of his claim on the guaranty. The court, in its opinion, points out the distinction between such a change and a change in compensation from a salary to a commission. The change as to remuneration did not subject the parties to any greater or other risks than they originally intended to assume. It is to be observed, further, that the bond in the case cited was a general one, while the bond in the case at bar rests upon a particular contract which is mentioned therein. In the respects mentioned the case seems distinguishable from the one under consideration. In *Northwestern R'y Co. v. Whinray*, 10 Exch. Reports, 75, the facts were these: The defendant, as surety, executed a bond to the railway company, which, after reciting that the company had agreed to appoint L. as their agent for the purpose of selling coal at a yearly salary of £100, was conditioned for the due accounting by L. of all moneys received by him for the use of the company. L. performed the duties of such agent at the salary specified until a certain time, when it was agreed between L. and the company to substitute for such salary a commission of 6*d.* per ton on all coal for which he should obtain orders. After this change in the agreement L. became indebted to the company for sums which he did not pay over, and, the company having sued the defendant on the bond, it was held that the change in the contract from an agency at a salary to an agency with compensation by commissions so altered the relation between the principal and sureties that the latter were not responsible for the former's default.

The facts of the case at bar, as alleged in the answer, appear as strongly to sustain a similar conclusion here. For here is a contract by virtue of which Adams was to receive compensation by way of salary and the expenses of the business were to be defrayed by Joslin. And it was for the performance of such a contract that the defendant sureties became bound. It is then charged that at a time subsequent the contract was, without the knowledge of the sureties, changed so that Adams was to receive compensation by way of commission and was to pay the expenses of the business. The similarity between this case and that last cited is such as to lead me to adopt the latter as an authority upon the point involved. It is true that the character and amount of the compensation to be paid to the agent in that case were recited in the bond, and therefore the recital was to be looked at as part of the contract. But I do not regard this as weakening the application of the case as an authority to that at bar, because here the compensation is stated in the contract and the contract is referred to in the bond as the basis of defendants' liability, and is really part of the bond for the purpose of determining what liability the sureties have assumed. Demurrer overruled.

RYAN *v.* UNITED STATES.

(19 Wallace, 514-518. 1873.)

ERROR to U. S. Circuit Court for Indiana.

STATEMENT OF FACTS.—The facts of this case are substantially as follows: One John May, a tobacco manufacturer in the sixth district of Indiana, represented that he wished to transport a certain lot of tobacco from his factory to

New York. He executed the usual transportation bond, describing the tobacco, with sureties. He also exhibited a number of boxes to the inspector, representing that these boxes contained the tobacco to be transported, which were branded by the inspector. The other customary steps were complied with. It was afterwards discovered that said boxes were filled with ashes and other worthless material. The sureties knew nothing of this fraud of their principal, who was indicted and fled the country. This suit was brought by the United States against the sureties. The court below gave judgment against them, and they bring the case to this court on error.

§ 678. *Sureties upon a bond for transportation of tobacco are not discharged by the fraud of the principal or the negligence of the revenue officers.*

Opinion by MR. JUSTICE MILLER.

The condition of the bond describes the subject of it with great particularity. It calls it merchandise, and, besides giving the number of boxes, calls it plug tobacco. It also gives the precise number of pounds, the tax for which each pound was liable, and the aggregate of the tax. The condition is that this tobacco shall be transported from the manufactory where it then was to the proper warehouse in New York, and on the performance of this condition the bond for \$10,000 was to be void, and not otherwise. That the condition was to transport the plug tobacco, and not the boxes in which it was supposed to be, is too obvious for argument. Who is to be responsible for the fact that the tobacco was never in the boxes; the persons who gave this bond binding themselves that May would deliver eleven thousand nine hundred and twenty-eight and a half pounds of plug tobacco in New York, or the party for whose security it was given, and who was to lose if it was not so delivered? The question admits of but one answer. When the sureties joined their principal in such a bond, it was their duty to protect themselves by seeing that the tobacco for which they were responsible was so transported, and if they trusted to him instead of making the requisite examination and supervision of the transaction, they must bear the loss sustained by this misplaced confidence.

It is urged, however, that the officer whose duty it was to examine these boxes did it in such a negligent manner that the success of the fraud is to be attributed to his carelessness. The finding of the court is, that the inspector did not examine the contents of said boxes, the same being closed and nailed up so as to exclude a view of the contents, and that they were duly branded by him as containing plug tobacco. The circuit court does not find that this was negligence, and we are not prepared here to say on this slight statement, as matter of law, that it was negligence. But if it were negligence we are of opinion that it was not such as would relieve the sureties from an obligation to the United States, voluntarily assumed by them, that one hundred and ten boxes containing eleven thousand nine hundred and twenty-eight and a half pounds of plug tobacco should be delivered by their principal in New York. The very purpose of their bond was to secure the United States against the fraud of their principal, and the fraud was committed by him in the very matter which the bond was designed to guard against. To say that the carelessness of the revenue officer made this fraud easier of accomplishment can be no release of the sureties from their obligation. Some rules prescribed by the internal revenue bureau for the guidance of these officers in reference to transportation of tobacco in bond are annexed to the brief of the plaintiffs in error. They are not made a part of the record by bill of exceptions or otherwise, and are not, we think, matter for our judicial cognizance. If they were, we see nothing in them

to change the opinion we have formed without them, that the judgment of the circuit court holding the sureties liable on their bond was right. It is therefore affirmed.

UNITED STATES v. STANSBURY.

(1 Peters, 573-577. 1828.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This was an action of debt on a judgment which had been rendered in favor of the United States against Thomas Sheppard and the two defendants in error. The marshal returned, as to Sheppard, *non est inventus*. The other two defendants pleaded that they were sureties to Sheppard in the bond on which the former judgment was rendered; that the United States took out a *ca. sa.* on that judgment against Sheppard, by virtue of which he was imprisoned; whereupon William H. Crawford, the secretary of the treasury of the United States, released the said Sheppard from execution on his paying costs and conveying all his property, real, personal and mixed, to the United States, with which condition it is admitted Sheppard complied. The United States demurred, and the circuit court gave judgment on the demurrer, *pro forma*, for the defendants, which judgment is now before this court on a writ of error.

§ 679. *The release of a debtor whose person is in execution is, at common law, a release of the judgment.*

It is not denied that, at common law, the release of a debtor whose person is in execution is a release of the judgment itself. Yet the body is not satisfaction in reality, but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction if the person be voluntarily released. The release of the judgment is, therefore, the legal consequence of the voluntary discharge of the person by the creditor.

§ 680. *The release of a debtor from execution under the act for the relief of imprisoned debtors does not discharge his sureties.*

This being the positive operation of the common law, it may unquestionably be changed by statute. The United States contend that it is changed by the act providing for the relief of persons imprisoned for debts due to the United States. That act authorizes the secretary of the treasury, on receiving a conveyance of the estate of a debtor confined in jail at the suit of the United States, or any collateral security to the use of the United States, to discharge such debtor from his imprisonment under such execution; and he shall not be again imprisoned for the said debt; "but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then or at any time afterwards belong to the debtor. The sole duty of the court is to construe this statute, according to its words and the intent of the legislature. Did congress design to discharge the sureties or to release the judgment? The act is "for the relief of persons imprisoned for debts due to the United States," not for the relief of their sureties, and does not contain a single expression conducing to the opinion that the mind of the legislature was directed towards the sureties or contemplated their discharge. The only motive for the act being to relieve debtors, who surrender all their property, from the then useless punishment of imprisonment, there can be no motive for converting this act of

mere humanity into the discharge of other debtors, whose condition it does not in any manner deteriorate. If the act produces this effect, it is an effect contrary to its intention, occasioned by a technical rule originating in remote ages, which has never been applied to a statutory discharge of the person.

But the language of the statute has guarded against this result. It has expressly declared that the judgment shall remain good and sufficient in law. How can this court say that it is not good, and is not sufficient? If it be good and sufficient, for what purpose is it so? Certainly, for the purposes for which it was rendered; to enable the United States to proceed regularly upon it, as upon other judgments, with the single exception made by the act itself. The voluntary discharge of a debtor by his creditor is a release of the judgment, because such is the law. But in this case the legislature has altered the law. It has declared that the discharge of a debtor in the forms prescribed shall amount solely to a liberation of the person, not to a release of the judgment; that shall remain good and sufficient. Were courts to say that, notwithstanding this provision, the judgment is released, it would amount to a declaration that a technical rule in the common law, founded in a presumption growing out of the simplicity of ancient times, and not always consistent with the fact, is paramount to the legislative power. It would in fact be to repeal the statute. It would unquestionably be to defeat the object of the legislature, since it would be no very hardy assertion to say that, if the discharge of the person in custody discharged the other obligors, the imprisoned debtor would never be released while the debt remained unpaid, unless the insolvency extended to all the obligors.

§ 681. — *nor does the surrender by the debtor to the United States, under said act, of his whole property.*

The second point made by the counsel for the defendants, that the sureties are exonerated by the compromise made with the principal without their concurrence, is the same in principle with that which has been considered. No compromise of the debt has been made. The course prescribed by the law has been pursued. The whole property of the imprisoned debtor has been surrendered, and on receiving it his person has been discharged. The act of congress declares that the judgment shall still remain in force. If the creditor had entered into a compromise not prescribed by law, or had given any discharge not directed by statute, the question might have been open for argument. But, while the whole transaction is within the precise limits marked out by law, it cannot produce a result directly opposite to that intended by the statute. The only doubt which can be suggested, respecting the intent of the legislature, is created by the last words of the sentence, declaring that the judgment shall remain good and sufficient in law. They are, "and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor." These words are certainly useless, and may be supposed to indicate an idea that it could be satisfied out of the estate of the debtor only; that, as they are not required to render that estate liable, they may be understood to limit the right of the creditor to obtain satisfaction from the estate of any other person. We do not, however, think this the correct construction. The words are considered as mere surplusage, not as limiting the rights of the United States to proceed against all those who are bound by the judgment. We think, then, that the circuit court ought to have sustained the demurrer, and that the judgment which overrules it ought to be reversed. But, considering the plea, and the manner in which the cause has been brought up, the court will not direct

an absolute judgment to be entered for the United States, but will reverse the judgment, and remand the same for further proceedings, that the circuit court may give leave to the defendants to plead.

HOPKIRK v. M'CONICO.

(Circuit Court for Virginia: 1 Marshall, 220-227. 1812.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit is instituted to obtain a settlement of the accounts of Christopher M'Conico as collector for the plaintiffs, and to obtain payment from the other defendants, who were his sureties, in a bond given for the faithful performance of his duty as collector. The securities oppose this claim because, in 1800, M'Conico gave to the agent of the plaintiffs a deed of trust on all his property, to secure the balance then stated to be due, upon receiving which the plaintiffs, by their agent, gave him further time for payment. The deed, too, was executed on the faith of a letter promising to relinquish the bond, if the deed should be executed according to the requisition of the letter. This prolonged credit, it is urged, has entirely discharged the securities.

§ 682. *An extension of credit by the obligee of a bond to the principal obligor will release the sureties.*

The two cases cited, the one from 2 Brown's Ch. Ca., and the other from 2 Ves. Jr., do certainly establish the principle for which the defendants contend. A stipulation, without the knowledge of the surety, giving further time of payment to the principal debtor, is held to discharge the surety. But the plaintiff contends that this case differs from those which have been cited, because the bond, from its terms, not being for the payment of a particular sum at a specified time, but of money as it should be collected, the obligation is a continuing obligation, and, therefore, not released by suspending proceedings upon it. The counsel for the plaintiff did not appear to rely much upon this argument, as applicable to the debt then known to be due, and the court cannot perceive its force. An action for any sum of money actually collected accrues as soon as it is collected; and if that action be suspended, such suspension appears to the court to release the sureties with respect to the sum so suspended, as completely as they would be released from the whole bond, if the whole money had been collected. The court feels no hesitation in declaring the sureties discharged for so much as was known to be due when the deed of trust was executed.

§ 683. — *but an extension of credit procured by the fraud of the obligor of a bond will not release the sureties from liability.*

But a question of much more difficulty remains to be decided. A much greater sum had been actually collected than was reported by the defendant M'Conico, or known by the agent for the plaintiff to be in his hands. Are the sureties discharged for this sum also? On this question I have felt great doubts, nor are those doubts entirely removed. I must suppose the settlement establishing the balance for which the deed of trust was taken to have been made on an account rendered by M'Conico. If that account did not contain a true statement of the sums in his hands it was a false account and a fraud committed on the plaintiff. The agreement exhibited by the deed would not, in the opinion of the court, have restrained the plaintiff from suing, immediately, to compel a fair account, and payment of so much as had been collected and

fraudulently concealed. Much less could it have restrained the sureties from instituting a suit in chancery to compel a full settlement and payment of what was really due. But it is urged, and urged with great force, that, by this settlement, the sureties were lulled into perfect security, and prevented from taking any measures for their own safety. That this supineness was produced by the act of the plaintiff and ought to disable him from proceeding to fix any loss afterwards discovered on the sureties. The court has felt the weight of this argument, but it is opposed by others which possess still greater influence. It has been already stated that this settlement must be considered as having been founded on the account rendered by M'Conico. This account is false and fraudulent. It is a breach of the condition of the bond. That condition requires that he should account fairly for his transactions as often as he should be required so to do, and at least once in every year, namely, on the first day of September. This condition is broken by the rendition of a false account. The securities are liable for this breach. The case is a hard one, but I cannot say that they are discharged from this liability by an agreement produced by the fraud.

§ 684. *The acceptance of a deed of trust in satisfaction of a bond will not, if procured by fraud, operate as accord and satisfaction.*

The defendants rely also on the letter of Strange, of the 13th of February, 1800. I concur with them in opinion that the promise to deliver up the bond, if the deed be recorded in the spring of 1800, does not lose its obligation by the postponement of recording the deed until the fall of that year, because the postponement was made by the plaintiff's own agent. He has himself released the condition of his promise and the promise remains absolute. On this letter the sureties contend that they are discharged at law, and as they are not bound in equity further than at law, this suit cannot be sustained against them. They are said to be discharged at law, because, if suit was instituted at law against them on the bond, accord and satisfaction might be pleaded and would bar the action. If the sureties are correct in their law there is an end of the case. But the court is not of opinion that accord and satisfaction would bar this action. To this plea it might be replied that the accord was obtained by the fraud of M'Conico, and, as at present advised, I think that a verdict found on such an issue for the plaintiff would authorize a judgment. If the defendants chose to demur to the replication it is believed that the demurrer would be overruled and the replication sustained. If this be correct the sureties are not discharged at law. The question is whether a court of equity will relieve against the bond or decree against the defendants or leave the parties to their action at law? I should incline to the latter course were it not for the obvious advantage which the settlement of such an account as this before a commissioner has over a settlement before a jury. With respect to the sum for which M'Conico took credit as the guardian of his son, I rather incline to the opinion that the securities must be discharged from it, because the agent for the plaintiff admitted it knowingly. This, however, would seem to be a question between the two securities, because one of them is security to the guardian's bond.

UNITED STATES v. TRUESDELL.

(Circuit Court for Ohio: 2 Bond, 78-84. 1867.)

Opinion by the Court.

STATEMENT OF FACTS.—This suit is prosecuted by the United States to recover the penalty of a bond executed by James F. Truesdell, as principal, and

Gassoway Brashears and John W. Menzies, as sureties. The process has not been served on the defendant Menzies, and he does not therefore appear to the action. The declaration avers, in substance, that Truesdell, being a manufacturer of tobacco at the city of Cincinnati, executed a bond on May 20, 1865, as such manufacturer, pursuant to the internal revenue statute, in the penalty of \$6,000, with the said Brashears and Menzies as his sureties. The condition of the bond, as set out in the declaration, is that Truesdell shall well and truly comply with all the requirements of law as a manufacturer of tobacco; and shall not manufacture, or employ others to manufacture, tobacco without having first obtained a permit therefor; and shall not engage in any attempt, by himself or by collusion with others, to defraud the government of any duty or tax upon any manufacture of tobacco; and shall render truly and correctly all the returns, statements and inventories prescribed for manufacturers of tobacco; and shall pay to the collector of the district all the duties or taxes which may or shall be assessed and due on any tobacco so manufactured; and shall not knowingly sell, purchase, or receive for sale, any tobacco which has not been inspected, branded or stamped as required by law, or upon which the tax has not been paid. It is then averred that Truesdell, after the date of the bond, and during the months of April, May and June, 1866, manufactured and sold large quantities of tobacco; and the breach averred is, that neither Truesdell nor his sureties have paid the duties or taxes assessed and due on such tobacco. Truesdell makes no defense to the claim of the government, and admits his liability on the bond for the sum sued for. The defendant, Brashears, demurs to the declaration; and the question arising upon it is whether the allegations in the declaration disclose a valid cause of action against him for the whole amount claimed by the United States.

There is but one count in the declaration, and but one breach of the bond assigned, namely, the non-payment of the tax assessed and due for tobacco manufactured and sold by Truesdell during the three months above named, and subsequently to May 20, 1865. And the only question is, are the sureties in the bond liable for the failure of their principal to pay this tax on tobacco manufactured and sold after the expiration of the license granted to Truesdell? It is insisted by the counsel, in support of the demurrer, that as the license by the law in force when it was issued expired on the 1st of May next after its date, the bond had no validity as to duties or taxes subsequently accruing, and that the liability of the sureties did not extend beyond the life of the bond; and consequently they are not responsible for the non-payment of duties, or other default by Truesdell after that date. In support of this view, it is urged that it was the duty of the collector of the revenue to cause the license of Truesdell to be renewed upon its expiration, and that the bond as to the sureties became inoperative and void upon his failure to do so; and that if Truesdell was permitted by the collector to proceed with his business as a manufacturer after his license expired, it was in violation of law, and the sureties are not chargeable with any default by Truesdell while thus engaged in the illegal prosecution of his business.

This is the first case in which this question has been presented in this court; nor am I aware it has been judicially decided elsewhere. I am not, therefore, favored with any precedent to guide me in my decision. I have not, however, encountered much difficulty in the consideration of the question, and will very briefly state the reasons which have led me to the conclusion that the demurrer cannot be sustained. I do this with the recognition of the well-settled

legal principle that the rights of sureties are to be liberally construed, and their liability is never to be extended beyond the strict letter of their undertaking.

§ 685. *The failure of a manufacturer to renew his license does not operate to release the sureties on his bond.*

As before noticed, the bond on which this suit is brought was executed on May 20, 1865. The declaration avers that subsequently to its date Truesdell was a duly licensed manufacturer of tobacco at the city of Cincinnati, but the precise date of the license to him is not alleged. As the statute requires bond to be given before the license can issue, it may be assumed it was granted immediately upon the execution of the bond. And under the last clause of section 74 of the internal revenue act of June 30, 1864, the license expired on May 1, 1866. There is no averment that the license was renewed; and it must therefore be assumed upon this demurrer that Truesdell, after that date, pursued his business of manufacturing and selling tobacco without a license. The declaration avers that he continued his business up to June 1, 1866; and duties and taxes accrued on the tobacco manufactured and sold up to that date, and after the expiration of his license. Are the sureties in his bond liable for his default in not paying these taxes? I am clear in the opinion that the bond was valid and obligatory after the expiration of the license, and that the liability of the sureties continued, notwithstanding the failure of Truesdell to procure a new license. It is true section 71 of the statute, before referred to, prohibits the prosecution of any trade or business requiring a license, until a license is procured in the manner pointed out by the statute. And by section 73 a punishment by fine or imprisonment is denounced against any one for carrying on his business without such license. But there is no necessary connection between the bond required to be given by a manufacturer and the license which he is to procure. By section 12 of the act of March 3, 1863, a manufacturer of tobacco must give bond before a license can issue. That section defines, with great minuteness, what shall be the conditions of the bond. The bond sued on in this case was taken under and in pursuance of that section. This is obvious by a comparison of its provisions with the conditions of the bond, as set forth in the declaration, and before recited. Without restating these conditions, it will be sufficient to notice that one is that the manufacturer "shall comply with all the requirements of law" applicable to his business. As the bond precedes the license, it cannot be supposed to be executed with any reference to it, or that its validity, or the duration of the liability it creates, can in any way depend upon the license. The undertaking of the sureties is not that they are bound for the acts of the manufacturer for any specified time, or until the expiration of his license, but generally that they will be responsible for him while he manufactures and sells tobacco subject to tax or duty at the place designated. Section 12 of the statute referred to clearly does not contemplate, nor does it authorize, any restriction or limitation in the condition of the bond as to the duration of its validity. Indeed, I am not aware of any provision of the statute authorizing a renewal of the bond, unless, perhaps, at the instance of the collector, for the insufficiency or insolvency of the sureties.

I cannot, therefore, assent to the conclusion that the manufacturer, by pursuing his business after the expiration of his license, and, therefore, in violation of law, absolves himself or the sureties in his bond from liability. While it is expressly the duty of the manufacturer to renew his license, and failing to

do so, if he continues his business, he subjects himself to a severe penalty, I know of no principle by which it can be held that his failure to comply with the law can inure to the benefit of his sureties. The provision making his neglect a punishable offense was not designed for the benefit of sureties, but to protect the government against the frauds of the manufacturer. And it is worthy of notice that it is one of the obligations which the sureties expressly assumed in the bond, that the principal shall fulfil all the requirements of the statute. Now, his failure to renew his license, as required by the law, is a breach of this condition, for which an action could be maintained. It would be strange if his failure in his duty in this regard should operate to discharge his sureties from liability.

§ 686. *It is incumbent on a manufacturer to take notice of the time of expiration of his license. There is no official obligation on any one to give him notice.*

The argument of the counsel of the demurrant erroneously assumes that it is the duty of the collector, or other revenue official, to give notice to the manufacturer of the expiration of his license, and to require him to renew it; and that if he is permitted to prosecute his business after his license has expired, the government, through its agents, acquiesces in the violation of the law and thereby the sureties in the bond are relieved from their obligations. But I am not aware of any provision of the statute requiring any officer to give notice of the expiration of a manufacturer's license. This is a matter within his knowledge, and of which he must, by the law, take notice at the peril of a prosecution by indictment for neglecting it. It was not the policy or the intention of the law to create the burdensome duty of notifying every manufacturer within a collection district when his license expired, and that it must be renewed. It would be a requirement which in many cases it would be impossible to comply with, and in all cases would greatly embarrass revenue officers in the execution of the law, while it would open the door for the commission of innumerable frauds on the government. It would impose upon the officers the duty of making rigid inquiry as to every manufactory within his district, and to ascertain who had suspended and who were continuing their business. There is no necessity for this, as the government is protected by the bond which has been given, and the provision making it the duty of the manufacturer to apply for and obtain a renewal of his license. There is certainly no reason why his criminal neglect to do what the law enjoins, and what the sureties covenant in the bond he shall do, shall acquit them of their responsibility.

For the reasons indicated I am clear that the demurrer to the declaration is not sustainable. The allegations set forth a legal liability on the part of these sureties, for the non-payment of the duties and taxes accruing after, as well as before, the expiration of the license to Truesdell. The objection to the declaration as bad for stating several breaches in one count must be based on a misapprehension of the count. As I read it, it avers but one breach; and that is the non-payment of the duties and taxes assessed against and due from the principal in the bond. If it were otherwise, the American authorities sanction the assignment of several breaches in the same count, in a declaration on a bond. The demurrer is overruled.

§ 687. *In general.*—Payment of money in his hands, by the collector of a port, pursuant to orders of the secretary of the treasury, is in the line of his duty, and will not release the sureties. *Gausson v. United States*, 7 Otto, 584 (§§ 739-742).

§ 688. Whether the death of the principal, and the refusal of the proper authorities to permit his personal representatives to complete the contract, will release the sureties. *United States v. Tillotson*, * 1 Paine, 305.

§ 689. The plea of a surety in a paymaster's bond averred that he arrested and surrendered his principal to the plaintiffs, and that the plaintiffs accepted the surrender and thereby the obligation of the surety was discharged and canceled. *Held*, the plea was bad. *Raymond v. United States*, 14 Blatch., 51.

§ 690. The neglect of a cashier to settle the accounts of a teller daily will not discharge the sureties on the bond of the teller, though such neglect increased the risk of error in the teller's accounts. *Union Bank of Georgetown v. Forrest*,* 3 Cr. C. C., 218.

§ 691. The sureties on an official bond are not discharged by the giving of a new bond by the principal, which was required of him by proper authority. *Postmaster-General v. Reeder*,* 4 Wash., 678.

§ 692. The fact that a paymaster has failed to report at the end of every two months the amounts paid out by him, and to forward estimates of the probable amounts necessary to make the next payment, and that he was not recalled for such neglect, but additional funds were placed in his hands after his default in these particulars was known for several months, will not exonerate the sureties on his official bond from liability for such additional funds so placed in his hands. *United States v. Vanzandt*,* 2 Cr. C. C., 338.

§ 693. A direction by the postmaster-general to a postmaster, to retain the quarterly balances due to the government until drawn for, does not discharge the sureties on the official bond of the postmaster. *Postmaster-General v. Reeder*,* 4 Wash., 678.

§ 694. The law requiring that postmasters shall make quarterly payments of the moneys received by them, any order by the postmaster-general that dispenses with the necessity of such quarterly returns is void as contravening the positive provisions of the law, and cannot be construed as being a contract which discharges the sureties on the bond given by a postmaster to the postmaster-general for his good conduct. *Locke v. Postmaster-General*,* 3 Mason, 446.

§ 695. It is not such fraudulent concealment as will exonerate the sureties on the official bond of a postmaster for the postmaster-general to neglect to inform them of a default of their principal when no inquiries have been made by them. *Postmaster-General v. Reeder*,* 4 Wash., 678.

§ 696. A marshal, before the execution of his bond, collected certain money due the United States on judgments, and though he was ordered by the comptroller to pay it over to the Bank of the United States, he neglected to do so. No demand appeared to have been made for the moneys thus collected. *Held*, that the sureties on the marshal's bond were not liable for these moneys, though they were in the marshal's hands at the time of the execution of the bond. *United States v. Giles*,* 9 Cr., 212.

§ 697. The failure of the postmaster-general to remove a defaulting postmaster from office does not release his sureties. *Postmaster-General v. Munger*, 2 Paine, 189 (§§ 598-601).

§ 698. Release of principal.—The fact that the principal in a joint and several custom-house bond was sued alone, committed to prison and released and discharged by the United States, without the consent of the sureties, under the provisions of the act of 6th June, 1798, c. 66, does not release the sureties, when there was a law in force at the time that, notwithstanding such release and discharge, the judgment should remain good and sufficient in law, and might be satisfied out of any estate which then, or at any time thereafter, belonged to the debtor. *Hunt v. United States*, 1 Gall., 32. See § 668.

§ 699. A conditional release of the obligor in a bond is not operative until the condition is complied with. The release does not take effect without performance of the condition, because the officer, in making the release, has required more than the law authorized him to require, or because the performance of the condition has become impossible. *United States v. Cushman*,* 2 Sumn., 426.

§ 700. To effect the release of an insolvent debtor by the secretary of the treasury, retaining the liability of the sureties, assent must be given by the sureties, or by their personal representatives; assent by an heir of a surety is not sufficient. *United States v. Cushman*,* 2 Sumn., 314. See § 668.

2. Alterations and Erasures.

SUMMARY — *Right to discontinue suretyship on giving notice*, §§ 701, 702. — *Change of contract*, §§ 703, 707, 710. — *Execution of new bond by obligor*, §§ 704, 705. — *Erasure of name of surety*, § 706. — *Liability not extended*, §§ 708, 710. — *Change in the office*, § 709. — *Accepting work incomplete*, § 711. — *New agreement*, § 712. — *Changes and interlineations in the bond*, § 713. — *Imposing other duties on officer*, §§ 714, 715.

§ 701. Where a surety has the right to discontinue his suretyship on giving notice, *provided* the principal's accounts are settled, etc., such proviso is not a condition precedent, and on

giving the required notice the surety is discharged from liability for transactions subsequent to such notice. *Gass v. Stinson*, §§ 716-722.

§ 702. Where an agreement is made subsequent to the execution of a bond, but on the same day, that a surety may be released on giving notice, and the obligee accepts the bond and acts upon it with full knowledge of the effect of such agreement, the agreement is binding on him. *Ibid.*

§ 703. Where a bond is executed by one as agent for the sale of property, and the agreement is changed so as to make him a conditional purchaser of the property, such change releases his surety. *Ibid.* See § 743.

§ 704. Where the obligor in a bond expresses a dissatisfaction with his surety, and makes out a new bond and sends it to the obligee, the latter must return it promptly, or he will be held to an acceptance of it. *Ibid.*

§ 705. And after retaining such bond, and expressing a willingness to surrender the old bond, he will not be permitted to hold the surety on the old bond, although such surety had not given notice of a desire to terminate his suretyship pursuant to an agreement made at the time the old bond was executed. *Ibid.*

§ 706. A., together with others, signs his name as surety on the official bond of a United States marshal, the bond being the joint and several obligation of the marshal and his sureties. Before the bond is accepted and approved by the district judge, the name of one of the other sureties is erased from the bond, by the marshal, at his request. The other sureties, except A., appear before the district judge, after the erasure, and acknowledge their signatures, with knowledge of the erasure, and the bond is approved by the judge. *Held*, that A. having no knowledge of the erasure before the approval of the bond and not having acknowledged the bond as his, subsequent to the erasure, cannot be held as a surety on the bond. *Smith v. United States*, §§ 723-728.

§ 707. A collector of revenue being appointed for eight townships entered into a bond with sureties conditioned for the faithful performance of his duties as collector in those townships. Afterwards his appointment was extended to another township, and without the consent of one of his sureties the additional township was interlined in the bond which had been previously executed. *Held*, that the alteration avoided the bond as to the surety mentioned. *Miller v. Stewart*, §§ 729-735. See § 743.

§ 708. The liability of a surety is not to be extended by implication beyond the terms of his contract. He has a right to stand upon its very terms, and any variation made without his assent is fatal. *Ibid.*

§ 709. A surety on an official bond is not liable, if, after the execution of the bond, a change is made, without his consent, in the office to which the principal is appointed, which makes it materially another appointment. *Ibid.*

§ 710. A surety is not bound beyond the terms of his contract, and his liability cannot be extended or enlarged by implication. He is discharged by any change in the terms of the contract not expressly assented to by him. *United States v. Corwine*, §§ 736, 737. See § 743.

§ 711. If the United States accepts a work not completed by the obligor according to the terms of his bond, the sureties are discharged. *Ibid.*

§ 712. Sureties are not discharged by a new and distinct agreement made subsequent to the execution of the bond. *Crawford v. Dexter*, § 738.

§ 713. Sureties are not discharged by changes and interlineations in the recitals of the bond which do not in any way change their rights, duties and obligations. *Ibid.*

§ 714. The imposition upon an officer of other duties besides those pertaining by law to his office will not release his sureties, it not appearing that the character of the office was changed or that the officer's ordinary responsibility was increased. *Gausson v. United States*, §§ 739-742. See § 751.

§ 715. Sureties are not discharged by the fact that the principal was required to receive and disburse large sums of money in addition to the ordinary duties of his office. The surety is not responsible for money which the officer does not receive by virtue of his office. *Ibid.*

[NOTE.— See §§ 743-753.]

GASS v. STINSON.

(Circuit Court for Massachusetts: 2 Sumner, 453-469. 1836.)

STATEMENT OF FACTS.—Stinson was warden of the New Hampshire penitentiary, and in that capacity, and through the instrumentality of Thompson, the deputy warden, made a contract with James, constituting him agent to sell the granite for the prison. James gave a bond, with Gass as his surety,

for the faithful discharge of the duties of the agency, and at the same time that the bond was signed Thompson executed an instrument in writing, to the effect that Gass might, by ten days' written notice, discontinue his liability as surety, provided the accounts of the agent were then all settled up, the balance paid and the property of the prison delivered over to the warden or his agents. There was a suit at law on the bond and a verdict by consent; a reference was made to an auditor, who stated the accounts and found a balance against James of \$6,033.39, but reserved for the opinion of the court the question of Gass' liability on the bond. Gass filed this bill to be relieved of his responsibility, and the case was heard on bill, answer and evidence. Further facts will appear in the opinion of the court.

Opinion by STORY, J.

The present bill is brought by Gass to be relieved from his suretyship and liability under the bond given to Stinson upon several grounds. In the first place he insists that the nature and character of the suretyship were essentially changed after the execution of the bond, without his consent, by a contract (commonly called a contract of sale and return), by which, in effect, James, instead of a mere agent, became a conditional purchaser of the granite, liable if he sold it for certain stipulated prices, and for all the bad debts contracted under his own sales, however faithful might be his conduct in the course of his agency. In the next place he insists that he did give notice of his dissatisfaction at remaining surety to Stinson, who waived any formal notice; and he was thereupon entitled to be discharged from all liability for the future agency of James. In the third place he insists that a bond with new sureties was accepted from James with the avowed understanding of its being a substitute for that originally given by Gass. In the fourth place, he insists that a certain contract called the New Orleans contract, by which James and another engaged to furnish granite for building a bank at New Orleans, which was made known to and acted upon by Stinson, and for which the granite, charged in the account against James, was furnished by Stinson, is in no sense a contract or proceeding appertaining to the agency, for which Gass is liable under his bond. All these various matters are insisted upon in some form or other in the charges in the bill, and in the argument at the bar on behalf of Gass, and they are all denied in the answer and in the argument on the other side.

§ 716. *Where a surety has a right to discontinue his suretyship, provided the proviso is not a condition precedent to his discharging himself from future liability.*

Before proceeding to a consideration of these matters, thus put directly in contestation by the parties, it is necessary to dispose of one or two preliminary points, which grow out of the collateral agreement stated in the case, as to the obligation and construction of that paper. It is contended by Stinson that he never gave any authority to the deputy warden to sign any such paper; and that it was not a part of the original contract with Gass at the time of executing it, but was a subsequent unauthorized proceeding. And it is further contended that the true interpretation of the agreement, if valid, is that the settling of the accounts of the agency, paying the balance, and delivering over the property of the prison in the hands of James, constitute a condition precedent to the right of Gass to avail himself of the written notice. It appears to me that the true and reasonable interpretation of the instrument is, that Gass upon giving the ten days' notice was entitled to be discharged from his liability, or, as the instrument phrases it, "to discontinue his liability" for

the future proceedings of James, remaining, however, liable for the balance then due to Stinson, and for the delivering over of the other property then in his hands. Upon any other construction, Stinson and James, by any arrangement between themselves, as to continuing the agency, or as to not settling the accounts, or not requiring such balance or property to be paid or delivered, would have it in their power to defeat the whole intent of the instrument, and to hold Gass to an indefinite responsibility as surety. It seems to me, therefore, that the natural interpretation of the terms of the agreement is, that the proviso is not a condition precedent to the right of Gass to liberate himself from future suretyship, but is a qualification of the effect of the notice, as to his discharge from liability for antecedent proceedings under the agency.

§ 717. *A collateral agreement limiting the operation of a bond executed the same day held binding.*

The other point involves considerations of a very different nature; and in one aspect would be decisive of the case against Stinson. If, as Stinson in his answer solemnly affirms, he gave no authority to the deputy warden to enter into this collateral agreement with Gass, and it was a stipulation on the part of Gass, at the time of executing the bond, that it should be entered into, thus forming the substratum of his suretyship, it is very clear that the bond and agreement must, as to Gass, be treated as nullities; for neither instrument in such a case would operate unless both did, the one being the motive for the other. But I am abundantly satisfied that the collateral agreement, though executed after the bond, on the same day, was understood by all parties to be a part of the *res gestæ*, and the very condition of Gass' assuming the suretyship. And I am also as well satisfied, that as Stinson accepted and acted upon the bond with a full knowledge of the nature and effect of the collateral agreement without objection; and, indeed, as some of the evidence shows, with a positive adoption of the latter, it must be taken to be a final ratification of the whole transaction on his part, and binding upon him. In the whole course of the subsequent negotiations and proceedings there is not a tittle of evidence establishing his disapproval of it.

§ 718. *A change of the relation of an obligor from an agent to a purchaser releases his surety. Competency of principal as witness for his surety.*

We may now proceed to the examination of the other questions in the case. In respect to the first, viz., the change of the relation between Stinson and James from that of a mere agency in the sale of granite to third persons to that of a conditional purchase, or sale and return, I entirely agree with the argument at the bar, that, if made out in point of fact, it is so total a departure from the true nature of the original agency, and involves so much more responsibility and risk, that it will amount to a discharge of Gass; or rather, the transactions will fall without the condition of the bond. The difficulty is in coming to the conclusion that the fact is precisely made out. Stinson explicitly denies it in his answer. James as explicitly affirms it in his deposition. His competency as a witness in this case has been objected to; but I cannot perceive what interest he has in the present suit, to which he is not a party, and by the event of which he can neither gain nor lose. If the plaintiff succeeds in the suit, James is not discharged from his liability; if he fails, the costs must be exclusively borne by the plaintiff. The case of *Riddle v. Moss*, 7 Cranch, 206, is distinguishable. There the surety was sued at law on the bond; and his principal, who was offered as a witness, had made over his prop-

erty to the surety to indemnify him for the event of that very suit. The court on this account, as well as that his liability would be increased to the extent of the costs of the suit, if the judgment was for the plaintiff, held the principal an incompetent witness. It appears to me, however, as the result of the subsequent correspondence and acts of the parties, that the proposal contained in the letter of the 12th of February, 1831, by which Stinson proposed to change the former agreement, under which James was to receive a commission of five per cent. upon his sales of granite, and to substitute a low price of the granite, so as to give James the full benefit of the extra price of the sales, was never definitively acted upon by either party. No account is shown, in which it was ever adopted as the basis of any settlement; and there is a subsequent letter of James (8th of April, 1831), in which he says, "I must have pay for trucking and commissions on all I sell; unless, I cannot live." So that it appears to me that the denials of the answer ought under all the circumstances to prevail over the positive assertions of James on this point.

But this leads me to the consideration of the New Orleans contract, and whether it can be treated as a transaction within the scope of the agency. The nature of this transaction was as follows: On the 15th of August, 1831, a special contract was entered into between James and one Hastings (then his partner in business), on the one part, and Reynolds and Zacharie of New Orleans of the other part, by which the former agreed to furnish the latter with all the stone for a bank building at New Orleans of certain specified dimensions and sizes, to be shipped at specified periods, for the gross amount of \$10,000, under a penalty or rent (as it was termed) of \$500 per month for every month which should elapse after the stated periods of shipment at Boston. After the making of this contract, which was made known to Stinson, James wrote from time to time to Stinson for such stone as he wanted for the undertaking; all of which was furnished to him by Stinson, and charged to him in account. It does not appear that Stinson had any other participation in the New Orleans contract than by supplying the stone from time to time for the same. James in his bill insists that Stinson agreed to furnish the stone at the period stipulated in the contracts, and claims damages for losses sustained by him from his inability strictly to perform the same, in consequence of the default of Stinson. The answer of Stinson explicitly denies any participation in the contract, and any agreement to comply with its stipulations.

Now, upon this posture of the case, the question arises, whether the stone, supplied to James under the then New Orleans contract, can properly, as against Gass, be deemed a part of the business of the agency for which he is responsible. I think it cannot. So far as the supplies went to James avowedly to fulfil this contract, they must be treated as absolute sales to James or to James and Hastings, and not deliveries to James to be afterwards sold by him under the agency. It is impossible that he could be at once agent and vendee; that he could negotiate as agent to sell to himself as purchaser. Reynolds and Zacharie never contracted at all with Stinson, directly or indirectly; but with James and Hastings only. Stinson, in making the supplies of stone to James, treated him as the absolute debtor for the stone, as soon as received by him, and charged him therefor as purchaser. A purchase is in no just sense an agency; a contract to sell to an agent is in no just sense a contract by an agent to sell for his principal. Not knowing the exact state of the accounts between the parties, independent of this transaction, I am unable to say what will be the effect of this view of the matter as to Gass' responsibility.

§ 719. *Where a new bond is made and sent to the obligee, he must return it promptly, or it will be presumed to be satisfactory.*

I proceed, therefore, in the next place to the consideration of the question as to notice by Gass to Stinson of his dissatisfaction with continuing his suretyship; and of the waiver of any formal notice by Stinson, and his assent to discharge Gass. It appears from the evidence that, at the time when the bond was given, Gass was a stone-cutter in Boston in the employ of James, then a wharfinger in Boston, and concerned in the sale of stone. In September or October, 1831, Gass left the regular employment of James and set up business for himself, which was a cause of dissatisfaction to James; and it is in a very high degree probable that, about this period, Gass intimated his wish to James to be absolved from his suretyship in future. On the 20th of September, 1831, James wrote a letter to Stinson, stating that Gass was going into the granite business soon; that he was daily interfering in contracts that happened under his immediate observation; that he, James, felt well persuaded that he had been a great injury to the sale of many stone on his wharf; and he then added: "Entertaining the above views respecting his universal interference in my concerns, I have come to the conclusion to ask the favor of you to fill up a new bail bond and forward it inclosed in a letter by mail as early as possible, and immediately on my receiving it I will have it signed by a man that will be satisfactory to you and all concerned, and remit it to you for your inspection. If the person is satisfactory to you, after you have made investigation, on the reference I shall offer respecting it, you will oblige me by sending me the old bond, signed by Gass," etc. On the 20th of the same month the deputy warden replied: "If it will be of as much benefit as you say it will, we have no objection to your changing your surety; all we want is to have things about right; and if Mr. Gass does not answer your purpose, you can get a better one. As soon as we can possibly get time we will send you a copy of the obligation, and you may see what you can do with it." On the 29th of September, 1831, the deputy warden wrote a letter to James, in which he said: "We have sent you a copy of the bond, varying only where it says, 'for what may have been done since the 27th January.' This variation will make it the same as though it was signed at the time the other was written, and will agree with the commission you have appointing you agent, dated 27th January. You can get whom you please on the bond, one or two, as you like, and forward it; and, if acceptable, we will exchange with you." On the 4th of October, 1831, James inclosed the same bond with certain persons proposed in pencil as sureties. On the 9th of the same month Stinson acknowledged the receipt of the bond, and added: "I can only say, the names of the sureties are strangers; presume they are good; but wish to have it to say to the executive, I know them to be good. Mr. T. or myself will be down in all this month, and will then adjust the business satisfactorily." This bond does not appear ever to have been executed or accepted. On the 13th of October James wrote to Stinson: "If it would not discommode you, you would confer on me a favor, a great favor, to give up the old bond, as Mr. Gass considers me as beholden to him on that account, and takes the advantage of it, having lately commenced the granite business near my wharf, and still expects me to employ his men at any price he may choose to charge." On the 16th of October the deputy warden, in the absence of the warden, wrote to James, saying that he could not say what would be his (the warden's) course respecting the bonds. He does not know Mr. Sanborn nor Mr. Hastings (the proposed sureties). All

he wants is to be able to say to the directors that the bond is perfectly good. If he can be satisfied that they are good, he will willingly exchange with you. I shall be in Boston the last of this month, and then we can arrange it, I think." On the 8th of November, 1831, the deputy warden wrote to James, saying: "We sent you the copy of the bond some time since; have not heard anything of it yet." What bond this refers to does not distinctly appear. On the 10th of November, James & Co., by their clerk, wrote to Stinson, saying: "We have received the bond; but have been so very busy with shipping stone, that I have not had time to attend to it; but will soon." The bond here alluded to probably was the copy referred to in the letter of the 8th, and probably also was that which was soon afterwards executed by one Amos C. Sanborn, and one Joseph Hastings, as sureties, and was received by Stinson, and never afterwards returned to James. Stinson, however, in his answer, denies that it was satisfactory to him or ever accepted by him; and says that he retained it some time in order to redeliver it to James, when he should come to Concord (N. H.). But he does not pretend that he ever returned this bond; and he says "he does not know what became thereof." It is proved by Hastings and Sanborn that the bond was never returned to them, and by James that it was never returned to him; and that no notice was ever given to either that it was not accepted by Stinson. On the contrary, James expressly asserts that no dissatisfaction was ever expressed by Stinson, respecting the sureties, and that on one occasion he expressed himself satisfied with the bond. Be this as it may, it is very clear that the bond was never returned to James or the sureties; and I cannot but express myself under some difficulty in avoiding the conclusion that its being retained affords some, if not cogent evidence, that it was satisfactory and was in fact accepted. It was the duty of Stinson to return it forthwith, if he did not mean to accept it, and to give notice thereof to the parties interested in that bond. His omission to do so, under all the circumstances of the present case, cannot but afford a presumption that it was accepted. I am aware that the language of the letter of Stinson to James, of the 19th of April, 1832, leads to a different conclusion; and, indeed, it is the principal source of my doubts on the subject.

§ 720. *Conduct held to release a surety, and to amount to a waiver of notice from the surety of a desire to discontinue his suretyship.*

But I should be sorry to place the decision of this part of the case upon the mere fact of an acceptance of the new bond, even if the presumption were stronger than it is, as I am of opinion that the whole subsequent conduct of Stinson demonstrates that he afterwards had full notice of the dissatisfaction of Gass in remaining a surety; that he waived any formal notice in writing of his (Gass') wishes to discontinue his suretyship; that he intentionally lulled Gass into the belief that he required no other notice; that he had no claims on him under the old bond, and that he did not mean to insist upon any settlement according to the terms of the proviso. Under such circumstances, if clearly made out, there can be no doubt that Gass is entirely discharged from his suretyship in regard to all transactions subsequent to that notice and waiver. The written correspondence of James & Stinson, in September, October and November, 1831, do, as I think, furnish a good deal of internal evidence of a knowledge on the part of Stinson that Gass, as well as James, was then desirous of his being relieved from the suretyship; and, taken in connection with the deposition of James and of the other witnesses for the plaintiff, there does arise a strong presumption of the fact, notwithstanding the rebut-

ting evidence on the other side. Indeed, if the plaintiff's depositions are to be believed, there is the most conclusive evidence that Stinson repeatedly admitted that he was willing to give up the old bond; and that he had no claim under it upon Gass; and that he excused himself from his repeated promises to deliver it up by subterfuges and evasive pretenses, which varied at different times, but which all admitted, by implication, that Gass was entitled to be discharged. And, although the answer strenuously denies these allegations, I am not satisfied that, in this respect, as well as in some other respects, it stands sufficiently supported to give it entire credence.

But what I rely on is, that the answer itself admits that in the spring of 1832 (though not before) an application was made by Gass to Stinson, in Boston, to deliver up the old bond; and that he, Stinson, then stated to Gass that he could not, consistently with his duty as a public officer, give up the original bond without receiving another with a satisfactory surety; that James had proposed substitutes, but none were satisfactory; and he, Stinson, was ready to receive a sufficient substitute. The answer also admits that the brother of Gass did twice or thrice in Concord converse with him on the same subject, and for the same purpose. But it denies that he, Stinson, ever promised to give up the bond, unless all the accounts were settled by James, the balance paid, and the remaining property of the prison delivered over to him. Now, without stopping at present to consider whether the answer is, under all the circumstances, satisfactory on this head, it is material to state that here notice is actually brought home to Stinson, in the spring of 1832, of Gass' dissatisfaction, and of his desire to discontinue his suretyship, and to have the old bond given up. No objection whatsoever was made as to the form or manner of the notice; and the objection to the delivering up of the old bond (which was a very different matter from the termination of the suretyship) was put upon a distinct ground, not touched in the collateral agreement, and not required by it, viz., the giving of a new bond with new sureties. Stinson had no right to insist that the new bond should be given before the discontinuance of Gass' suretyship, whatever he might insist on before a delivering up of the old bond. I think, therefore, that Stinson must be taken to have dispensed with any formal notice in writing by Gass of his intention not to be held to any suretyship for the future conduct of James in his agency.

There is a letter of the 19th of April, 1832, from Stinson to James, which shows how earnestly Gass was at this time pressing his claim to deliver up the bond. It begins thus: "Mr. Gass is pressing us hard to give up the bond. We know not what to do. Has sent his brother, J. P. Gass, two or three times, to come and see us; says he shall come up this week himself, if the bond is not sent. Had you not better see him, and say to him to remain easy. I know of no cause of his requesting this. I suspect he is not satisfied, because you do not employ him to cut stone. So far as I am interested personally, I should feel easy with your own paper. But you know the duty we owe the state. I hope you may get some good man, and let Mr. Gass off, as he is so anxious, etc. I think, however, if you say to Gass, you shall settle up in June or July, and then will get some one else, if we require it, he will be satisfied—I think he ought." It is apparent from this letter that Stinson had not, at that time, any intention to revoke James' agency, or to close his accounts, or to insist upon the delivery up of the granite remaining in his hands. On the contrary, his object was to continue the agency, and to lull Gass into security.

On the 4th of June Stinson wrote a letter to Gass, in which he says: "On

my return home I looked to the bond, and also to the certificate given you by Mr. Thompson (the deputy warden), which specifies the bond to be given up on ten days' notice, providing the accounts be all settled, etc. By referring to the certificate you have of Thompson's, you will see it, as above stated. You know what I said to you, as to the propriety of our holding the bond, when I saw you the other day, and you yourself must be satisfied of the propriety of it. I am at a loss to know your anxiety to get it up, other than Mr. James' not employing you to prepare stone. Mr. Thompson or myself will be in Boston soon, and shall then settle with Mr. James, and relieve you of an unnecessary anxiety." On the same day Stinson wrote to James, and said: "After I saw you, Mr. Gass pressed me hard for the bond, and demanded it as a matter of right. I told him why and wherefore I wished it, and the reasons I stated to you, etc. I tried to make him quiet, but he said, if I did not send the bond, he should come up this week. Would it not be well for you to see him, and say to him that so soon as the New Orleans job was done, you should settle with us and discharge him. Of this course you will judge." On the same day Thompson also wrote to James and said, "Major Stinson wrote to-day to you about Gass; he also wrote to Gass. I think you need not be any worried about him, as he will be still, we think." Now, it seems to me clear from these letters, that Stinson was trying to lull Gass into security; that he was seeking to evade the just rights of Gass to a termination of his suretyship; and that he was postponing a final settlement of the accounts with James in order to answer his own particular purposes. There is a total silence in all these letters as to any existing claim against Gass under his suretyship.

If we pass from this documentary evidence to the testimonial evidence of the plaintiff, it is most manifest, if that evidence is believed, that Stinson had the fullest notice that Gass wished to discontinue his suretyship; that Stinson either had written notice thereof or waived it; that he admitted Gass had fully entitled himself to the exercise of this right; that he lulled Gass into the belief that he required no further notice; that he had no claim against Gass under the bond; and that he would surrender the bond to him. There is some portion of the testimony of the defendant's witnesses which is in conflict with the testimony of the plaintiff's witnesses on these points. But, after making every deduction, I am constrained to come to the conclusion that the weight of the evidence, as well as of the corroborative circumstances, is decidedly in favor of the plaintiff. It appears to me that the latest period to which the notice can be referred, and to which Gass' liability can be prolonged, is the close of the month of April, 1832. The subsequent retainer of Gass' bond was a violation of the reiterated promises made to him to deliver it up; and it was for purposes and under pretenses wholly beside any avowed intention to hold Gass responsible for any balance then due, or supposed to be due, from James. In short, the reasons assigned by Stinson for retaining the bond, according to the plaintiff's witnesses (to which I, on the whole, give credit), were of a nature wholly personal to Stinson, and excluded any notion of a continuing liability on the part of Gass.

§ 721. *Of the right of a surety to put an end to his obligation by notice.*

In cases of this sort, where a bond is given for the fidelity of a party for an indefinite period, I am aware that it has been supposed that at law the obligation created by the bond cannot be determined at the will of the surety by notice. That was intimated by Mr. Justice Bayley in *Calvert v. Gordon*, 7 Barn. & Cress., 809, and afterwards confirmed by the whole court, in the same

case, in 3 Mann. & Ryl., 124. That doctrine may well be maintainable at law. I am aware that the same doctrine seems to prevail in equity; for, in the case of Gordon v. Calvert, before the vice-chancellor (2 Sim., 253), and again in the same case, before the lord chancellor (4 Russ., 581), it seems to have been held that notice would not terminate the liability; and that it was no more a defense in equity than at law. I confess that I should yield with more reluctance to this latter doctrine, though I am by no means prepared to say that it is not maintainable. The case of Shepherd v. Beecher, 2 P. Will., 288, is distinguishable in several respects. In the first place, the father gave no notice that he would not be liable on the bond for the future delinquencies of his son, but only requested that the master would not trust him with any cash; at least that he would do it sparingly. In the next place, the bond was for the fidelity of the son during the specified term of his apprenticeship of seven years. But it was wholly unnecessary, in this case, to decide what would be the effect of notice generally in equity in the case of a bond for an indefinite period; because here it is a matter of express contract. And my judgment is that, taking all the circumstances together, all the parties understood that the liability of Gass as surety was terminated by a notice, sufficient for that purpose, at farthest at the close of the month of April, 1832; and that he ought not to be held responsible for any subsequent transactions under the agency of James.

§ 722. *Matters open at law may be inquired into in equity where the bill is brought for other purposes which a court of law is incompetent to adjudicate.*

It was suggested by the counsel for the defendant, in opening the argument, that the question as to the effect of the supposed change of the contract from a mere agency to a conditional purchase, or sale and return, was a defense open at law, and therefore not properly matter for equitable relief. That is true, if it constituted the whole matter of the bill. But the jurisdiction of a court of equity is invoked in this case for other purposes and other relief; for a discovery, for an injunction to the proceedings at law, and for other general relief upon all the merits, which a court of law is incompetent to administer. What I propose to do is to refer it to a master, to ascertain the state of accounts between Stinson and James upon the principles above stated, unless the parties agree to the statement annexed to the auditor's report in the suit at law. If nothing shall appear to be now due to Stinson from James, as a balance of accounts for any debts of the agency, contracted before the end of April, 1832, then Gass is entitled to be discharged altogether. If any balance is due, then he ought to be held liable therefor. Considering the suit at law as having been placed under the power of the court, for the purpose of administering substantial justice between the parties, it appears to me that that will be perfectly attained by accepting the auditor's report in that suit, and entering a joint judgment thereon against both James and Gass; and then to require Stinson to stipulate on record not to execute any execution issuing on the said joint judgment against Gass, except for such sum as the court shall direct to be levied by its own order indorsed on the execution.

SMITH v. UNITED STATES.

(2 Wallace, 219-237. 1864.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This case comes before the court upon a writ of error to the circuit court of the United States for the northern district of Illinois.

Suit was instituted by the United States, and the record shows that it was an action of debt on the official bond of Charles N. Pine, late marshal of the United States for the district where the suit was brought. Service was not made on the principal in the bond, nor on four of the sureties as named in the declaration. Of those served, three were defaulted, and the remaining three, Thomas Hoyne, B. William Snowhook and Ezekiel S. Smith, appeared and made defense. First two pleaded,—1, *non est factum*; 2, performance by principal. Smith filed separate pleas,—1, *nil debet*; 2, *non est factum*. Issue was joined upon those several pleas, and the parties went to trial. Verdict and judgment were for the plaintiffs, and the defendants excepted and sued out this writ of error.

I. Record shows that the plaintiffs, at the trial, offered the bond described in the declaration in evidence, to prove the issue on their part, but the defendants objected to the reading of the same as inadmissible, because, as they alleged, it had been altered by the erasure of the name of one of the sureties. Yielding to that objection, the plaintiffs called the district judge, and examined him as a witness. He testified to the effect that the bond, when it was brought to him for approval, was precisely as it appeared when offered in evidence, except that the names of the sureties were inserted by him in the introductory part of the instrument. His statement was, that it was brought to him for approval either by the marshal or his principal deputy, and that the erasure as described was there, just as it appeared at the time the witness was examined. Witness did not see the bond till it was brought to him for approval with the name erased; but he had previously been informed, both by the marshal and the person whose name was erased, that the latter had objections to having his name remain on the bond. Signatures of some of the parties not being known to the witness, he held the bond for several days after it was presented, and during that time all of the sureties, except the defendant Smith, came in and acknowledged its execution. Whereupon the witness approved the bond agreeably to the certificate in the record, which is under his signature. Substance of the certificate is that all of the parties to the instrument, except the defendant Smith, acknowledged the genuineness of their signatures; and that the district judge, being satisfied from his own knowledge and from evidence that the signature of Smith also was genuine, approved the bond. Being asked by the defendants if Smith had ever consented to the erasure, the witness answered that he had no knowledge upon the subject. Relying on the explanations given by the witness, the plaintiffs again offered the bond in evidence, and the court, overruling the objections of the defendants, admitted the same to be read to the jury, which constitutes the first exception of the defendants.

Certain treasury transcripts were also produced by the plaintiffs, exhibiting the official settlement of the accounts of the marshal at the treasury department, together with the statement of certain treasury warrants and drafts in his favor, showing a balance due to the plaintiffs. Evidence was then offered by the defendants tending to show that the settlement of the marshal's account as stated in the treasury transcripts was not correct. Most of the documents offered for that purpose were objected to by the plaintiffs, and were excluded by the court. Defendants excepted to the rulings in that behalf, but in the view taken of the case it will not be necessary to examine the questions which the exceptions present.

Having offered evidence upon the merits, they recalled the district judge, and examined him again as to the erasure. Among other things, he testified that,

before he approved the bond, the person whose name was erased told him that he had signed it with others for the marshal, and that he had become dissatisfied, and wanted his name taken off; that the marshal and his deputy had both agreed that his name should be erased, and that he was not willing that it should remain. Same parties also called and examined Philip A. Hoyne, whose name was erased from the bond. Material statements of the witness are that the bond was circulated for signatures by the principal deputy of the marshal, and that the witness signed it with others at that time; that he, the witness, became dissatisfied some days before it was approved, and requested to have his name erased, and that the marshal and his deputy promised to do it; that, not being able to get hold of the bond, he mentioned the subject to the district judge, and explained to him that he "could not consent to have it there at all." Suggestion of the judge was that he, the witness, in justice to the other signers of the bond, should see them and tell them what he wanted, and the witness stated that in a short time he spoke to all of them except defendant Smith, who was then absent, and told them that he wanted his name erased, and that he was not willing to let it remain there as one of the sureties. Erasure was made before the bond was approved, but when, or by whom, the witness did not know.

II. Theory of the defendant Smith was, that he was discharged from all liability on the bond in consequence of the erasure, and he accordingly wished the court to instruct the jury in substance and effect as follows: 1. That if the jury believed from the evidence that the name of P. A. Hoyne was erased from the bond in suit, without the knowledge or consent of the defendant, and that he did not acknowledge the bond as his, subsequent to such erasure, the jury should find the issue in his favor. 2. That the law places the burden of proving such consent upon the plaintiffs, and if they have failed to make such proof they are not entitled to a verdict. 3. That notice of the erasure to the district judge who approved the bond was notice to the government. But the court refused so to instruct the jury, and the defendant excepted.

III. Principal question for decision arises upon the exception of the defendant to the refusal of the court to instruct the jury as requested in the first prayer presented by the defendant. Tendency of the evidence plainly was to show that the person whose name was erased signed the bond before or at the same time with the defendant. Nothing else can be inferred from his own testimony, in which he states that he signed with others at the time the bond was circulated for signatures; and his ready acquiescence in the suggestion of the district judge, that in justice to the other signers he ought to see them and tell them what he wanted, strongly favors the same view. Testimony of the district judge also confirms that theory and makes it certain that all had signed before the erasure, and before any interview had taken place between him and the person whose name was erased. Record does not show who made the erasure, but the proof is satisfactory that the marshal and his deputy agreed to do it, and that it remained in the possession of one of them until it was presented to the district judge for approval.

Defendant insists that the erasure from the bond of the name of one of the sureties after Smith had signed it, and without his knowledge or consent and before the approval of the bond, was sufficient to discharge him from all liability. On the other hand the plaintiffs, although they concede that the erasure was after the defendant had signed the bond, and that it was done without his knowledge or consent, yet insist that, inasmuch as the erasure was made

before the bond was approved by the district judge, it left the liability of all concerned precisely as it would have stood if the person whose name was erased had only promised to sign and had not fulfilled his engagement.

§ 723. *The erasure of the name of one surety on a United States marshal's bond releases co-surety, although made before approval and acceptance of the bond by district judge.*

Proposition as stated may be correct as applied to all the sureties who subsequently appeared before the district judge, and acknowledged the bond as altered to be their deed, and it certainly is correct as to the person whose name was erased. Liability cannot attach to the person whose name was erased before the instrument was approved, and all those who subsequently consented to remain liable, notwithstanding the alteration, are estopped under the circumstances to interpose any such objection. They have waived the effect which the alteration in the instrument would otherwise have had, and consented to be bound, and therefore have suffered no injury. *Volenti non fit injuria*. Granting all this, still it must be borne in mind that the alteration in this case was made without the knowledge or consent of the defendant, and the case shows that he never appeared before the district judge and acknowledged his signature, or in any manner ever waived the right to insist that the instrument was not his deed. Materiality of the alteration is not denied, and the plaintiffs admit that it is apparent on the face of the instrument, but still they insist that inasmuch as the marshal, before he enters on the duties of his office, is required by law to become bound before the district judge with sufficient sureties for the performance of the conditions, it is clear that the bond is in no manner executed until it is presented to the district judge and is by him approved. 1 Stats. at Large, 87. Approval, say the counsel, is as essential to its execution as is the acknowledgment made in court to a recognizance, and the argument is that no alteration made in the instrument before such approval can have the effect to discharge any one of the sureties, unless it be shown that it was made with the knowledge or consent of the obligees. Reason for the conclusion, as suggested by the plaintiffs, is that, where the alteration precedes the approval, the presumption is that it was made by a stranger and not by the party seeking to enforce the obligation.

§ 724. — *authorities discussed.*

Support to the proposition, as stated, is attempted to be drawn from the case of *United States v. Linn*, 1 How., 112, and it must be confessed that there are expressions in the opinion of the majority of the court which give some countenance to that view of the law. Question in that case arose upon the demurrer of the plaintiffs to the plea of the defendants, and the judgment of the court was in fact based upon the ground that the allegations of the plea were insufficient to establish the defense. Alteration charged in that case was that the seals had been attached to the signatures after the instrument was signed and before it was delivered, and the allegations of the plea were that the alteration was made without the consent, direction or authority of the surety, but it was not alleged that it was done *without his knowledge*, or by whom it was done. Referring to those omissions in the plea, the court say that, in view of those circumstances, it was not an unreasonable inference that if the plea had disclosed by whom the alteration was made, it would have appeared that it did not affect the validity of the instrument. Much stress also was laid upon the fact that there was nothing upon the face of the instrument indicating that it had been altered, or casting a suspicion upon its validity, and the court held

that the burden of proving when and by whom the alteration was made, under the state of facts alleged in the plea, was properly cast upon the defendants. But the court admitted that a party claiming under an instrument, which appears on its face to have been altered, was bound to explain the alteration, and show that it had not been improperly made. Reference was also made by the court at the same time to two decided cases as asserting that doctrine, and it is clear that both the cases cited (*Henman v. Dickinson*, 5 Bing., 183; *Taylor v. Mosely*, 6 Car. & P., 273) fully sustain the position.

§ 725. — *burden of accounting for alteration appearing in a written instrument.*

General rule is, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection or is made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration. 1 Greenl. on Ev., 564. Exceptions to the rule undoubtedly arise, as where the alteration is properly noted in the attestation clause, or where the alteration is against the interest of the party deriving title under the instrument; but the case under consideration obviously falls under the general rule. *Knight v. Clements*, 8 Ad. & Ell., 215; *Newcomb v. Presbrey*, 8 Metc., 406. Every material alteration of a written instrument, according to the old decisions, whether made by a party or by a stranger, was fatal to its validity if made after execution, and while the instrument was in the possession and under the control of the party seeking to enforce it, and without the privity of the party to be affected by the alteration. *Pigot's Case*, 11 Coke, 27; *Master v. Miller*, 4 Term R., 380. Grounds of the doctrine, as explained in the early cases and by text writers, were twofold. First. That of public policy, which dictates that no man should be permitted to take the chance of committing a fraud without running any risk of losing by the event in case of detection. Secondly. To insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned. 2 Taylor on Ev., § 1618. Courts of justice have not always adhered to that rule, but the decisions of recent date in the parent country show that her courts have returned to the old rule in all its vigor. *Davidson v. Cooper*, 11 Mees. & W., 778; S. C., 13 id., 343; 2 Taylor on Ev., § 1624. Judge Story, in *United States v. Spalding*, 2 Mason, 482, condemned so much of the rule as holds that a material alteration of a deed by a stranger, without the privity of the obligor or obligee, avoids the deed, and the weight of authority in this country is decidedly the other way. He objected to the rule as repugnant to common sense and justice, because it inflicted on an innocent party all the losses occasioned by mistake or accident, or by the wrongful acts of third persons. 2 Pars. on Bills, 574; 1 Greenl. on Ev. (10th ed.), § 567, p. 749.

§ 726. *The alteration of an instrument in a material point by a party claiming under it renders it void.*

IV. Present case, however, does not depend upon that rule; nor, indeed, is it necessary to express any opinion as to what is the true rule upon the subject, except to say that where the alteration is apparent on the face of the instrument, the party offering it in evidence and claiming under it is bound to show that the alteration was made under such circumstances that it does not affect his right to recover. Pars. on Bills, 577; Greenl. on Ev. (10th ed.), § 564; *Knight v. Clements*, 8 Ad. & Ell., 215; *Clifford v. Parker*, 2 Mann. & G., 909; *Wilde v. Armsby*, 6 Cush., 314. Defense in this case, as exhibited in the prayer

for instruction, was based not only upon the ground that there was a material alteration in the bond, but also upon the ground that the defendant was a surety, and, consequently, both considerations must be kept in view at the same time. True inquiry, therefore, is, what is the rule to be applied in a case where it appears that the contract of a surety has been altered without his knowledge or consent, and where it appears that the effect of the alteration is to augment his liability? Mr. Burge says that an alteration in the obligation or contract, in respect to which a person becomes surety, extinguishes the obligation and discharges the surety, unless he has become, by a subsequent stipulation, a surety for, or has consented to the contract as altered. *Burge on Suretyship*, p. 214. Same author says, if there be any variation in the contract made without the consent of the surety, and which is, in effect, a substitution of a new agreement, although the original agreement may, notwithstanding such variation, be substantially performed, the surety is discharged. *Evans v. Whyte*, 5 Bing., 485; *Archer v. Hale*, 4 id., 464; *Eyre v. Bartrop*, 3 Madd., 221; *Bonser v. Cox*, 6 Beav., 110; *Archer v. Hudson*, 7 id., 551. Authorities are not necessary to show that the alteration in this case was a material one, as it obviously increased the liability of the defendant; and, in case of the default of the principal and payment by the defendant, diminished his means of protection by the way of contribution; and the rule is universal that the alteration of an instrument in a material point by the party claiming under it, as by inserting or striking out names without the authority or consent of the other parties concerned, renders the instrument void unless subsequently approved or ratified. *Boston v. Benson*, 12 Cush., 61.

§ 727. *A surety to an instrument is discharged by an alteration of it without his consent.*

Responsibility of a surety rests upon the validity and terms of his contract, but when it is changed without his knowledge or authority it becomes a new contract and is invalid, because it is deficient in the essential element of consent. Where, after the execution of a bond by the principal and the surety, conditioned for the performance by the former of his duty as collector in certain townships, the name of another township was added with the consent of the principal, but without that of the surety, this court held, in *Miller v. Stewart*, 9 Wheat., 702 (§§ 729–735, *infra*), that the latter was discharged from all obligation, because the duties imposed by the instrument in its altered state were not those for the performance of which he had made himself responsible, and that the defect could not be cured by declaring on the condition as it originally stood. Opinion of the court was given in that case by Judge Story, and his remarks upon the subject are decisive of the question under consideration. Indeed, nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal.

§ 728. — *authorities reviewed.*

When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle, says Chancellor Kent, is well settled that the case must be brought strictly within the guaranty, and the liability of the surety cannot be extended by implication. 3 Com. (10th ed.), 183; *Birkhead v. Brown*, 5 Hill, 635. Liability of a surety,

say the court in *McClusky v. Cromwell*, 1 Kern., 598, is always *strictissimi juris*, and cannot be extended by construction; and this court, in the case of *Leggett v. Humphreys*, 21 How., 76 (§§ 486–488, *supra*), adopted the same rule, and explicitly decided that a surety can never be bound beyond the scope of his engagement. *United States v. Boyd*, 15 Pet., 208 (§§ 409–411, *supra*); *Kellog v. Stockton*, 29 Penn. St., 460. Argument is unnecessary to show that a variation of the contract was made in this case, because it is admitted, and it is equally certain, that the person whose name was erased is fully discharged, and, consequently, that the plaintiffs cannot declare upon the original obligation as it stood before the alteration was made. Neither a court of law or equity, said this court in *McMicken v. Webb*, 6 How., 296, will lend its aid to affect sureties beyond the plain and necessary import of their undertaking, nor add a new term or condition to what they have stipulated. Sureties must be permitted to remain in precisely the situation they have placed themselves, and it is no justification or excuse with another for attempting to change their situation to allege or show that they would be benefited by such change. Such, say the court in that case, is the doctrine in England, in this court, and in the state courts, and the authorities cited fully justify the remark. Whenever the contract is varied, whether by giving time to the principal or by an alteration of the contract, it presents a new cause of action to which the surety has never given his assent, and with which, therefore, he has nothing to do. *Gass v. Stinson*, 2 Sumn., 452 (§§ 716–722, *supra*).

Evidence shows that the alteration was made without the knowledge of the defendant, and there is neither fact nor circumstance in the case from which to infer any subsequent assent. Undoubtedly he knew, when he signed the bond, that the law required that it should be approved by the district judge, but his knowledge of the law in that behalf furnishes no ground of inference that he authorized the alteration or that he consented to be bound in any other manner or to any greater extent or under any other circumstances than what was expressed in the instrument. Supreme court of Massachusetts held, in the case of *The Agawam Bank v. Sears*, 4 Gray, 95, that a surety did not authorize the principal to make a material alteration in the note by permitting him to take it to the bank for discount, and that such an unauthorized alteration discharged the surety; and where two sureties signed a probate bond subject to the approval of the judge of probate, and it was subsequently altered by the judge of probate by increasing the penal sum, with the consent of the principal but without the knowledge of the sureties, and was then signed by two additional sureties who did not know of the alteration, and then was approved by the judge of probate, the same court held that the bond, though binding on the principal, was void as to all the sureties. See, also, *Howe v. Peabody*, 2 Gray, 556; *Burchfield v. Moore*, 25 English Law and Equity, 123. Analogous as those cases are, however, they are not as directly in point as that of *Martin v. Thomas*, 24 How., 315, which is the latest decision upon the subject pronounced by this court. Suit in the court below, in that case, was against the sureties in a replevin bond. Statement of the case shows that the bond was given by the defendant in replevin with sureties to obtain the return of the property which was the subject of the replevin suit. Defendant subsequently erased his name from the bond with the consent of the marshal but without the knowledge or consent of the sureties, and this court held that the bond was thereby rendered invalid against the sureties. Principle of these decisions is that the alteration varies the terms of the obligation, and that the contract thereby ceases to be

the contract for the due performance of which the party became surety, and wherever that appears to be the fact and the surety is without fault he is discharged.

Correct rule, we think, is stated by Lord Brougham in *Bonar v. Macdonald* (1 Eng. L. & Eq., 1), and which is substantially the same as that adopted by Mr. Burge in his treatise on surety. Substance of the rule is, that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety, upon the principle of the maxim *non hæc in fœdera veni*. Intentional error cannot be imputed to the district judge, but the undisputed facts show that the erasure was made after the defendant signed the instrument and before its approval, and without the knowledge or consent of the defendant. For these reasons we are of the opinion that the first prayer for instruction, presented by the defendant, should have been given. Judgment of the circuit court, therefore, is reversed, and the cause remanded, with direction to issue a new venire.

MILLER v. STEWART.

(9 Wheaton, 681-719. 1824.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of New Jersey.

STATEMENT OF FACTS.—Miller was a collector of direct taxes and internal revenue, and, by authority of law, appointed Ustick his deputy for eight townships. Ustick gave a bond for the faithful discharge of his duties as deputy collector within the said eight townships, which were named in the bond. Stewart was a surety on the bond. After the execution of the bond, but before Ustick had acted under his appointment, another township was added by interlineation, with the consent of Ustick, but without the knowledge of Stewart. The question is, whether the change released Stewart.

§ 729. *The liability of a surety cannot be extended by implication beyond the terms of his contract.*

Opinion by MR. JUSTICE STORY.

Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. The class of cases which have been cited at the bar, where persons have been bound for the good conduct of clerks of merchants, and other persons, illustrate this position. The whole series of them from *Lord Arlington v. Merricke*, 2 Saund., 412, down to that of *Pearsall v. Summersett*, 4 Taunt., 593, proceed upon the ground that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. Therefore, where an indemnity bond is given to partners by name, it has constantly been held that the undertaking stopped upon the admission of a new partner. And the only case, that of *Barclay v. Lucas*, 1 Term R., 291, note *a*, in which a more extensive construction is supposed to have been given, confirms the gen-

eral rule; for that turned upon the circumstance that the security was given to the house as a banking-house, and thence an intention was inferred that the parties intended to cover all losses, notwithstanding a change of partners in the house.

§ 730. *A surety is not liable for defaults under an appointment to office which is a material alteration, without his consent, of that as to which he undertook. (a)*

Now, what is the purport of the terms of the present condition? The recital stated a special appointment which had then been made by Miller, of his deputy for eight townships, particularly named. It was not a case of several distinct appointments for each township, but a single and entire appointment for all the townships; and the condition is that Ustick has, and "shall continue, truly and faithfully to discharge the duties of said appointment, according to law." Of what appointment? Plainly the appointment stated in the recital to which the condition refers, and to which it is tied up; that is to say, the appointment already made and executed for the eight townships. If this be the true construction of the condition, and it seems impossible to doubt it, then the only inquiry that remains is whether any money unaccounted for was received under that appointment. To this the plea answers in the negative, unless the subsequent alteration of the instrument created no legal change in the appointment. To the consideration of this point, therefore, the attention of the court will be addressed. And in the first place, upon principle, how does the case stand? Can it be affirmed that the alteration wrought no change in the appointment? This will scarcely be pretended. In point of fact, the first appointment was for eight townships only; the alteration made it an appointment for nine townships. It is not like the case where an appointment is made for eight townships, and another distinct appointment is made for the ninth; for then there are, in legal contemplation, two distinct and separate appointments. But here the original appointment is extended; it was one and entire when it included eight townships; it is one and entire when it includes the nine. Can it then be legally affirmed to remain the same appointment when it no longer has the same boundaries? An appointment for A. is not the same as an appointment for A. and B. In short, the very circumstance that there is an alteration in the appointment, *ex vi termini*, imports that its identity is gone. If an original appointment is altered by the consent of the parties to the instrument, that very consent implies that something is added to or taken from it. The parties agree that it shall no longer remain as it was at first, but that the same instrument shall be, not what it was, but what the alteration makes it. It shall not constitute two separate and distinct instruments, but one consolidated instrument. A familiar case will explain this. A. gives a note to B. for \$500; the parties afterwards agree to alter it to \$600. In such case the instrument remains single; it is not a note for \$500 and also for \$600, involving separate and distinct liabilities, but an entire contract for \$600, and the obligation to pay the \$500 is merged and extinguished in the obligation to pay the \$600. To bring the case nearer to the present; suppose there was a bond given as collateral security to pay the note of \$500; it will scarcely be pretended that the alteration would not extinguish the liability under the bond. The instrument would indeed remain, but it would no longer possess its former obligation and identity. Nothing can be better settled than the doctrine that if an obligation be dependent on another obligation (and by parity of reasoning upon the legal existence of another instrument), and the latter be discharged or become void, the former is

(a) The same ruling was made in the lower court. *Miller v. Stewart*, * 4 Wash., 26.

also discharged. Sheppard, in his Touchstone, p. 394, puts the case, and illustrates it by adding: "As if the condition of an obligation be to perform the covenants of an indenture, and afterwards the covenants be discharged or become void; by this means the obligation is discharged, and gone forever." It is not denied at the bar that the same would be the legal operation in the present case if there had been an actual revocation of the first appointment or an extinguishment of the instrument of appointment. But the stress of the argument is that here there was an enlargement, and not an extinguishment, of the appointment; that the consent of the immediate parties being given to the alteration, it remained in full force with all its original validity as to the eight townships. We cannot accede to this view of the case. After the alteration was made, it is as between the parties to be considered by relation back, either as an original appointment for the nine townships, or as a new appointment for the nine townships from the time of the alteration. It is immaterial to the present decision whether it be the one or the other, for in either case it is not that appointment which the defendant Stewart, referred to in the condition of the bond, and in respect to which he contracted the obligation. It is no answer to say that it is not intended to make him liable for any money except what was collected in the eight townships. He has a right to stand upon the terms of his bond, which confine his liability to money received under an appointment for eight townships; and the pleadings admit that none was received until the appointment was altered to nine. It will scarcely be denied that if, upon the agreement to include the ninth township, the original instrument had been destroyed, and a new instrument had been executed, the obligatory force of the bond would, as to the surety, have been gone. And in reason or in law, there is no difference between that and the case at bar. The alteration made the instrument as much a new appointment as if it had been written and sealed anew. It is not very material to decide whether the alteration operated by way of surrender or as a revocation, or as a new appointment superseding the other. It was, to all intents and purposes, an extinguishment of the separate existence of the appointment for the eight townships.

This point is susceptible of still further illustration, from considerations of a more technical nature. The act of congress of the 22d of July, 1813 (3 Stats. at Large, 30), c. 16, s. 20, under which this appointment was made, provides "that each collector shall be authorized to appoint, by an instrument of writing under his hand and seal, as many deputies as he may think proper," etc. The appointment must, therefore, be by deed; and the effect of an alteration or interlineation of a deed is to be decided by the principles of the common law. Now, by the common law, the alteration or interlineation of a deed, in a material part, at least, by the holder, without the consent of the other party, *ipso facto* avoids the deed. It is the consent, therefore, that upholds the deed after such alteration or interlineation. The reason is, that the deed is no longer the same. The alteration makes it a different deed; it speaks a different language; it infers a different obligation. It must, then, take effect as a new deed, and that can only be by the consent of the party bound by it. Whether, by such consent, the deed takes effect by relation back to the time of original execution, or only from the time of the alteration, need not be matter of inquiry, because such relation is never permitted to affect the rights or interests of third persons, and cannot change the posture of the present case. If the deed, after the alteration, is permitted to have relation back, it is not the same deed of appointment recited in the condition, and to which the obligation is limited, for

that is an appointment for eight townships. If it has no such relation, then it is a deed of appointment made subsequent to the bond, and of course not included in its obligation. It cannot be at one and at the same time a deed for eight, and also a deed for nine townships; and the very circumstance that it is the one excludes the possibility of assuming it as the other. In truth, the assent of the parties to the alteration carries with it the necessary implication that it shall no longer be deemed an appointment for eight townships only; and the same consent of parties which created is equally potent in dissolving the deed and changing its original obligation. It is no objection that, to constitute a new deed, a redelivery is necessary; for if it be so, the consent to the alteration is in law equivalent to a redelivery. Nor is it necessary that a surrender or revocation should be by an instrument to that effect. It may be by matter *in pais*, or by operation of law. Every erasure and interlineation in the deed, by the obligee or appointee, without consent, is a surrender; and a revocation may be implied by law. The passage cited at the bar from Co. Lit., 232 (a), establishes that if the feoffee, by deed of land, grants his deed by parol to the feoffor, it is a surrender of the property as well as of the deed. And if in this case the deed of appointment had been delivered up to the collector, it would at once have operated as a surrender by the deputy, and a revocation by the collector.

§ 731. *The revocation or surrender of the appointment of a deputy collector without public notice thereof will release his sureties.*

An objection has been urged at the bar, against this doctrine, that the act of congress giving the authority to the collector to appoint deputies also authorizes him "to revoke the powers of any deputy, giving public notice thereof in that portion of the district assigned to such deputy." Hence it is argued that no revocation can be, unless by public notice. But this is certainly not the true interpretation of the act. The very terms suppose that the revocation is already made, as between the parties, and the notice is to be given of the fact. The object of the legislature was to protect the public from the mischief of payments to the deputy after his powers are revoked. It requires public notice to be given of the revocation, so that no future imposition shall be practiced; and if the collector should make a private revocation, without any public notice, the legal conclusion would be that all payments made to his deputy, in ignorance of the revocation, ought to be held valid; for no man is entitled to make his own wrongful omission of duty a foundation of right. But as between the parties, a revocation or surrender, if actually made, would be, to all intents and purposes, binding between them, and release the sureties to the bond from all future responsibility. Upon the whole, the opinion of the court is that the fourth plea in bar is good, and that the demurrer thereto ought to be overruled; and this opinion is to be certified to the circuit court.

Dissenting opinion by MR. JUSTICE JOHNSON, TODD, J., concurring.

My brother Todd and myself are of opinion that the merits of this cause have been misconceived, the points on which it turns misapprehended, and the law of razures, if correctly laid down according to the law of the present day, erroneously applied to this cause.

§ 732. *A plea to debt upon a bond must identify an altered deed of appointment with the deputation named in the condition.*

The condition of Stewart's bond to the plaintiff recites no particular deed of appointment under which Ustick was constituted deputy collector; nor is

there an iota in the bond or in the declaration that can identify the deed set forth in the plea with the deed under which Ustick held his deputation. The condition of the bond simply states: "Whereas, E. M., collector, as aforesaid, hath, by virtue of authority vested in him by the laws of the United States, appointed U. deputy collector," etc. It is the plea that specifies a deed of a particular date, and then proceeds to set forth a rasure in avoidance of that deed; but it contains no averment that the deed so set forth is the same under which U. held the deputation under the plaintiff, referred to in the condition. That the plea is faulty, and, even with the averment, might have been the subject of a special demurrer, cannot now be doubted; for it amounts to the general issue; and the general issue was the legitimate plea in this case. *Pigot's Case*, and *passim*. But we also hold it bad, in its present form, upon a general demurrer; for, unless the deed so pleaded was duly identified by the pleadings with that under which Ustick was constituted deputy, the plaintiff was not bound to answer it. We cannot conceive how the defendant can have judgment, in the present state of the pleadings, unless under the idea that the demurrer cures the failure to identify the deeds. This, however, cannot be sustained, since the want of identification is, in itself, a sufficient ground of demurrer. Indeed, we see no sufficient ground for admitting that the condition of the bond implies a deputation by deed at all. It is true that the twentieth section of the act under which this collector was appointed authorizes him to appoint deputies, under his hand and seal; and, as far as was necessary to enable the deputy to act against individuals, unquestionably the solemnities of a deed were requisite to constitute him a deputy collector. But the demand in this action is for money received by him, and not paid over, and, surely, a deputation of a less formal kind would have enabled him to bind his principal as to the actual receipt of money; so that the words of the condition do not necessarily imply a deputation by deed. He is expressly authorized, in this twentieth section, to act for himself in collecting the revenue, and he could, therefore, act by his servant or deputy, constituted in a less solemn way than by deed, so far as to involve himself with the government.

But if a deed is to be implied from the condition, surely not this particular deed; and though a deed of a date antecedent to the bond is to be implied, it may have preceded it by a month, and yet the act and the condition of the bond both be complied with. But what form shall be presumed or implied to the deed? Why may it not have been several as to each county, or have comprised two or more? and why may not a dozen deeds, of the very date and form of this, have been in existence at the same time? A defendant who, like the present, places his defense upon the very highest stretch of legal rigor, cannot complain if he has the same measure meted out to himself.

§ 733. *An interlineation enlarging the district as to which a deputation to an office is made does not imply a revocation of the original appointment.*

But if this ground is to be got over, and we are to consider the bearing of the facts pleaded upon the law of the case, we then say that they imply no revocation of the deputation to Ustick, against which this defendant entered into the contract of indemnity. It is the intent that gives effect to the acts of parties; nothing was further from the minds of the parties here than the distinction of the power of Ustick, as to the eight counties, at the time of this interlineation. The plea avers no such intent, and as well might a delivery of a deed for perusal be tortured into a surrender and extinction of it, and its return into a revocation, as the acts of these parties respecting this interlineation

be construed into a revocation and redelivery. *Non constat*, from anything that appears in the plea, that the paper ever passed from the hands of the party legally holding it. It was unnecessary, upon the facts stated, that it should so pass; in fact, no redelivery is averred in the plea, nor any one of the formalities necessary to re-execution. It cannot be denied that this part of the defense savors too much of a perversion of the solemnities and rules of the law. It is a catch upon the unwary, an effort to attach to men's acts consequences which are directly negated by their intentions.

§ 734. *The identity of a deed of appointment to office is not destroyed by interlining other territory.*

As to the idea of the identity of this instrument being destroyed by the interlineation, we consider it as springing out of an incorrect view of the nature of the instrument and of the circumstances that fix its identity. It is not one entire thing, but a several deed for each county. A deputation as to the county of A. is not a deputation as to the county of B., although written on the same paper, and comprised within the same words; it is as much a several deed as to each county as if written on several sheets of paper; as much as a policy of insurance is the several contract of each underwriter, or as a bond would be the several deed of as many individuals as executed it, if it be so expressed, making them, if such be the letter of it, severally liable, and for various sums, no one for another. Interlining another county then, left it still the original deed as to each county taken severally, and only operated as the creation of a new power as to another county, if, in fact, as there is no averment of a subsequent delivery, it was anything more than a mere nugatory act. Such is certainly the good sense of the law upon the subject, and it is supported, we conceive, by respectable opinions and by adjudged cases. Chief Baron Gilbert, in treating on this topic, observes, "But if any immaterial part of the contract be added after sealing and delivery, as, if A., with a blank left after his name, be bound to B., and after C. is added as a joint obligor, this does not avoid the bond, because this does not alter the contract of A., for he was bound to pay the whole money without such addition." 1 Loft's Gilb., 111; Ventris, 185. And the case of *Zouch v. Clay*, which he quotes, as reported in Ventris, undoubtedly sustains his doctrine, for there the court overruled the plea of *non est factum* on the interlineation on the ground that the bond remained the same as to him.

In this case the bond emphatically remained the same as to this defendant, for he was still liable only as to the eight counties and no more, and was so guarded as to make it impossible that the interlineation of a thousand other counties could alter or increase his liability, since the names of the counties are inserted in the condition specifically. As to his liability, and as to its influence upon the power conferred in the eight counties, this interlineation was altogether insignificant, no more than a dash of the pen, and could have done him no more injury. There is nothing in the argument which would attach importance to it on the ground of producing difficulty and confusion—it has been said even impracticability in rendering the accounts of this deputy. It is begging the question and urging the very thing as a difficulty which the plaintiff proffers to execute. He claims a sum collected in the eight counties specified, and no more, and unless he can prove so much collected in the eight original counties, it is very clear that he cannot have a verdict. But is he to be prejudiced? Is he not to be permitted to make out the case which he offers to prove? Nor is there any more weight in the argument, that "although the defendant may

have been willing to indemnify against eight counties, it does not follow that he would undertake to indemnify against nine." No one pretends to charge him with nine counties. Surely there was nothing in the contract to preclude the plaintiff from extending his deputation to this individual over his whole district had he thought proper. Could a separate deed as to the ninth county have been pleaded as a defense? There is no charge of positive injury in this plea, it will be observed, nor do the facts admit a suspicion of fraudulent intention. The sole effect of the interlineation was to confide in U. to collect in another county without giving security. The defense rests upon certain inferences from or consequences imputed to the naked act of interlining the word "Willingborough," without even averring the acts necessary to make the instrument a deed as to that county or the intent to revoke or re-execute the deed as to the residue. To us it appears that it ought no more to affect the rights of the parties than interlining the name of a region beyond the Atlantic or a mere dash of the pen.

§ 735. *Law of razures discussed.*

On the subject of razures we would remark it is to be regretted that this plea had not been specially demurred to, that the question might have been taken from the court and sent to the jury. There is no doubt that they might have found this deed several in its nature as to each county, and, therefore, unaffected by the addition of another. The tendency of the decisions has been to carry such questions to that tribunal; and, notwithstanding some contrariety of *dicta*, it is now clearly settled that a rasure must make a deed void or it is immaterial, and, therefore, *non est factum* is held to be the proper plea. Chief Justice Holt has declared any other form of taking advantage of a rasure impertinent (6 Mod., 215), and the rule is not now to be doubted. But as to the principle upon which a rasure avoids a deed, it is not too much to say that the law of the subject appears to have got into some confusion. Modern decisions, particularly of our own courts, lean against the excessive rigor with which some writers and some cases disfigure it. In the case of *Cutts v. The United States*, 1 Gall., 69 (§§ 22-25, *supra*), a bond that had been canceled and mutilated, the seal torn away by the joint act of the defendant and the plaintiff's bailee, was still held, and rightly held, to be sustainable as the deed of the party. In the case of *Speake v. United States*, 9 Cranch, 28 (§§ 37-39, *supra*), a bond was sustained, notwithstanding the striking out of one joint and several co-obligor in the absence of the others and the insertion of another. And so as to revenue bonds, there is not a court of the United States which has not sustained them against the plea of *non est factum*, notwithstanding that both sum and parties have been inserted after the execution by one of the obligors, and this, in his absence, because the contract was not altered, and the good sense of the law prevailed against its technicalities.

There is a great paucity of decisions, in modern times, on the subject of razures and interlineations. If we mount to its origin, we find it in the year-books, and in Perkins, who cites them, given as the ground of suspicion and inquiry. And so, unquestionably, it ought to be, and frauds or mutilations, to which the parties having the custody of deeds are privy, cannot be taken too strongly against them. But when we encounter the doctrine, as laid down in *Pigot's Case*, 11 Coke, 27, "that when a deed is altered in a point material, by a stranger, without the privity of the obligee, even by drawing a pen through the midst of a material word, that it shall be void," without reference to the fraud, privity or gross negligence of the obligor, it certainly is time to pause;

and I highly approve of the hesitation of my brother Story, in Cutts' case, as to the authority of Pigot's case. As an adjudication, the value of that case should be limited to the single point, "that an immaterial interlineation, without the privity or command of the obligee, does not avoid the bond." The case does not call for the decision of another point, for it is upon a special verdict, and that the only question submitted. Yet the reporter, who seldom lets an opportunity escape him that furnishes an apology for exemplifying his indefatigable research, makes it authority for a score of positive decisions, and the introduction to a mass of law, upon questions totally distinct. But it should be noted of this learned judge that his reports, like the text of Littleton, are only to be considered as the occasion or excuse for displaying his acquirements in the law learning of his day, and expressing his opinions upon juridical topics.

It is certainly true that some of the decisions in the books have carried this doctrine a great way. As, for instance, the case of the lease of the Dean of Pauls, in which the counterpart expressed a rent of 27*l.*, and the tenant altered his deed from 26*l.* to 27*l.*, to make it accord with the counterpart and the true contract. Yet it was held to avoid his lease. 2 Roll. Abr., 29; Cro. Eliz., 627. But the utmost that can be made of these cases is that they apply to those instances in which the deed is, necessarily, an entire thing; and the reason assigned is that the witness can no longer testify to the deed as the deed which he saw delivered. Surely, this reason is not applicable to the present case; for, let the witness be examined upon this instrument as to the county of A., as introductory to the proof of the money collected in A., and so on as to the counties of B., C. and D., and what is to prevent his proving the execution of this deed? That which may just as well have been executed in as many detached sheets of paper as there are counties certainly has nothing of necessary entirety or indivisibility in its nature. Any other rule, as applied to this case, would, we conceive, be permitting frauds to be covered by a principle which was intended to prevent frauds.

Certificate for the defendant.

UNITED STATES v. CORWINE.

(Circuit Court for Ohio: 1 Bond, 839-845. 1860.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is an action of debt against Richard M. Corwine, John A. Corwine and Wm. Wiswell, Jr., as the sureties of Waldo Putnam Craig and William Russell Righter. There is a general demurrer to the declaration on which the questions submitted to the court are presented. The declaration avers that on November 13, 1856, the defendants executed a bond to the United States, in the penalty of \$75,000, to be void on the condition that the said Craig and Righter should faithfully fulfil their written contract of the same date, whereby they agreed to open a straight ship channel at the outlet of the Mississippi river, known as the *Pass de l'Outre*, to a depth of twenty feet, throughout a well defined width of three hundred feet, to the deep water of the Gulf of Mexico, and keep the same open to the same width and depth for a period of four and a half years from the time of the completion and acceptance of the work. It is further averred that by the said contract Craig and Righter were to finish the work within fifteen months from the said November 13, 1856, and that upon its completion to the satisfaction of the secretary of war, the United States was to pay them \$125,000. The declaration

also avers that, in consideration of the agreement of said Craig and Righter to keep open the said channel as above stated, the United States agreed to pay them \$36,000 for the period of four and a half years, and at the same rate for the further time they should keep said channel open, until the appropriation for that purpose should be exhausted. It is also recited as a part of said contract, that in order to determine whether the agreement to keep open the said channel had been complied with, the secretary of war should appoint an officer or officers to examine the work at such time as he might deem necessary; and that, if the secretary should be satisfied from the report of such examinations that the channel had been constantly maintained of the width and depth before stated, at the expiration of one-third of said period of four and a half years, eighty per cent. of one-third of the amount of the contract to keep said channel open was to be paid to said Craig and Righter, and one-third more at the expiration of two-thirds of the said time, and the balance at the end of said four and a half years.

The declaration then avers that Craig and Righter proceeded to execute said contract to open said channel; and that on September 10, 1858, they had opened the same at the width of three hundred feet and with the depth of eighteen feet; and that on that day the work was accepted by the secretary of war, and the contract price of \$125,000 was then paid in full. The breach of the condition of the bond as assigned is that Craig and Righter, since the said September 10, 1858, have not kept the said channel open with a width of three hundred feet and the depth of eighteen feet, and that thereby an action has accrued against the defendants, as the sureties of Craig and Righter. The second count of the declaration is upon a bond which recites a contract identical with that set forth in the first, with the exception that it refers to the opening of another channel at the mouth of the Mississippi. There is, of course, no occasion for the separate consideration of the two counts.

It is not my purpose to examine all the points of exception to the declaration urged in support of the demurrer. There is one which, in my judgment, is conclusive as to the plaintiff's right to recover against these defendants on the cause of action set out in the declaration. The point of this exception may be stated thus: That the declaration shows on its face that Craig and Righter did not perform their agreement for opening the channel, according to its terms, and that the government accepted the work with a channel of only eighteen feet in depth, instead of twenty, as required by the contract, without any averment that the defendants had any knowledge of or assented to such modification. On this ground, it is insisted, the sureties in the bond are relieved from all liability, and that this action cannot be maintained against them.

§ 736. *If the government accepts a work for the execution of which a bond was given, a surety therein is discharged.*

The contract, as has been stated, obligated Craig and Righter to make the channel of a specified width and depth, and keep it open, of that width and depth, for four and a half years from the time of the acceptance of the work by the secretary of war. The defendants became their sureties in a bond conditioned for the faithful performance of these stipulations. The work was accepted by the secretary of war and paid for in full, as if completed according to the contract. The government had a right to forego the terms of the contract in regard to the depth of the channel, and to accept one of less depth. In doing this the obligation of the contract as to the dimensions of the channel

was at an end, both as to the principals and the sureties, and the government was estopped from asserting any claim for a violation of that part of the contract. It was, in effect, the substitution of a new contract for that originally entered into by the parties. But it is claimed that the defendants, as sureties, are liable upon the averment in the declaration that Craig and Righter failed to keep open the channel as accepted by the United States. There seems to be an incongruity between the contract set out in the declaration and the averment of its breach. In other words, the declaration avers a breach of a contract, for the performance of which these defendants contracted no obligation as sureties. Their undertaking was that a channel twenty feet in depth, made in all respects according to the requirement of the contract, should be kept open for a specified time. The United States waived that part of the contract which specified the depth of the channel, and accepted the work with a channel of a less depth. The sureties are in no sense parties to this arrangement, and therefore not bound by it.

§ 737. *Nature and limits of the liability of a surety.*

There is no principle better settled than that a surety is not bound beyond the terms of his contract and that his liability cannot be extended or enlarged by implication; and any change in its terms, unless expressly assented to by him, releases him from his legal responsibility. This is familiar law; so long and so well settled that it is not necessary to cite the numerous cases by which it is sustained. Its application to the present case is so apparent as not to admit of doubt or controversy. As already stated, these defendants, as sureties, guarantied that Craig and Righter should maintain a channel of a specified depth. The bond to which they were parties, though executed at the same date of the execution of the contract, could not take effect, so far as it related to keeping the channel open, until the channel was excavated as required by the contract. The averment of the declaration, however, is that such a channel has not been made, and was not insisted on by the government. It follows, as an inevitable conclusion, that the condition on which alone the sureties became bound for the maintenance or continuance of the channel, and on which their obligation was to attach, did not occur. There never was a channel of twenty feet depth, and their undertaking to keep it open was never operative, and is of no obligation on them. The contract provided that the work should be inspected by an officer to be appointed by the secretary of war; and if it appeared from his report "that the work has been properly executed, and that a straight channel of the above width and depth actually exists," it was to be paid for; but if it should be found "that the work had not been completed agreeably to the contract," the contractors were to receive no pay for what they had done. It is clear, therefore, that the acceptance of the work by the government before a channel was opened, as required by the contract, left nothing on which the guaranty of the sureties could operate.

This view would seem to be decisive of the question raised on this demurrer, and it is not a material inquiry whether the interference of the government, and its acceptance of the work not executed according to the contract, could affect, injuriously or otherwise, the interests of the sureties. The only ground on which it is claimed that the sureties are liable is, that the acceptance of the work in its incomplete state has not placed them in any worse condition than if the contract had been strictly complied with, and that their liability on their undertaking that the channel should be kept open continues unaffected by the act of the government. The first reply to this assumption is, that any change

in the terms or obligation of a surety, without his consent, releases him from liability. And it is well settled that this principle applies, even in cases where a modification of the contract is favorable to the sureties. But in this case, if it be conceded that the government had a right to waive a strict performance of this contract on the part of Craig and Righter, and to insist on the continued legal liability of the sureties, for the reason that they were not injured by the act of the government, the facts will not sustain the position. Their obligation was that the contractors should keep open a channel of the depth of twenty feet. Now, it needs no argument to prove that a channel of only eighteen feet in depth would be much more liable to fill up or become obstructed than if it were twenty feet deep. The pressure of the water being so much greater in the latter case, the probabilities that the channel would fill up would be greatly lessened; in a word, there is a palpable difference in an undertaking to maintain an open channel made to the depth of twenty feet, and one but eighteen feet deep.

I will only add that while, in my judgment, the law of the case is with these defendants, and am clear that this action cannot be maintained against them, I am equally clear that no claim of justice is invaded by holding them to be exempt from liability. Under the circumstances of the case, an opposite conclusion would operate inequitably on them. There was a moral obligation on the government to protect the rights of these sureties as far as practicable, without a sacrifice in its own interest. Under the contract, the government was not bound to pay anything for the work, unless it was completed according to the terms of the contract. If, without consulting the sureties, it was deemed expedient to pay the full contract price for the excavation of a channel but partially made, they are fully justified in asserting their exemption from liability. And it would be a most rigorous application of law that would enforce the payment of the penalty of their bond. But without further discussion of the points presented on this demurrer, I am led unhesitatingly to the conclusion that it must be sustained.

CRAWFORD v. DEXTER.

(District Court for Nevada: 5 Sawyer, 201-205. 1878.)

STATEMENT OF FACTS.—Dexter was a sub-mail contractor under one Smith. Plaintiff is the assignee in bankruptcy of Ullrick. Dexter entered into a contract with Ullrick and Wright, under which the latter were to receive \$1,800 per annum for carrying the mail over a certain route once a week. The interest of Wright was transferred to Ullrick before the bankruptcy of the latter. Dexter entered into a bond, with five sureties, for the faithful performance of the contract on his part. Ullrick, and after his bankruptcy his assignee, performed the contract on his part, and this suit is brought on the bond to recover \$2,650. After the execution of the bond, a new agreement was made, by which the mail service was changed to three times a week, and the compensation was to be proportionally increased. The chief defense to the suit was that changes were made in the bond after it was executed, there being an interlineation of "Adam E. Smith" as one of the two parties who were to pay, and upon the payment by them Dexter was to pay Ullrick and Wright. The other alteration was that on the margin was written an agreement by Dexter not to run a competing coach for passengers during the time covered by the contract. It was conceded that the alteration was made by

Ullrick's attorney without any fraudulent intention on his part or that of his principal. Further facts appear in the opinion of the court.

Opinion by HILLYER, J.

On the argument, counsel for plaintiff admitted that the defendants are not liable on this bond for anything more than \$883.33, the amount due from Dexter to Ullrick under the first agreement, for a weekly mail service at \$1,800 a year. The defendants resist any recovery against them upon two grounds, the first of which is, that at the time the tri-weekly service began there was a new agreement made, to which the bond has no reference. The testimony, however, does not support this position. It appears from Ullrick's testimony that the compensation for carrying the mail two times more a week than he had at first contracted to do was measured by the first agreement; and as, under the first agreement, Ullrick was to receive \$1,800 per year for one service per week, Dexter further agreed upon Ullrick's undertaking the tri-weekly service to pay him \$1,800 for each additional trip in excess of one a week. The new contract was not a substitute for the old, but a contract distinct from it, providing for a new mail service at a compensation measured by that provided in the first contract. The sureties, therefore, are not released by Dexter making the further agreement.

§ 738. *Alterations in a bond made by the obligee or his agent after the execution of the instrument will not vitiate the bond if they are immaterial and do not prejudice the rights or interests of the obligors.*

The second ground is that the sureties are discharged from all liability by reason of the interlineations altering the bond after its execution. The substance of the rule on this point is stated in *Smith v. United States*, 2 Wall., 219 (§§ 723-728, *supra*), as follows: "Any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety." Because he can then well say: "I came not into this contract." If, then, the alterations do not prejudice the defendants, and do not amount to a substitution of a new contract for the old one, the sureties are not thereby relieved from liability. An immaterial alteration, though made by the obligee himself, will not destroy the bond. Both of the alterations occur in the preamble or introductory part of the condition of the bond, in which is stated the terms of the agreement between Dexter, the principal, and Ullrick, the obligee, to secure the due performance of which, on Dexter's part, the bond was given. The condition following this recital of the agreement is, that if Dexter "pays all sums of money as they may become due, according to the terms of said contract," then the bond shall be void. Whatever the change in the recital of the agreement, the condition remained the same, and hence such change would be immaterial, unless it in some way affected the terms of the contract in respect to the time or manner of the payments to be made by Dexter to Ullrick.

But neither of the interlineations do so affect the contract. They do not, in any manner, change the rights, duties or obligations of any of the parties under the instrument. The name "Adam E. Smith," as interlined, may seem, at first view, to change the terms of the contract in respect to the persons from whom Dexter might receive the money. But, when we know the situation of the parties when the agreement was made, it does not do so. Adam E. Smith was the first or original contractor with the government, Dexter a

subcontractor under him, and Ullrick under Dexter. The money to be received by Dexter was the money due from the government for the particular mail service undertaken by Ullrick. Until it came into his hands, whether directly from the United States or through Adam E. Smith or any other person whatsoever, neither he nor his sureties could become liable to Ullrick on the bond. Before the name of Adam E. Smith was interlined this recital read, that Dexter had agreed to pay the money quarterly, "or as the same may be received from the United States or by said T. W. Dexter." This would include a receipt of the money directly from the United States or from any person, and by the condition the liability attached only when the particular money came into the hands of Dexter. Thus this alteration in no manner prejudiced the makers of the bond or changed the legal effect of that instrument.

The second alteration does not purport to be a recital of any portion of the agreement referred to in the condition of the bond and has no possible effect on the liability of the obligors. It is an independent covenant by Dexter not to put any opposition on Ullrick's mail route, and seems to be an afterthought of Ullrick's which was inserted in the bond by the attorney instead of in the agreement where it properly belonged. At all events, so long as the condition of the bond remained unchanged the insertion of this stipulation was immaterial. The condition of the bond refers only to the payment of the money as it fell due by the terms of the contract, and the obligors have no concern with any part of the agreement except that which fixes the time when the money must be paid by Dexter. Clearly no recovery could be had on this bond for any breach of Dexter's contract not to run any stage on the route of Ullrick. There must be judgment for plaintiff.

GAUSSEN v. UNITED STATES.

(7 Otto, 584-594. 1878.)

ERROR to U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—This was a suit against the sureties of Barrett, collector of the port of New Orleans. The defense was, first, a general denial; second, that the bond had been rendered void by the action of the government in imposing on Barrett other and extra duties apart from the regular duties of his office in the disbursement of large sums of money for various purposes; third, that Barrett died about 1846 in possession of a large estate, out of which the bond in question might easily have been paid, and would have been so paid but for the laches of the officers of the government. The two last defenses were made by special pleas, which upon motion were stricken out. There was judgment for the plaintiff. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE STRONG.

This suit was founded upon the bond of a collector of customs, the condition of which is that he had truly executed and discharged, and should continue to execute and discharge, all the duties of the office of collector according to law; and the breach assigned was that he had failed to account for and pay over the money received by him in his official capacity as collector. The defendant's testator was a surety in the bond, but that is an immaterial fact in the case, for nothing is plainer than the rule that a surety in a bond is liable to the same extent to which his principal is liable by force of the bond.

§ 739. *Laches of government officers constitutes no bar to a judgment against the sureties of a collector of a port.*

A general denial having been interposed to the plaintiff's petition, the defendant added two special pleas, which, upon motion, the circuit court ordered to be stricken out, and this order is now assigned as error. An examination of the pleas stricken out, however, satisfies us that they were plainly impertinent. They aver nothing that constitutes either a total or even a partial defense. The second alleges, in effect, laches on the part of the government, in failing to assert its claim against other sureties in the bond, whereby, it is averred, the liability of defendant's testator, if it ever existed, was discharged. But laches of the officers or agents of the government is confessedly no bar to the assertion of its rights. This is admitted by the plaintiff in error, and it has not been contended in argument, as it could not have been successfully, that delay or neglect in prosecuting its claims against the co-sureties of the defendant's testator is any bar to this suit.

§ 740. *The imposition upon an officer of other duties does not relieve his securities from liability for his due discharge of those duties for which they originally became bound.*

The first special plea requires a more minute examination. It was, in effect, that the obligation of the bond had been discharged, not directly, but because the principal obligor had been required to perform and had performed duties additional to those which pertained by law to his office when the bond was made. It does not aver that the additional duties changed the character of the office, or increased the responsibility of the collector for the money received by him as collector of customs. How, then, the requisition of duties not inconsistent with accounting for and paying over money received by him as collector of customs can operate to release his bond is quite incomprehensible. If it be conceded, as it may be, that the addition of duties different in their nature from those which belonged to the office when the official bond was given will not impose upon an obligor in the bond, as such, additional responsibilities, it is undoubtedly true that such an addition of new duties does not render void the bond of the officer as a security for the performance of the duties at first assumed. It will still remain a security for what it was originally given to secure. And it is noticeable that most of the allegations in the plea of extra-official expenditures and disbursements required of the collector (for example, payments to other collectors and surveyors of other collection districts, payments to other government officers, payments for the construction of a new marine hospital, and for the maintenance and supply of existing hospitals and light-houses and vessels of the revenue and naval service) are averments of conduct and requirements which the collector was under legal obligations to observe and obey when the bond in suit was made. The act of congress of March 2, 1799, c. 2, sec. 21 (1 Stat., 644), made it the duty of collectors to "pay to the order of the officer who shall be authorized to direct the payment thereof, the whole of the moneys which they may respectively receive" by virtue of the act. All payments and disbursements of money received by the collector in his official capacity, if made as charged in the plea, by direction of the government, were therefore strictly within the range of his official duty.

§ 741. *Neither a collector of a port, nor his sureties, are responsible by virtue of his bond for money which the former received, but not in his official capacity.*

The remaining reason given by the plea in support of the averment that the bond had been avoided is, that the collector was, during his official term,

required to receive and disburse large sums of money which the law did not require him to receive and disburse as collector, as appeared by the official accounts filed by the plaintiff in the suit. But how that fact, if it was a fact, could operate, even in favor of a surety, to release him from the obligation of the official bond, we find ourselves unable to perceive. Such an effect has not been claimed in the argument for the plaintiff in error. It is doubtless true that neither the surety nor his principal is responsible, by virtue of the bond, for money which the collector received, not as collector,—money which his office did not require him to receive or disburse; but this suit was brought to enforce no such responsibility. The surety may not be liable for a failure of his principal to account for such money; yet if he is not, it does not follow that he is not bound by his bond to respond for his principal's default to account for money received in his official character. Requiring a person who is a collector of customs to receive a sum of money and apply it in discharge of some liability of the government entirely outside of his ordinary employment, for example, to pay debentures, may impose a new duty upon him, but it leaves his office, as collector, untouched and his accountability in it unimpaired. This is quite consistent with the doctrine which we admit, that if, after an official bond has been signed, the nature of the office be changed by law, the bond ceases to be obligatory. In such a case the office is no longer the same, within the meaning of the bond. *Converse v. United States*, 21 How., 463. It follows from these considerations that neither of the special pleas set up anything which amounted to a defense to the action. The facts averred exhibited no discharge of the defendant's testator from the obligation of the bond, nor did they tend to show that he was not responsible for the collector's neglect to account for and pay over whatever money he had received as collector. There was no error, therefore, in striking out the pleas as impertinent, and in refusing to receive evidence to support them. Holding this opinion, we are not called upon to inquire whether the money received and disbursed by the collector, "as appearing by the official accounts filed by the plaintiff in the suit," was all money which it was his duty to receive and disburse as collector. And we are not to be understood as assenting to the claim that some part of it was not. On this subject see *Broome v. The United States*, 15 How., 143 (§§ 552-555, *supra*).

§ 742. *Payment of money in pursuance of the orders of the secretary of the treasury is in the line of duty of a collector of a port.*

The next assignment of error requiring attention is, that the court refused to charge the jury, if they found from the evidence the secretary of the treasury required the collector to use the money received by him in the redemption of treasury notes, that such requirement was an important and material change of the duties, functions and employment of the collector as required by law, and discharged the sureties in his official bond from all liability for his subsequent official misconduct. Enough has already been said to show that such a charge should not have been given. By the act of 1799, to which we have referred, it was made the official duty of the collector to pay the public money in his hands to the order, or according to the direction, of the officer authorized to direct the payment thereof. Payment of treasury notes, therefore, in pursuance of the order of the secretary, was directly in the line of the collector's duty as such an officer.

The same remarks are applicable to the refusal of the court to affirm the second point proposed by the defendant as instruction to the jury. It would have been error had such instruction been given. While it may be true that

no law specifically imposed upon the collector the duty of making disbursements for any marine hospital, or for the light-houses or revenue-cutters, it is not true that such duties "were extra-official as to the office of collector," if the payments were ordered by the secretary of the treasury; for the collector was bound to pay to his order, as we have seen. Nor could the court have affirmed that money furnished to the collector from the treasury of the United States, or from sources other than the proper receipts and collections, must be shown by the plaintiff to have been necessary to cover the disbursements proper to the office of the collector, or that it was furnished for that purpose. As the law was when the bond was executed, the government was authorized to furnish money to collectors for certain purposes on their requisition. But apart from this, when the proposition was submitted to the court, the treasury transcript was in evidence. By law it made out a *prima facie* case, and the burden of proof, instead of being upon the plaintiff, was on the defendant to disprove it. Besides, it was proven by the transcript, and by the accounts furnished to the department by the collector, that the money he had received from other sources than collection of customs had all been expended in the payment of debentures, with the sanction of the treasury department. To this there was no contradictory evidence. The point proposed by the defendant was, therefore, wholly inapplicable to the case.

The remaining assignment is that the court refused to affirm the third point in the words in which it was proposed. But the court did affirm it in substance, and even more broadly than it was presented. The court charged the jury, "that, in order to recover the balance brought down in the present action, it is incumbent on the government to prove, to the satisfaction of the jury, that the said balance brought down resulted from the failure of the said Barrett (the collector) to account for the funds which came into his hands as collector, and within the scope of his official duties in that office, and his failure to perform his duty in respect to such funds, and not from his failure to account for funds received from the treasury for the extra-judicial purposes, and his failure to perform his duty in respect to such funds." This was an unqualified direction, not dependent upon what the jury might believe to be proved by the evidence. It was, therefore, more than the defendant asked. The case requires nothing further. The plaintiff has recovered a judgment for the sum which the principal obligor in the bond admitted to be due from him as collector. The judgment includes nothing except an unpaid balance of duties collected, and we discover no error in the trial.

Judgment affirmed.

§ 743. Alteration.—A contract extending the liability of a surety beyond the time contemplated by him, without his knowledge or consent, will discharge him. *Bank of Mount Pleasant v. Sprigg*,* 1 McL., 178. See §§ 703, 707, 710.

§ 744. Any essential change in the terms of the contract will release the sureties, if made without their consent. Thus, where a contract for the construction of a fort was changed by the substitution of tapia for brick, and providing a new mode of estimation and price of labor, it was held that the sureties were discharged. *United States v. Tillotson*,* 1 Paine, 305.

§ 745. A change in the agreement will release the sureties without reference to whether it was beneficial or prejudicial to the principal. *Ibid.*

§ 746. Where the principal in a bond given for the return of property in a replevin suit to the marshal erases his name from the bond, with the consent of the marshal, after the execution of the bond by the sureties, and without their knowledge or consent, the sureties are thereby released. *Mayer v. White*, 24 How., 315.

§ 747. An appeal bond was signed, sealed and delivered by A., as principal, and C. and D., as his sureties, and afterwards presented to the proper officer for approval and acceptance,

and was by him rejected. After such rejection the name of E. was interlined, as a co-obligor, and E. on the following day signed, sealed and delivered the bond, all without the knowledge or consent of D. Subsequently the bond was approved by the proper officer. *Held*, that the bond was void as to D. *Oneale v. Long*, 4 Cr., 60.

§ 748. A warehouse bond was conditioned for the payment of duties and charges, if the goods were withdrawn within one year, and ten per cent. additional if withdrawn after one year and within three years, or for the withdrawal of the goods within three years for export beyond the United States. The goods not being withdrawn within three years, were advertised for sale as "abandoned goods," under section 2971 of the United States Revised Statutes. The sale was postponed by order of the secretary of the treasury beyond the time prescribed for their sale by the treasury regulations, which were in force at the time of the execution of the bond. *Held*, that the sureties in the bond were thereby discharged. *United States v. De Visser*, 10 Fed. R., 642.

§ 749. An expression of an opinion by an agent of the obligee in a bond, that a new agreement would have the effect of releasing the sureties in the bond, will not have such effect if there was no agreement to release. *Singer Manuf'g Co. v. Hester*, 2 McC., 417 (§§ 642, 643).

§ 750. Where a collector's bond provides that he shall receive, as a commission, ten per cent. of the moneys collected, and it is afterwards agreed that his commission shall be fifteen per cent., this will not release his sureties. *Smith v. Addison*,* 5 Cr. C. C., 623. See § 666.

§ 751. Where the general duties of an office remain unchanged the sureties on the official bond of the incumbent continue to be liable, although there may have been changes in the duties and responsibilities of the office. *United States v. Gausson*,* 2 Woods, 92. See § 714.

§ 752. Where the official bond, given by a postmaster to the postmaster-general, is conditioned that he will pay over the balance in his hands due the department once in three months, an order of the postmaster-general that a postmaster shall retain such quarterly balance until drawn for is not such a change of the condition of his bond as will release the sureties thereon. *Locke v. Postmaster-General*,* 3 Mason, 446.

§ 753. An increase in the rate of postage does not discharge the sureties of a postmaster; but if he should be made the receiver of other moneys, his sureties would not be liable therefor. *Postmaster-General v. Munger*, 2 Paine, 189 (§§ 598-601).

3. Delay.

SUMMARY — *Taking collateral security*, § 754. — *Remedy suspended*, § 755. — *Delay in suing*, §§ 756, 760, 761; *laches of government officers*, 757; *no presumption of payment*, § 758. — *Failure to remove officer*, § 759. — *Arrest and release of principal*, § 762. — *Extension of time*, § 763.

§ 754. A mortgage taken as collateral security to a bond, which does not suspend the remedy on the bond, but only delays action on the mortgage itself, does not release the sureties. *United States v. Hodge*, §§ 764-768. See §§ 779, 788.

§ 755. If the remedy on a bond is suspended for a valuable consideration the surety is released; but if the contract is not founded on a valuable consideration it is void and does not release the surety. *Ibid*.

§ 756. Sureties on a postmaster's bond are not discharged by the omission of the postmaster-general to institute suit on the bond within the time after a default prescribed by the law. *Dox v. Postmaster-General*, §§ 769-771. See § 785.

§ 757. Laches of the officers of the government, however gross, does not discharge the sureties on an official bond. Thus, where the sureties on a postmaster's bond alleged that their principal was solvent when he was removed from office in 1816; that he remained so until 1819; that no demand was made on him, or suit brought, until 1821, it was held that these facts did not release the sureties. *Ibid*. See §§ 781, 782, 791.

§ 758. Delay in bringing suit on an official bond will not authorize the presumption of payment in favor of the sureties. *Ibid*. See § 784.

§ 759. Though the statute requires that if a paymaster shall fail to render his accounts for more than six months after receiving public money he shall be removed, yet if he is not recalled the sureties on his official bond are liable for moneys placed in his hands after the six months have expired. In such cases laches is not imputable to the government, and the provisions requiring periodical settlements by public officers is directory upon the officers of the government, and forms no part of the contract of the surety. *United States v. Vanzandt*, §§ 772, 773. See §§ 792, 793.

§ 760. Where there is no contract for delay, a mere delay in bringing suit or in demanding payment of the principal will not release the sureties. *Hunt v. United States*, §§ 774, 775.

§ 761. So it is held that the provision of the act of March 2, 1799, that suit is to be brought on a duty bond as soon as it becomes due, is directory, and a delay will not release the sureties. *Ibid.*

§ 762. And it seems, also, that where the principal is arrested on execution, and discharged under the act of 1798, this will not release the sureties. An act will not amount to a discharge where the law provides that it shall not be deemed a satisfaction. *Ibid.*

§ 763. Although sureties are discharged by an extension of time, yet the rule does not apply where the extension was only such as must have been reasonably contemplated when the bond was given. *Nash v. Heilman*, §§ 776, 777.

[NOTES.—See §§ 778-795.]

UNITED STATES v. HODGE.

(6 Howard, 279-284. 1847.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is a writ of error to the circuit court for the eastern district of Louisiana. William H. Ker, being appointed postmaster of the city of New Orleans, in 1836, gave a bond, with the defendants as his security, in the sum of \$25,000, for the faithful discharge of his duties as postmaster. Having failed to perform those duties, an action was commenced on the bond against his securities, alleging a large defalcation by Ker, and claiming the penalty of the bond. In their defense the defendants set up a mortgage which was executed by Ker the 15th of August, 1839, on property real and personal, to secure the payment to the postoffice department of a sum not exceeding \$65,000, or such sum as might be found due on a settlement, from and after six months from the date of the mortgage. This instrument, which gives time for the payment of the indebtedment by Ker, it is pleaded, releases the defendants as the sureties of Ker. A jury being impaneled, found a verdict for the defendants. A motion for a new trial was made and overruled. No exception lies to this decision. The motion is made to the sound discretion of the court. The questions arise on certain instructions to the jury prayed for by the district attorney; none were asked by the defendants.

§ 764. *What is a sufficient exception.*

It is objected that it does not appear that the exceptions were taken on the trial and signed by the judge during the term. The bill of exceptions states that, "on the trial of the cause, the district attorney requested the court to charge the jury," etc., and at the close, "to which opinions of the court, refusing to charge as requested, the district attorney excepts and prays that the bill of exceptions, with the documents referred to therein, be signed, sealed and made a part of the record, which is accordingly done," and which is signed by the judge. Upon its face this bill of exceptions appears to have been regularly signed; and the court cannot presume against the record.

§ 765. *It is the duty of the court to construe all written instruments given in evidence.*

The first, fifth, seventh, ninth and tenth instructions, refused by the court, are not so connected with the case as to require a consideration. Nor is it deemed necessary to consider the instructions given as asked or as modified by the court, until we come to the eleventh and last prayer. In this the district attorney requested the court to instruct the jury "that, according to the true interpretation of said mortgage, there was and is contained therein no stipula-

tion or agreement to extend the time, or preclude the government from suing the principal and sureties on said bond." This the court refused to give, on the ground that the jury were the proper judges of the fact whether time was given, on a perusal of the mortgage. In this the court erred. It is its duty to construe all written instruments given in evidence, as a question of law.

§ 766. *Taking a mortgage as collateral security to a bond without suspending the remedy against the obligors does not discharge a surety.*

Payment under the mortgage could not be enforced until after the lapse of six months from its date. And it appears that the mortgage was designed to cover the whole amount of Ker's defalcation. But the important question is, whether this mortgage suspended the legal remedy of the department on the official bond of the postmaster. There is no provision in the mortgage to this effect. And it cannot be successfully contended that taking collateral security merely can suspend the remedy on the bond. The holder of a bill of exchange, by taking collateral security of the drawer, not giving time, does not release the indorser. *James v. Badger*, 1 Johns. Cas., 131; *Kennedy v. Motte*, 3 McCord, 13; *Hurd v. Little*, 12 Mass., 502; *Ruggles v. Patten*, 8 Mass., 480. Giving time for payment, to discharge the indorser, must operate upon the instrument indorsed by him. Now, if the postoffice department had, by the mortgage, suspended the right of action on the bond for the time limited in the mortgage, it might have released the sureties. But no such condition is expressed, and none such can be implied. The mortgage does not purport to be given in lieu of, or in discharge of, the bond. It is merely a collateral security which operates beneficially to the defendants. For if they shall pay the defalcation of Ker, or so much of it as shall amount to the penalty of the bond, and the mortgaged property shall be sufficient to cover the whole indebtedment, there can be no question that the sureties would be subrogated to a due proportion of the rights of the department in the mortgage.

The principle is in no respect different from that which arises on a promissory note or bill where collateral security is taken. In the authorities above cited it was considered that, where an indorser takes an indemnity for indorsing a note, he waives a notice of demand. But if the holder of the note take additional security from the drawer the indorser is not released. And it cannot be material of what character the collateral security may be. It may consist of promissory notes not due, a mortgage payable on time, or anything else, it does not affect the remedy on the original instrument. This can only be done by an express agreement for a valuable consideration. The remedy on the collateral instrument is wholly immaterial unless it discharges or postpones that on the original obligation. There is no such condition in the mortgage under consideration, and consequently it can in no respect affect or suspend the remedy of the postoffice department on the bond. If the remedy on an instrument is suspended for a valuable consideration the indorser or security is released, because his right to discharge the obligation and be subrogated to the rights of the holder of the paper is also suspended. But a contract to give time is void and does not release the security unless it be founded upon a valuable consideration. It must be a contract which a court of law or equity can enforce. Now there is no contract in the mortgage which suspends the right of action on the official bond, consequently no injury is done to the sureties on that bond. They are left free to act for their own interests as they could have acted before the mortgage. The principle on which sureties are released is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties

by which they are supposed to be injured. But by no possibility can they be injured in the case under consideration. On the contrary it is clear that the mortgage may operate beneficially to them if they shall pay the full amount of their bond. And the circuit court should have instructed the jury to this effect.

§ 767. *How a motion for a new trial is made to operate as a waiver of a writ of error.*

The motion for a new trial was not a waiver of a writ of error. In some of the circuits there is a rule of court to this effect, but effect could be given to that rule only by requiring a party to waive on the record a writ of error before his motion for a new trial is heard. In the greater part of the circuits no such rule exists. It does not appear to have been adopted in Louisiana. It is insisted that "The action is brought wrong, and that, if the judgment be reversed, the plaintiffs cannot recover, because of the non-joinder of Ker as a defendant."

§ 768. *In Louisiana the sureties may be sued without joining the principal.*

The action against the sureties, omitting the principal, is sustained by the Louisiana practice. In *Griffing v. Caldwell*, 1 Rob., 15, it was held that a creditor has the right, but he is under no obligation, to include the principal and surety in the same suit. And in *Smith v. Scott*, 3 Rob., 258, it is said a surety who binds himself with his principal *in solido* is not entitled to the benefit of discussion, and may be sued alone for the whole debt. So in *Curtis v. Martin*, 5 Mart., 674, it is laid down that the surety may be sued without the principal. In *Barrow v. Norwood*, 3 La., 437, the court held, where the obligation is joint, all the obligors must be made parties to the suit. But that was not a case of suretyship. The action was brought against one of three indorsers. On the grounds above stated the judgment of the circuit court is reversed and the cause remanded for further proceedings conformably to this opinion.

DOX v. POSTMASTER-GENERAL.

(1 Peters, 318-327. 1828.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Southern District of New York.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was instituted against Gerrit L. Dox, a deputy postmaster, and against his sureties, on a bond given for the faithful performance of his duty. It was brought in the district court for the northern district of New York, and was removed, by writ of error, into the circuit court sitting for the southern district of New York, composed of the associate justice of this court and the judge of the southern district. On the hearing, the judges were divided in opinion upon three questions, which have been certified to this court: 1. Whether the district court had jurisdiction of the cause. 2. Whether, by the facts appearing on the record and admitted by the pleadings or found by the jury, the sureties are exonerated or discharged from their liability upon the bond so given by them, as set forth in the record. 3. Whether the said bond, from the facts found or admitted by the pleadings, as appearing by the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged.

§ 769. *The district courts of the United States have jurisdiction of suits by the postmaster-general upon official bonds of postmasters.*

1. The question first to be considered respects the jurisdiction of the court. The difficulties which were believed to attend it when this cause was adjourned have been removed by the opinion of this court in the case of *The Postmaster-General v. Early*, 12 Wheat., 136. In that case the question was fully considered and deliberately decided. The time which intervened between the default of the officer and the institution of the suit exceeded the time prescribed by the act of congress, in that case as well as this. Consequently, the circumstances of the two cases are, in this respect, precisely the same. But the counsel for the deputy postmaster says that this point was not brought into the view of the court, and has not been considered. The opinion of the court undoubtedly did not take a view of the question, whether the postmaster-general possessed such an interest in the cause that it ceased to be a suit brought for the United States. This inquiry was not made in terms, but could not have escaped observation.

The act of congress for regulating the postoffice establishment does not, in terms, discharge the obligors from the direct claim of the United States on them, on the failure of the postmaster-general to commence a suit against the defaulter within the time it prescribes. Their liability, therefore, continues. They remain the debtors of the United States. The responsibility of the postmaster-general himself is superadded to, not substituted for, that of the obligors. The object of the act is to stimulate the postmaster-general to a prompt and vigilant performance of his duty, by suspending over him a penalty, to which negligence will expose him; not to annul the obligation of his deputy. Had the object of the act been to favor the sureties, its language would have indicated that intention. If this construction be correct, the obligors in this bond remain the debtors of the United States, and the super-added responsibility of the postmaster-general cannot affect the reasoning on which the jurisdiction of the court was sustained in the case of *The Postmaster-General v. Early*.

The second question proposed for the consideration of the court is whether, on the facts appearing in the record, the sureties are discharged from their obligations. The breaches assigned are: 1. That Gerrit L. Dox failed to render accounts of his receipts and expenditures as deputy postmaster. 2. That he had failed to pay over the moneys he had received over and above his commissions, etc.

The defendant pleaded: 1. *Non est factum*. 2. That Gerrit L. Dox did render true accounts, etc.; and 3. That he did pay over the moneys he received. The issues joined on these pleas were found for the plaintiff.

The question arises on other pleas, the issues on which were found for the defendants, and which state, in substance, that Gerrit L. Dox was removed from his office on the 1st day of July, 1816. That the postmaster-general did not open an account against him and make any claim and demand on him for the moneys received by him as postmaster, until the 1st day of July, 1821. That at the time of his removal from office he was solvent and able to pay his debts, and continued so until the 1st day of July, 1819, after which he became insolvent, and continues to be so. These pleas also state that the postmaster-general, well knowing that Gerrit L. Dox had neglected and refused to pay over the moneys due from him as postmaster at the end of every quarter, etc., did not commence a suit until August, 1821. These facts placed on the record,

without explanation, must be admitted to show a gross neglect of duty on the part of the postmaster-general. Does this neglect discharge the sureties from their obligations? The condition of the bond is broken, and the obligation has become absolute.

§ 770. *Sureties on an official bond are not discharged by the failure of officers of the government to assert the claim of the United States against their principal.*

Is the claim of the United States upon them released by the laches of the officer to whom the assertion of that claim was intrusted? This question, also, has been settled in this court. The case of *The United States v. Kirkpatrick*, 9 Wheat., 720 (§§ 419–422, *supra*), was a suit instituted on a bond, given by a collector of direct taxes and internal duties, under the act of 22d July, 1813, c. 16 (3 Stats. at Large, 22). The act required each collector to transmit his accounts to the treasurer, monthly, to pay over the moneys collected, quarterly; and to complete his collection, pay over the moneys collected to the treasury, and render his final account within six months from the day on which he shall have received the collection list from the principal assessor. In case of failure the act authorizes and requires the comptroller of the treasury immediately to issue his warrant of distress against such delinquent collector and his sureties. The comptroller did not issue his warrant of distress according to the mandate of the law; and this suit was instituted four years after such warrant ought to have been issued. The court left it to the jury to decide whether the government had not, by this omission, waived its resort to the sureties. A verdict was found for the defendants, the judgment on which was brought before this court by writ of error.

The counsel for the defendant urged that laches might be imputed to the government, through the negligence of its officers, but this court reversed the judgment, declaring the opinion that the charge of the court below, which supposes that laches will discharge the bond, cannot be maintained in law. "The utmost vigilance," it was said, "would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities." It was further said that the provisions of the law which require that settlements should be made at short and stated periods, are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers and constitute no part of the contract with the security. After a full discussion of the question, the court laid down the principle, "that the mere laches of the public officers constitutes no grounds of discharge in the present case." The same question came on to be again considered in the case of *The United States v. Vanzandt*, 11 Wheat., 184 (§§ 772, 773, *infra*). This was an action of debt brought upon a paymaster's official bond, against one of the sureties. The act for organizing the general staff, and making further provision for the army of the United States (3 Stats. at Large, 297), "makes it the duty of the paymaster to render his vouchers to the paymaster-general, for the settlement of his accounts;" and if he fail to do so, for more than six months after he shall have received funds, the act imperatively enjoining "that he shall be recalled and another appointed in his place." The paymaster had failed to comply with the requisites of the law, after which the paymaster-general, instead of obeying its mandate, by removing him, placed further funds in his hands. The circuit court instructed the jury that the defendant, the surety, was not chargeable for any failure of the paymaster to

account for such additional funds so placed in his hands after his said default and neglect in respect of the funds previously received were known; and a verdict was found for the defendant. The judgment on this verdict was also brought before the court, by a writ of error, and was reversed. The counsel for the defendant contended that this case differed from *The United States v. Kirkpatrick*, 9 Wheat, 720, but the court said: "The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety." The placing further funds in the hands of the defaulting paymaster was considered as the necessary consequence of his continuance in office. This is certainly a very strong case. These two cases seem to fix the principle that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond from the obligation it creates, as firmly as the decisions of this court can fix it. We think they decide the question now under consideration.

§ 771. *A lapse of five years before instituting a suit upon an official bond creates no presumption of payment or satisfaction.*

The third question is whether the bond can, upon the facts of the case, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. If this question was founded on the time which was permitted to elapse before the institution of the suit, the answer must be in the negative. The bond was executed on the 1st day of January, 1816, the postmaster was removed from office on the 1st day of July, in the same year, and this suit was instituted in August, 1821. But little more than five years intervened between the time when the sum due from the principal in the bond was ascertained and the institution of the suit. The presumption of payment has never been supposed to arise from length of time in such a case, even between individuals; much less in the case of the United States, where all payments are placed on that record which must be kept by the officers of government. An additional reason exists against the presumption in this case. Length of time is evidence to be laid before the jury on the plea of payment. The pleas on which this presumption is supposed to arise not only do not allege payment, but presuppose that payment has not been made, which failure they ascribe to the laches of the postmaster-general. In such a case, there can be no ground for presuming payment and satisfaction.

That part of the question which is general, and which refers it to the court to decide whether the bond has been "otherwise discharged," is understood to be a repetition of the second question, and to be answered in the answer given to that question. This court is of opinion that it be certified to the circuit court of the United States for the southern district of New York: 1. That the district court had jurisdiction of this cause. 2. That the sureties are not exonerated from their liability, upon the bond given by them, as set forth in the record. 3. That the said bond cannot be considered, in judgment of law, as paid and satisfied, or otherwise discharged.

UNITED STATES *v.* VANZANDT.

(11 Wheaton, 184-191. 1826.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This was an action of debt, brought in the circuit court for the District of Columbia upon a paymaster's official bond, against

the defendant in error, one of the sureties in that bond. The condition of the bond, as set out upon oyer, is in the following words, namely: "That, whereas the above bounden John Hall is appointed paymaster of the rifle regiment in the army of the United States; now, if the said J. H. shall well and truly execute, and faithfully discharge, according to law and to instructions received by him from proper authority, his duties as paymaster aforesaid, and he, his heirs, etc., shall regularly account, when thereunto required, for all moneys received by him from time to time, as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified, on the part of the United States, for that purpose; and, moreover, pay into their treasury such balance as, on final settlement of the said J. Hall's accounts, shall be found justly due from him to the United States, then," etc.

To the declaration filed in this action, the defendant pleads that the said John Hall did well and truly observe and discharge, according to law and to instructions received by him from proper authority, his duties as paymaster in the rifle regiment of the army of the United States, and did pay into the treasury such balance as, on settlement, was found due, and hath observed, kept and fulfilled every matter and thing in the condition of the said bond, which, according to the said condition, ought to have been observed and kept. The breach set out in the replication is, that the said J. H. did not pay to the United States the sum of _____, which was due, and in arrear on a certain day, and which he ought then to have paid, according to the condition of his bond.

Upon the trial of the issue formed on the matter stated in the replication, a bill of exceptions was taken to the opinion of the court, by the United States; which states that, to support the issue on the part of the United States, they gave in evidence a certified copy of the bond aforesaid, together with the account of the United States against the said J. H., settled at the treasury department, and duly certified according to law, whereby it appeared that a balance of \$29,266.06 was due to the United States by the said J. H., as paymaster of the rifle regiment of the army of the United States. Whereupon the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, they should believe that John Hall, named in the condition of the bond, had neglected and failed to make any report to the paymaster-general once in two months, showing the disposition of the funds previously transmitted, with estimates for the next payment of the said regiment, and had also neglected and failed, either to transmit such estimates or to render his vouchers to the paymaster-general for settlement of his accounts, more than six months after receiving funds, and was not recalled for such default and neglect, but additional funds were placed in his hands, notwithstanding his known defaults and neglects in the instances aforesaid, then the defendant is not chargeable for any failure of the said J. H. to account for such additional funds so placed in his hands, after his said defaults and neglects in respect of the funds previously received were known as aforesaid. The court gave the instruction as prayed; and a verdict being found for the defendant, a writ of error was sued out to the judgment rendered thereon.

§ 772. *Laches is not imputable to the government. Statutes requiring periodical settlements by its officers are for the protection of the government.*

The counsel for the plaintiffs in error have rested their cause entirely upon the decision of this court in the case of *The United States v. Kirkpatrick, 9 Wheat., 720* (§§ 419-422, *supra*), and as we do not feel disposed to dissent from

the opinion given in that case, it becomes material, in the first place, to inquire whether the two cases are the same in principle or not. If they are, it will avoid the necessity of any general reasoning upon the point decided in this cause by the court below. The case referred to arose upon the act of congress for the collection of the direct taxes and internal duties. 3 Stats. at Large, 22. The action was founded upon the collector's bond against the sureties; and one of the questions which came up for decision was, whether the failure of the comptroller to call the collector to account at the periods prescribed by law, and the consequent injury to the sureties, did not discharge them from their responsibility, upon the ground of laches? By the twenty-eighth section of the above act, the comptroller of the treasury is required, in case any collector should fail to collect, or to render his account, or to pay over quarterly, or sooner if required, the moneys by him collected, immediately after such delinquency, to issue a warrant of distress against the delinquent collector, to be levied on his personal estate; and, in case that should prove insufficient to satisfy the warrant, then upon his real estate. The decision of this court was: 1. That laches is not imputable to the government; and 2. That the provisions of the law, requiring settlements by its officers to be made at short periods, are designed for the security and protection of the government, and to regulate the conduct of those officers; that they are merely directory to the officers, and form no part of the contract with the surety. The correctness of these principles is admitted by the counsel for the defendant; but they insist that they are inapplicable to the case of a surety in a paymaster's bond; because, by the fourth section of the act (3 Stats. at Large, 298) "for organizing the general staff, and making further provision for the army of the United States," if the paymaster fail to render his vouchers to the paymaster-general for settlement of his accounts, for more than six months after his having received funds, the injunction of the act is imperative, "that he shall be recalled, and another appointed in his place."

§ 773. — *this rule applies to the case of delinquent paymasters, notwithstanding the law requires their discharge for failure to make such settlements.*

It is contended, by the defendant's counsel, that this section leaves no discretion in the proper officer of the government to continue the paymaster in office after his delinquency, but that he ceases thereafter to be paymaster, and the responsibility of his sureties is terminated. It must be conceded that the injunction on the proper officer of the government to recall the delinquent paymaster is expressed in very strong language. But whether the omission to perform the act amounts, under every possible circumstance, to a breach of official duty, may admit of some doubt. May it not be excused, in a case where the paymaster has been prevented from rendering his vouchers at the periods mentioned in the act by causes acknowledged by the government to have been beyond his control? And, if it may, it would seem that the ground of excuse could not properly be made a subject of judicial inquiry in an action against the surety. It may further be remarked that, if it had been the policy and intention of the legislature that the act of delinquency should be inexorably followed by a removal from office, it might not be unreasonable to presume that such a consequence would have been distinctly announced. It is not, however, the intention of the court to express any opinion upon this point, because, whatever may be the duty of the proper officer of the government in this respect, it must, we think, be admitted that, until the paymaster is recalled, he continues in office. The act authorizes, perhaps requires, his recall;

but it does not displace him. The officer whose duty it may be to recall him acts upon his own responsibility to the government by declining to do so; but, until he acts otherwise, the paymaster is authorized, notwithstanding his delinquency, to receive and to disburse the funds which may be placed in his hands.

The attempt to distinguish this from Kirkpatrick's case is made upon the ground that that was purely a case of laches; whereas, in this, an unauthorized act was done by the government, in confiding funds to the disposal of a public defaulter, whom the government was bound by law to have dismissed from office. But will it be contended that the obligation to dismiss this officer was more imperative than that imposed upon the comptroller, to call the collector of direct taxes to account at the periods prescribed by law, and, in cases of delinquency, to pursue the summary remedy which the same law provided for the safety of the public, and consequentially for that of the surety? The neglect in the one case and in the other imputes laches to the officer whose duty it was to perform the acts which the law required; but, in a legal point of view, the rights of the government cannot be affected by these laches. The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety. If, then, the paymaster continues in office, notwithstanding the omission of the proper officer to recall him, on the ground of his defaults, the act of placing funds in his hands, to be disbursed according to law, is not one of which the surety can complain; since the public interest requires that the troops should be paid, which can be done only by the officer appointed for that purpose. If the neglect of the officers of government, from which the surety suffers, does not discharge him from his responsibility in either case, it is not perceived how the placing funds in the hands of the paymaster, who continues in office, can have that effect, seeing that the latter circumstance is the necessary consequence of the former. If the law displaced the officer, upon the ground of delinquency, the placing funds in his hands, after his removal from office, could not possibly be upon the responsibility of the surety, inasmuch as his undertaking was for the faithful discharge of the duties of his principal as paymaster, and, consequently, he is not bound for his acts after he has ceased to hold that office. The whole argument of the counsel for the defendant proceeded upon the assumption that the office terminated, *ipso facto*, as soon as the delinquency occurred; which, we have endeavored to show, presents an incorrect view of the subject.

Whether, admitting that the surety could claim to be discharged from his responsibility, upon the ground assumed by his counsel, such a defense could be set up on the proceedings in this cause, is a question upon which the court avoids expressing an opinion, because it is rendered unnecessary by that which has been pronounced, and because it was not argued at the bar. The opinion of the court is, that there is error in the judgment of the court below, and that the same ought to be reversed.

Judgment reversed.

HUNT v. UNITED STATES.

(Circuit Court for Massachusetts: 1 Gallison, 31-37. 1812.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This is a writ of error to the district court of Massachusetts district. The original action was on a bond for the payment of du-

ties, in which one J. B. Frazier and one Ephraim Wilcox and the plaintiff in error, on the 11th of November, 1807, became jointly and severally bound to the United States in the penal sum of \$2,000, conditioned to pay on or before the 11th day of August, 1808, the duties of certain goods, which were ascertained to the amount of \$576. The plaintiff in error, after oyer of the bond, pleaded in bar, in the court below, that, on the 1st day of January, 1810, a suit was commenced on the bond against Frazier, and judgment recovered in that suit for \$576, upon which judgment execution issued, and Frazier, on the 10th day of May, 1811, was arrested and committed to prison; and that afterwards, on the 15th of June, 1811, Frazier was freely and voluntarily released and discharged therefrom by the United States, in conformity and according to the provisions of the act of 6th June, 1798, c. 66, without the consent and against the will of the plaintiff in error. To this plea there was a general demurrer and joinder, on which the court below gave judgment for the United States.

§ 774. *A surety in a joint and several bond is not discharged by mere delay in bringing suit upon it, there being no fraud or contract for delay with the principal.*

The points relied on by the counsel for the plaintiff in error are: 1. That, by the act of 2d March, 1799, c. 128, s. 65 (4 U. S. L., 386), the collectors of the customs are required immediately and without delay, as soon as bonds for duties become due and are not paid, to cause prosecutions to be commenced therefor. That no suit was commenced against Frazier until the 1st of January, 1810, which was more than sixteen months after the bond became due; by which negligence the sureties were injured, and so, in effect, are discharged by operation of law. On examining the pleadings, I do not find that it directly appears that the plaintiff in error stands in the character of a surety. It is not so stated in the bond nor in the plea, and can only be gathered by inference from the condition of the bond, where the goods are stated to be "entered by Frazier as imported in the brig Pallas." But by the act of 2d March, 1799, c. 128, s. 36, an entry may be made by an owner, consignee, part owner or agent, of any imported goods; and it cannot be inferred that Wilcox and the plaintiff in error were not jointly connected with Frazier in this transaction. Certainly so material a fact ought to have been directly averred, though perhaps it may be very doubtful whether a court of law could decide upon such an averment, where it did not appear to be true on the face of the bond. The *People v. Jansen*, 7 John., 332; *Rees v. Berrington*, 2 Ves. Jr., 540, 544. But even if this objection were removed, the main difficulty would remain.

In chancery it has been certainly held that where the obligee, without communication with the surety, takes notes from the principal, and gives further time, the surety is discharged. *Rees v. Berrington*, 2 Ves. Jr., 540; *Skip v. Huey*, 3 Atk., 91. So if, without such payment, the obligee on the bond becoming due, without notice to the surety, contract to give further time to the obligor. *Nisbel v. Smith*, 2 Bro. Ch. Cas., 579.

How far the same principles will avail the party in a court of law has been a subject of much discussion of late years. In *Peele, etc., v. Tatlock*, 1 Bos. & Pull., 419, where the defendant had made a guaranty for the good conduct of a clerk, it seems to have been thought that a fraudulent concealment of a default of the clerk, for a considerable length of time, would have discharged the guarantor at law. But in no case that I can find has the mere delay to require payment, without any contract for this purpose, been held to vary the responsibility of the sureties. In *The Trent Navigation Co. v. Harley*, 10 East,

34, where the only question was whether the laches of the obligee in not calling upon the principal so soon as he might have done, if the accounts had been properly examined from time to time, was an estoppel at law against the sureties, Lord Ellenborough said he knew of no such estoppel at law, whatever remedy there might be in equity. In *The People v. Jansen*, 7 Johns., 332, the court expressly held that in the ordinary case of a bond with sureties the obligee is under no positive injunction, or legal obligation, to watch over the conduct of the principal debtor, and, in case of failure of punctual payment, to adopt measures calculated to relieve the surety; and further, that mere delay in calling upon the principal was not a discharge of the surety either at law or in equity. It is true that in that case, which was a case of the bond of a public officer (in respect to the settlement of whose accounts from time to time there were many statutory provisions), the court held the sureties discharged at law; but it was on the express ground of those provisions, and also of the gross laches in the superintending officers, after full knowledge of the default, and when it appeared that the sureties must thereby have to sustain the whole loss, in case of a recovery; whereas, if there had been due diligence, none would have been sustained.

In the present case it does not appear that the sureties are worse off in consequence of the delay, and the court cannot certainly intend it. If it were true it ought to have been set out in the pleadings. But I do not conceive that the doctrine of the last case can in any shape affect the present case. The statute 2d March, 1799, c. 128, s. 65, is merely directory to the collectors, who may, perhaps, in case of a loss by their omission, become themselves liable for the debt. The mandate applies equally to the suing of all the parties to the bond, and the neglect to sue one cannot operate to discharge another any more than the same neglect would operate to discharge the first party. I adopt it as a sound principle that mere delay, unaccompanied with fraud, or a settled agreement with the principal for that purpose, does not discharge the responsibility of the surety.

§ 775. *The discharge of the principal debtor from custody, under the act of congress of June 6, 1798, does not discharge his surety.*

2. In the second place it has been argued that the discharge of Frazier from imprisonment was a complete discharge of the debt; and this, having been done without the consent of the plaintiff in error, has completely exonerated him. It has been said by the attorney for the United States that however that may be, as to joint obligations, it cannot apply to those which are joint and several. And *Kyd on Bills*, 116, which cites *Heyling v. Mullhall*, 2 Bl. Rep., 1235, has been cited in support of the argument. But that authority does not apply, because there the contract was not joint, but there were several independent contracts on a bill of exchange; and the decision of the court was that the actual taking of a man in execution and afterwards discharging him is no satisfaction as to any of the antecedent parties on a bill of exchange. But it is most clear and undoubted law that a release to one of several obligors, who are bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar by all. 2 Roll. Abr., 412, C., pl. 4, 5; *Clayton v. Kynaster*, 2 Salk., 574; *Com. Dig. Plead.*, 2 W., 30; *Co. Litt.*, 232, and note 144; 2 Saund., 48; *Rowley v. Stoddard*, 7 Johns., 207. So also it is settled that a discharge of one debtor taken on a joint execution is a complete discharge of both. *Clarke v. Clement*, 6 Term R., 525. Nay, if a debtor, once taken on execution, be discharged from arrest on an agreement to pay at a future day, or to yield him-

self up again on the execution, he cannot be again taken in execution, but is completely discharged. *Vigers v. Aldrich*, 4 Burr., 2482; *Jaques v. Withy*, 1 Term R., 557, *Tanner v. Hague*, 7 Term R., 420; *Blackburn v. Stupart*, 2 East, 243. Now the ground on which all these cases proceed is that the plaintiff can have but one satisfaction, and he is considered as receiving a satisfaction in law by having his debtor once in custody in execution. At first view these cases would seem to govern the present, and if it cannot be distinguished by the operation of the act of 6th June, 1798, c. 66 (4 U. S. L., 121), the bar must be supported. By that act (which was made long before the bond in this suit was given) it is provided that notwithstanding such discharge the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then or at any time afterwards belong to the debtor.

At the argument I was struck with the consideration that this act would not bind the surety, but leave him to the ordinary operation of the common law. But on further reflection I am of a different opinion. The sole ground upon which a co-obligor is discharged is that the debt or judgment has been once satisfied. When the law has declared that a particular act shall not be deemed a satisfaction of the debt or judgment, it would seem to follow that it cannot be pleaded as a discharge of any party to such debt or judgment. The cases of *Nadin v. Battie*, 5 East, 147, and *McLean v. Whiting*, 8 Johns., 339, seem to me evidently to rest on this general foundation. I have come to this result not without some hesitation, and it is certainly a perilous proceeding to discharge the principal debtor without the assent of his surety. I give no opinion how the law would have been if it had appeared that upon the discharge the United States had taken any security pursuant to the act of 6th June, 1798, c. 66.

Judgment affirmed, with costs.

NASH v. HEILMAN.

(Circuit Court for Indiana: 9 Bissell, 358-365. 1890.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—This is a demurrer to the first paragraph of the complaint by the defendants, Heilman and Mackey, who are sureties upon the bond upon which this suit is brought. The material facts which appear by the complaint are these: Thomas J. Hunt and Semonen and Dixon, two of the defendants, in 1872 and prior thereto, were engaged in business, chiefly at Evansville, in the manufacture and sale of boots and shoes. Hunt was a resident of Massachusetts. In the early part of January, 1873, Mr. Hunt died, leaving a will. The probate of the will was contested and the controversy continued for some time. Pending this a special executor or administrator was appointed to take possession of the property of the testator and take care of it until the dispute about the will was settled — as it was, ultimately, by proof establishing the will. The present plaintiffs are the executors of the will. One of them had resigned. Mr. Hunt at the time of his death supposed that the value of his interest in the firm amounted to a large sum, and upon that assumption made his will. He bequeathed various legacies to different persons, requiring the surviving partners to pay out of the assets of the firm about \$34,000, in order to satisfy the legacies which he had given by his will. He supposed that there remained a large amount due him from the firm after these legacies should be paid, and by a codicil to his will of the 31st day of December, 1872, he declared that if the executors decided not to collect the amount which was due to

him from the firm (obviously implying that they might exercise the power of choice), then it might continue in the firm for the benefit of his estate. But in case they did decide the amount should be collected, then he declared that it should not be paid until a certain time had elapsed; \$15,000, for example, were to be paid in four and a half years; \$15,000 in five years; \$20,000 in five and a half years, and whatever might be obtained afterward from the accounts of the firm which had been carried to profit and loss, if any collections should be made therefrom, the surviving partners were to have a reasonable time to pay. And there was a qualification also made to the general direction as to the payment of these amounts, viz., that in case he was mistaken as to the amount that was due, that is, if it were more or less than \$50,000, then that fact was to modify the directions he had given.

While Thaxter, the special administrator, had control of the property certain arrangements were made by the executors of the will with the surviving members of the firm in relation to the disposition of the stock of the firm which was on hand on the 1st day of January, 1873, and also as to certain accounts that might have been received up to a fixed time on account of goods sold, and the price which the surviving partners were to pay for that was agreed upon. There was a controversy about this for a time, but ultimately it was arranged by a sum of money being received in cash and notes for the balance given. This settlement took place on the 26th of February, 1874, and the amount fixed was \$22,373.70, of which \$10,080.60 were paid in cash and two notes given for the balance, payable in six and eight months respectively. It seems that Mr. Thaxter, believing that the surviving partners were not making a proper use of the assets of the firm, and by their conduct were jeopardizing the interests of the estate, on the 5th of March, 1874, filed a bill in this court against Semonen and Dixon, asking for the appointment of a receiver and for an injunction against them.

Thereupon the defendants appeared and filed an answer, in which they set forth the facts which have been referred to. And they tendered with their answer the payment of a certain sum of money and also the bond upon which this suit is brought. They state in their answer that not waiving their claim to the management of the partnership business, yet for the purpose of avoiding controversy as to the injunction and appointment of a receiver or receivers as prayed for in the bill, they offered and brought into court with their answer their bond with freehold sureties in the penal sum of \$100,000, the condition being that the said defendants, Semonen and Dixon, should well and truly perform their duties as the surviving partners of the said firm, and the defendants also avowed their readiness to execute notes in accordance with the terms of the agreement which had been made to carry out the will of Mr. Hunt. The condition of the bond which was then filed was, that if "the said Peter Semonen and George Dixon shall well and truly account for and pay over to the said — Thaxter, administrator, as aforesaid, and his successors, all sums of money that are now due or may hereafter become due from them as surviving partners" of the particular firm of which Mr. Hunt was a member, to the estate of their leading partner, Thomas J. Hunt, deceased, "this obligation shall be void, else be and remain in full force and virtue." When this bond was filed it was accepted by the plaintiff, and the application for an injunction and the appointment of a receiver was waived, and the court thereupon directed the amount which was paid into court by the defendants to be paid to the plaintiff, and the bond which had been tendered to be given to the plaintiff, a copy being left on file in the court. On this bond the two defendants that demur, as I

have said, were sureties, and the contention on their part is, that after this bond was executed and delivered to the plaintiffs there were acts done by the executors of Mr. Hunt which should prevent the plaintiffs from recovering on the bond. The bond was dated on the 25th day of March, 1874, and the order of the court already referred to, accepting the money and the bond and ordering both to be delivered to the plaintiff, was made on the 3d of April, 1874. After the probate of the will Mr. Thaxter ceased to be the special administrator and the executors appointed under the will assumed control of the estate.

On the 18th of July, 1876, they made a settlement with Semonen and Dixon of all the matters in controversy and fixed upon the amount due from the surviving partners to the estate of Mr. Hunt, and took four notes for the amount. All of which notes as written bear date the 30th of November, 1875. These notes were for \$15,865.61 payable the 9th of January, 1877; \$15,000 payable the 9th of July, 1877; \$15,000 payable the 9th of January, 1878, and \$20,000 payable the 9th of July of the same year, with interest at seven per cent. This settlement which was made did not include the accounts on the books to profit and loss. Anything that might be collected from those accounts was to be paid over. These notes were all payable at the Merchants' National Bank of Evansville. It was a part of the agreement and settlement that the suit which was then pending against the surviving partners was to be dismissed, and when the settlement was consummated the suit was dismissed accordingly. It does not appear by any allegation in the complaint that the sureties on the bond were parties to this proceeding, or in fact that they had any knowledge of this settlement.

The main ground upon which it is claimed the sureties are released from their obligation under the bond, as I understand, is because of this settlement made by the executors. It is said that the rights of the parties were changed in consequence of this settlement. At least that is the inference in the argument, although not distinctly made. It is a question whether or not they were from what took place. It is alleged in the complaint that these notes were taken in accordance with the terms of the will of Mr. Hunt and payable at the times then designated. It is alleged that three of the notes had been paid according to their terms, and that the last note, the one for the \$20,000, although demand has been made for its payment, still remains unpaid. It is necessary to particularly examine and consider the terms of the will of Mr. Hunt, and the effect of this settlement made on the 18th day of July, 1876, and the condition of the bond, in order to decide this question.

§ 776. *Release by extension of time.*

The rule undoubtedly is, that if, by agreement between the principals, time is given on the debt which is due, after the obligation of the sureties is entered into, they are released. The difficulty about this case is to say that there was time absolutely given on the amount that was due so as to release the sureties. The condition of the bond is that they were to pay all sums of money "that are now due, or may hereafter become due, from Semonen and Dixon as surviving partners." Then the sureties agreed that Semonen and Dixon should pay to the estate of Hunt all sums that were then due or might thereafter become due. Of course the important question is what sums were then due, and what sums thereafter became due, within the meaning of this condition of the bond. It cannot be said absolutely that there were any sums then due except those which are paid and about which no controversy arises; for instance, the notes which were given at the settlement, which was made between Mr.

Thaxter and the surviving partners on the 26th of February, 1874. There seems to be no controversy in relation to that. The presumption is they were paid according to their terms. Therefore, the only sums to which this condition of the bond can refer are those which remain to be paid by the surviving partners as the interest of Mr. Hunt in the assets of the firm.

§ 777. *Sureties are not released by time given to their principal not in excess of that in contemplation of the parties when the contract of suretyship was executed.*

Now, it is to be observed that, by the terms of Mr. Hunt's will, time was given on a certain contingency to the surviving partners for the payment of what might be due. And the allegation in the complaint is that these notes, given in the settlement of the 18th of July, 1876, were in accordance with the terms of the will. Then, was the arrangement which took place between the executors and the surviving partners, as to the payment of what was due, such a change in the condition of the parties as existed on the 25th of March, 1874, as to entirely release the sureties from the obligation of their bond? I do not think it was. Certainly not as to the whole amount that was due. It will be recollected that the executors had a certain discretion as to a portion of the amount that was due to the estate. And upon the determination of that discretion the surviving partners were to have a number of years to make the payment. Now, the presumption is that, considering the circumstances under which this bond was executed—tendered in court, accepted by the court, and delivered to the plaintiff,—that the sureties must have known the terms of the will of Mr. Hunt. I think the fair inference upon the allegations of the complaint is, that that fact must have been known to them, and it will be observed that it is assumed in the condition of the bond that a portion of the money at any rate was not then payable by the surviving partners. And they therefore agreed that whenever it should become payable the surviving partners should pay it. Was not a portion of this account due within the terms of the will as was understood by the parties to which they agreed with the surviving partners? I think it was, and that the sureties agreed to that. We may assume that was the fact. If the whole of the notes which were given on the 18th of July, 1876, are not due, some of them certainly are, and the sureties are liable for a portion at least of the amount. It certainly does not exempt the defendants from all liability, according to the terms of this paragraph, on the last note of \$20,000. So that, it being the duty of the court, while it protects the rights of sureties, at the same time to protect the rights of those for whose benefit the obligations of the sureties are given, I hold that it cannot be said that they are released from all liability.

And perhaps I ought to say, while overruling the demurrer, that it may be quite possible, if the case should go to trial before a jury, some facts may be elicited upon which it may be the duty of the court to say to the jury, or if it should be left to the court, for the court itself to say, that the parties are released. But, upon the face of the complaint, I cannot say that this is so; and the demurrer, therefore, will be overruled. It may be overruled with leave for them to answer, or I will give them the benefit of an exception if they prefer that.

§ 778. *Delay.*—A surety is not discharged where the time of payment is extended after a breach. *United States v. Howell*,* 4 Wash., 620. See § 755.

§ 779. *Taking collateral security, without suspending the right to sue, will not bar an action on the bond, and will not, therefore, discharge the sureties.* *United States v. Nicholl*, 12 Wheat., 505 (§§ 671-673). See § 754.

§ 780. The sureties on an official bond are not discharged by the laches of the superior officers of the government, unaccompanied by fraud. *Postmaster-General v. Reeder*,* 4 Wash., 678.

§ 781. Laches of the government in instituting suits on official bonds is no defense in an action against a surety. *United States v. Gausson*,* 2 Woods, 92. See § 757.

§ 782. A surety on an official bond is not discharged by the laches of the government officers in enforcing the liability of a co-surety. *Gausson v. United States*, 7 Otto, 584 (§§ 739-742). See § 757.

§ 783. The laches of the agents of the government in calling a collector to account will not release the sureties on his bond. *United States v. Kirkpatrick*, 9 Wheat., 720 (§§ 419-422).

§ 784. A creditor, by extending the time of payment, by agreement with a debtor without the consent of the surety, so as to suspend, even for a short time, his right to proceed against the debtor, discharges the surety from liability. *Sprigg v. Bank of Mount Pleasant*,* 1 McL., 384; *Sprigg v. Bank of Mount Pleasant*, 10 Pet., 257 (§§ 520-522). See § 758.

§ 785. The neglect of the postmaster-general to institute suit within six months after a default by a postmaster does not exonerate either him or the sureties on his official bond. *Postmaster-General v. Reeder*,* 4 Wash., 678. See § 756.

§ 786. Section 8 of the act of congress of March 3, 1825, provided that unless suit should be instituted against a postmaster and his sureties within two years after a default by him the sureties should be exonerated. In estimating the time limited by this act, where there have been successive deficits in the periodical returns of the postmaster, and successive periodical payments by him, the payments, as they are successively made, should be applied first to the deficits existing from the former period, and then to the amount due from the period in which the payment is made, and the two years is to be reckoned from the time from which the unreduced deficit exists. *United States v. Kerschner*,* 1 Bond, 432; *Postmaster-General v. Norvell*,* Gilp., 106.

§ 787. In an action against the sureties on an official bond of a postmaster running to the postmaster-general, the sureties pleaded that the postmaster-general did not institute suits within six months after the default of their principal, and did not give notice of such defaults to the principal or to them, "but fraudulently, unlawfully and negligently" neglected to institute such suits or give such notice. The plaintiff having demurred generally, it was held that, as the demurrer admitted the fraud charged in the plea, the defendant was entitled to judgment. *Postmaster-General v. Ustick*,* 4 Wash., 847.

§ 788. A collector of revenue, being in default, gave to the supervisor, at his request, certain bonds, with a warrant of attorney and a mortgage to secure the United States on account of his default, which securities were received by the supervisor, and the time for the payment of the default was extended, with the knowledge and consent of the commissioner of revenue and the secretary of the treasury, but without the knowledge or consent of the sureties on the official bond of the collector. Held, that the acts of the officers were the acts of the government, and that the extension of time in this case exonerated the sureties. *United States v. Hillegas*,* 8 Wash., 70. See § 754.

§ 789. The sureties on a custom-house bond are not released by the failure of the United States to bring an action against the principal for more than sixteen months after the bond became due, although the law requires the collector of customs, immediately and without delay, to cause prosecutions to be commenced for duties unpaid. *Hunt v. United States*, 1 Gall., 32.

§ 790. A plea by a surety, in an action on the official bond of a paymaster in the navy, set up that the paymaster had been granted leave of absence, and that the proper officer, in communicating this leave, added, referring to a previous direction of the department for the settlement of his accounts, that such settlement would necessarily be delayed by reason of his not having access to his papers on board a certain vessel, and that thereby the plaintiffs had lost the moneys then in his hands. Held, that the plea was insufficient, it not showing any binding agreement for time, and amounting merely to an allegation of laches on the part of the government. *Raymond v. United States*, 14 Blatch., 51.

§ 791. Laches or negligence on the part of the officers of the government in settling the accounts of the principal and collecting the balance of moneys in his hands does not discharge the sureties in his official bond. Thus, where sureties of a paymaster in the army set up in defense of an action on his official bond, that after dismissal from office, being solvent and able to pay the full amount of his defalcation, he applied to the department to have his account adjusted, but this was not done until after he had become insolvent, it was held that the plea showed no defense. *Smith v. United States*, 5 Pet., 292. See § 757.

§ 792. In a suit on a postmaster's bond, the sureties pleaded that they were discharged by the act of the plaintiff, in that the auditor of the treasury of the postoffice department had full notice of the defalcation and embezzlement of their principal, and neglectfully permitted

him to remain in office, whereby he was enabled to commit all the default and embezzlement aforesaid, etc. *Held*, not a good defense. *Jones v. United States*, 18 Wall., 662. See § 759.

§ 793. Where a postmaster makes default in paying over the quarterly balances due the United States, and the postmaster-general neglects to institute suit for two years, the sureties are discharged under the third section of the act of March 3, 1825; they are not liable for balances in respect to which the default has not continued two years, provided it is two years since the first default. *Roddy v. United States*,* 2 Pittsb. R., 374.

§ 794. Mere delay to require payment, unaccompanied with fraud or a settled agreement with the principal for that purpose, does not discharge a surety. So it was held that the delay of a collector of customs to institute suit for duties, for a period of sixteen months after they became due, did not discharge the sureties in the bond given therefor. *Hunt v. United States*, 1 Gall., 32.

§ 795. In an action on a paymaster's bond a plea, by a surety, that the principal was possessed of sufficient moneys to meet the demands of the government and was squandering the same, and that the surety notified the chief of the department thereof, and demanded that the principal be arrested and the moneys in his possession obtained, and that the department promised to do so, but failed, and that by reason of this negligence the plaintiffs sustained their loss, was held bad as amounting merely to a plea of laches on the part of the officers of the government. *Raymond v. United States*, 14 Blatch., 51.

B. MUNICIPAL AND OTHER CORPORATE SECURITIES.

I. POWERS OF CORPORATIONS, §§ 796-969.	IX. RECOVERY ON INVALID BONDS, §§ 1255-1278.
II. SUBSCRIBING AND ISSUING BONDS, §§ 970-1131.	X. NEGOTIABILITY; BONA FIDE HOLDER, §§ 1274-1572.
III. CORPORATION MAY CANCEL ITS SUBSCRIPTION AND BUY UP BONDS, §§ 1122-1133.	XI. INJUNCTION, §§ 1578-1586.
IV. PUBLIC PURPOSE, §§ 1139-1180.	XII. ENFORCING PAYMENT, §§ 1587-1659.
V. WHETHER BONDS ISSUED TO PROPER COMPANY, §§ 1181-1203.	XIII. RATIFICATION; CURATIVE LAWS, §§ 1660-1706.
VI. CONSOLIDATION OF COMPANIES, §§ 1204-1226.	XIV. STATE DECISIONS, §§ 1707-1722.
VII. LIMITING INDEBTEDNESS, §§ 1229-1245.	XV. COUPONS, §§ 1723-1772.
VIII. REGISTRATION, §§ 1246-1254.	XVI. SALE WITHOUT WARRANTY, §§ 1773-1775.
	XVII. ACTIONS, §§ 1776-1810.
	XVIII. MISCELLANEOUS, §§ 1811-1890.

I. POWERS OF CORPORATIONS.

SUMMARY—*Legislature may confer authority*, §§ 796, 800-802, 806.—*Whether power to borrow money imports power to issue bonds*, §§ 797-799, 828.—*Constitutional questions*, §§ 801, 802, 806.—*Road not within limit of state*, § 803.—*Exchanging bonds for stock*, §§ 801, 804.—*Loaning credit*, § 805.—*No vote; invalid bonds*, §§ 806, 807.—*Uniformity in taxation*, §§ 809, 832.—*Effect of constitutional amendments*, §§ 810-821, 831.—*As to amount under separate laws*, § 822.—*Taxation by townships*, § 823.—*Power of townships in Missouri*, §§ 824-827.—*Implied power*, §§ 828, 829, 833.—*What is a railroad company*, § 830.—*Power to issue coupon bonds*, § 834; *where payable*, § 835.—*No money received for bonds*, § 836.

§ 796. A legislature may confer upon municipal corporations the power to borrow money and issue bonds in aid of railroads. *Rogers v. Burlington*, §§ 837-841.

§ 797. Authority in the charter of a municipal corporation to borrow money for any public purpose includes the power to issue bonds and lend them to a railroad company to aid in its construction. *Ibid*.

§ 798. The provision in the charter of a railroad company that "it shall be lawful for all persons of lawful age, or for the agent of any corporate body, to subscribe any amount to the capital stock of said company," does not confer power on a municipal corporation to subscribe stock and issue bonds in payment. Where there is a want of power to issue bonds, there can be no *bona fide* holding. *Township of East Oakland v. Skinner*, §§ 842-845.

§ 799. A law authorizing a subscription by counties to the stock of a railroad company, and giving power to the board of supervisors to assess and collect a tax on the taxable property or the real property, at their election, for the payment of the capital stock so subscribed, and providing for no other mode of payment, but further providing that the sheriff or collector shall issue a certificate to any person paying such taxes, which certificate shall entitle the tax-payer or his indorsee to a corresponding amount of stock in the company in lieu of the county's stock, does not confer power to issue bonds. This act being incorporated into and made a part of a subsequent act, they are to be construed as one act, and the supplemental act providing for a special tax on lands adjoining the road, extending over a period of years, and the company being required to issue stock to tax-payers for all payments made, it is held that payment by the county in bonds, with interest, is excluded. No presumption to the contrary is to be drawn from the provision in the latter act that the company may sell any bonds that it may receive as a donation or in payment of subscriptions. *Wells v. Supervisors*, §§ 846-848.

§ 800. Unless restrained by a constitutional provision, a state legislature may authorize a municipal corporation to issue its bonds in aid of railroads. *Railroad Co. v. County of Otoe*, §§ 849-853; *Town of Queensbury v. Culver*, §§ 854-857.

§ 801. And it makes no difference whether the bonds are given outright or whether they are exchanged for stock. The constitutional prohibition against taking private property for public use has no application to a case of this character. *Railroad Company v. County of Otoe*, §§ 849-853.

§ 802. And in the absence of such prohibition an enabling act permitting a municipality to donate its bonds to a railway and collect taxes to pay them, if the municipality should decide to do so by vote, is valid and constitutional. *Town of Queensbury v. Culver*, §§ 854-857.

§ 803. Where a legislature has power to authorize a municipality to issue bonds in aid of a railway, it is immaterial whether the railway to which aid is given is within the limits of the municipality or of the state or not. *Railroad Company v. County of Otoe*, §§ 849-853.

§ 804. Where the legislature has power to authorize a municipality to issue its bonds in aid of a railway, it may direct that the bonds shall be given outright as well as that they shall be exchanged for stock. *Ibid.*

§ 805. A constitutional provision that the credit of the state shall never be given or loaned to a private individual or corporation, and limiting the amount of the indebtedness of the state, applies only to the state, and does not prohibit the state legislature from authorizing counties to incur indebtedness and issue bonds in aid of a railway. *Ibid.*

§ 806. Unless restrained by some constitutional provision, a state legislature may authorize a county court to issue county bonds, without the submission of the question to a popular vote, to pay for improvements contracted for and made, and for which bonds had been issued by the county, which were invalid for the reason that the question of the expenditure had not been submitted to a popular vote because of an ambiguity in the law. *Ritchie v. Franklin County*, §§ 858-860.

§ 807. In the absence of any constitutional provision restraining the legislature from authorizing a county to borrow money for public improvements, without a submission of the question to a popular vote, the legislature may authorize the county to issue bonds to pay for improvements already made without such a submission. *Ibid.*

§ 808. The constitutional prohibition, that no person shall be deprived of property without due process of law, does not prevent a legislature from authorizing a municipality to aid a railway. *Township of Pine Grove v. Talcott*, §§ 861-866.

§ 809. A state law permitting a municipality to incur indebtedness and issue bonds in aid of a railway is not in violation of the provision of the state constitution that the legislature shall provide a uniform system of taxation. *Ibid.*

§ 810. The township of L., in 1868, voted a donation in aid of a railroad, pursuant to laws then in force. On July 2, 1870, the people of the township voted in favor of the issue of bonds to pay said donation, and on the same day the people of the state voted for the adoption of a new constitution, a provision in which prohibited aid to railroads by counties, towns, etc. *Held*, that the bonds issued pursuant to said vote were valid. *Louisville v. Savings Bank*, §§ 867, 868.

§ 811. The new constitution of Illinois, which went into effect July 2, 1870, provided that no municipality should in any way aid a railroad or any private corporation. "Provided, however, that the adoption of this article shall not be construed as affecting the right of any municipality to make such subscriptions, where the same has been authorized under existing laws, by a vote of the people of such municipalities, prior to such adoption." *Held*, following the Illinois decisions, that a donation to a railway company, pursuant to a popular vote, by a county duly authorized, was included in the proviso, when the vote was taken before the

constitution went into effect, though bonds were not actually issued till afterwards. *Fairfield v. County of Gallatin*, §§ 869-871.

§ 812. The act incorporating a certain railway authorized the board of supervisors of a certain county to subscribe to the capital stock of the company to an amount not exceeding \$80,000, and to issue county bonds therefor, but provided that the bonds should not be issued till the road was opened for traffic between two points named. In December, 1869, the supervisors by resolution ordered the subscription to be made and the bonds issued when the road should be opened for traffic between the points specified. No formal subscription was made on the company's books till 1871, but the resolution of the county board was entered of record on the books of the company by its clerk and president, and by a contract entered into by it in April, 1870, appropriated the bonds to be received from the county. In July, 1870, a new state constitution went into effect which prohibited counties from subscribing to the stock of private corporations, or aiding them in any way. In 1873 the railroad was completed and opened for traffic as required, and the bonds were delivered. *Held*, that the resolution of the board was a subscription, and that even if it was not it was a contract to subscribe, and, in either view of the case, a contract was completed between the county and the company which could not be impaired by any prohibition of the constitution, and the delivery of the bonds after the constitution had gone into effect in pursuance of such contract was valid. *County of Moultrie v. Rockingham Ten Cent Savings Bank*, §§ 872-875.

§ 813. The constitution of Missouri, which went into effect in 1865, provided that the legislature should not authorize any municipality to loan its aid to any corporation except on an affirmative popular vote. *Held*, that this provision was wholly prospective, and that the charter of a railway company which was enacted before the constitution went into effect was not affected by it, but powers given to municipalities to subscribe for its stock remained as if the new constitution had not been adopted. *County of Callaway v. Foster*, §§ 876-878.

§ 814. The constitution of Missouri of 1865 prohibited the legislature from authorizing any municipality to lend its credit to a corporation except on a two-thirds vote of the qualified voters. An act passed subsequently provided that any municipality might lend such aid on such a vote. *Held*, that neither the constitutional provision nor the enabling act mentioned affected the authority previously conferred upon a municipality to subscribe to the capital stock of a railway, though without such submission of the question to a popular vote. *Louisiana v. Taylor*, §§ 879, 880.

§ 815. That provision of the constitution of Missouri of 1865, which prohibits the legislature from authorizing municipalities to loan their credit to corporations except on a two-thirds vote, is a limitation of the power of the legislature for the future, so that it should not thereafter grant to municipal corporations authority to become stockholders in companies except upon the terms expressly mentioned, and all previous grants of such authority remain in their original form until revoked, unaffected by the constitutional provision. *Ibid*.

§ 816. Pursuant to existing authority, a county subscribed in 1860 to the stock of a certain railway. In 1869 a new constitution went into effect, which prevented the legislature from authorizing a county to loan its credit to any railway except pursuant to a popular vote. In 1871 the legislature authorized the county in question to issue its bonds in payment of its subscription without any vote. *Held*, that the issue of such bonds was not a loaning of its credit by the county, and was consequently proper. *Supervisors v. Galbraith*, §§ 881-883.

§ 817. A provision in the state constitution which went into effect at a certain time provided that the legislature shall not authorize any county to loan its aid to any corporation except on certain terms. *Held*, that this permission was wholly prospective, and did not apply to authority previously conferred by the legislature, and that bonds issued by such previously conferred authority were good, though not conforming to the conditions prescribed, and not issued till after the constitution went into effect. *Ibid*.

§ 818. Under a series of acts in New York, the county judge, upon the required petition of the tax-payers of any town in the county for the issuing of bonds and investing them in the stock of a designated railroad company, was required to hold a hearing on the sufficiency of the petition, and, if sufficient, appoint commissioners to carry out the request of the petitioners. The powers of these commissioners were limited to the making and execution of the bonds and the subscription of the stock in the designated company, and paying for the same by exchanging the bonds therefor. They also had power to enter into an agreement for limiting and defining the times when and the proportions in which the bonds should be delivered. The petition of the tax-payers might be conditional, and, if so, the subscription should bind the company to an observance of the condition. After the petition in case of a certain town was declared sufficient and the commissioners appointed, the commissioners entered into an agreement with the intended company, that they would deliver the bonds in exchange for stock when the condition in the petition of the tax-payers had been fulfilled. The bonds were made and put into the hands of a trustee. Before the fulfilment of the condition and

subsequent to the agreement, a new constitution went into effect forbidding all municipal aid to railroad companies. It was held that the agreement between the commissioners and the company was *ultra vires* the commissioners, and could not be protected from the subsequent constitutional provision; that the proceedings prior to that time constituted no contract with the company, and the delivery of the bonds was rightly restrained. *Railroad Co. v. Falconer*, §§ 884-888.

§ 819. The charter of the Tebo and Neosho Railroad Company gave it power to construct a certain branch road. It also gave the county courts of counties through or near which its main line or branches ran power to subscribe to its stock, to be paid in bonds, without the vote of the people. The bonds issued by the Henry county court to this company in aid of the construction of this branch are not affected by the constitution of 1865 of Missouri, requiring a vote of the people, although the bonds were issued subsequent to that date, and the branch road in aid of which they were issued was built as an independent enterprise under the act of 1868, but under the authority of the parent company. The purchaser of these bonds, being apprised by the law that the county court had authority to issue such bonds in aid of such branch without vote of the people, is not bound to inquire as to the regularity of their issue, since they were regular on their face. *County of Henry v. Nicolay*, §§ 889-892.

§ 820. Where a donation is authorized by a popular vote pursuant to the provisions of law submitting the question to the people, a clause of the state constitution subsequently adopted, which forbids any municipality to lend its credit to aid any railway, does not apply to such donation, and bonds subsequently issued pursuant to such donation are valid. *County of Moultrie v. Fairfield*, §§ 893-896.

§ 821. In 1869 a company voted a donation to a railway on the performance of certain conditions by it, and on the performance of those conditions issued its bonds and delivered them to the company in 1871. *Held*, that the bonds were not rendered void because in order to pay county expenses, principal and interest on its indebtedness, the rate of assessment would exceed the rate limited by a constitution which went into effect in 1870, especially where, if taxes were assessed at the maximum rate, a surplus would be left after paying county expenses. *Ibid*.

§ 822. One section of the charter of a railroad company provided that any municipalities through which it might pass might, "in their corporate capacities, subscribe to the stock of said company, or make donations thereto, to aid in constructing or equipping said railroad." Such donations and subscriptions are conditioned, however, upon a favorable vote of the people. A subsequent section authorized a certain county to subscribe to the capital stock of said company to an amount not exceeding \$80,000, and to issue bonds therefor on certain conditions. *Held*, that under the latter section the county might subscribe for stock to an amount not exceeding \$80,000 and issue its bonds to that amount, and under the former section it might make a donation and issue its bonds therefor. *Ibid*.

§ 823. Under the laws of Illinois a congressional township, being a corporation for school purposes only, can raise money by taxation for school purposes only, and has no authority to levy taxes for the payment of bonds issued by it in aid of a railway company. *Weightman v. Clark*, §§ 897, 898.

§ 824. The provision in the constitution of Missouri that no "county, city or town" shall loan its credit to any railway corporation, except upon certain conditions, applies to townships as well as to those municipalities mentioned, and an issue of bonds by a township without the observance of those formalities, though authorized by a state law, is void. *Harshman v. Bates County*, §§ 899, 900.

§ 825. The "Township Aid Act" of Missouri, which prescribes that aid may be granted, if "two-thirds of the qualified voters of the township, voting at an election held for that purpose, shall vote in favor of the subscription," is not in conflict with the constitution of that state, which prohibits such subscription "unless two-thirds of the qualified voters, . . . at a regular or special election, shall assent thereto." *County of Cass v. Johnston*, §§ 901-904.

§ 826. Under the "Township Aid Act" of the state of Missouri, and in accordance therewith, a township voted to aid in the construction of a railroad, and bonds were issued by the county court of the county in which the town was situated in behalf of the township. The act under which the bonds were issued provided that the county court should assess taxes on the property of the town, making the subscription to an amount sufficient to pay principal and interest, and that these sums should be paid into and disbursed from the county treasury. *Held*, that an action on such bonds was properly brought against the county instead of the township. *Ibid*.

§ 827. The act of January 4, 1860, of Missouri, chartering a certain railroad, and providing that on the petition of the company, to the county court of any county through which the road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on each side of the road, to determine whether the in-

habitants of such strip desire to take stock in the road to be paid in taxes, it shall be the duty of the county court to order such election, and, on a favorable vote, requiring the county court to levy and collect such tax and pay it into the treasury of the company, does not confer power on the county to issue bonds in behalf of such strip. Nor does the act of March 24, 1870, amending the "township aid law," and providing that where, under the charter of any railroad company, taxable inhabitants of a portion of a municipal township have voted or may vote to take stock in the company, the county court may issue bonds for the stock so taken, to be paid out of taxes levied on property within the district voting, confer such power. The strip mentioned in the charter might include whole townships or parts of different townships, and would never include only a portion of one township. Bonds of a county issued in behalf of such a strip are unauthorized and void, and no one can recover on them. *Ogden v. County of Daviess*, §§ 905-908.

§ 828. The authority given to a town to subscribe to the stock of a railroad company does not imply the authority to issue municipal bonds in payment of such subscriptions. *Green v. Dyersburg*, §§ 909-914.

§ 829. Authority to issue municipal bonds for stock in a railroad company cannot be inferred from provisions in the constitution or statutes which merely regulate the general subject of such subscriptions and modify existing acts on that subject, but which do not directly confer the power. *Ibid.*

§ 830. A company having mining privileges and the power to construct and operate a railroad is a railroad company within the meaning of the law authorizing subscriptions in aid of railroads. *County of Randolph v. Post*, §§ 915-917.

§ 831. The constitution of Illinois, prohibiting subscriptions in aid of railroads, did not relate back so as to invalidate subscriptions already made. *Ibid.*

§ 832. The provision in the Missouri constitution of 1865, that "the general assembly shall not authorize any county, city or town to become a stockholder in, or loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election held therein, shall assent thereto," applies to the issuing of bonds by a city for the purchase of lands to be donated to a railroad company. And bonds issued for this purpose, under an act requiring only a majority of the voters, are void as made under a void act. It is held that an act, passed subsequent to the vote, but prior to the issue, forbidding county officers to issue bonds without a two-thirds vote, does not affect these bonds, since it conferred no power to issue the bonds in pursuance of the vote already had, that vote showing the assent of two-thirds of the voters to the issue. *Jarrold v. Moberly*, § 918.

§ 833. The charter of a railway company provided that towns, townships and cities along its route might subscribe to its capital stock and issue bonds therefor if such subscription was authorized by a popular vote. A subsequent section provided that "nothing herein contained shall prevent counties and cities from taking and voting for subscriptions in the stock of said company under the general laws of this state." *Held*, that the reservation in the latter section was not merely of the power to subscribe, but included as well the power to issue bonds in payment of such subscription. *County of Kankakee v. Aetna Life Ins. Co.*, §§ 919, 920.

§ 834. The charter of a city in Iowa empowered it "to borrow money for any object in its discretion if at a regularly notified meeting, under a notice stating distinctly the nature and object of the loan and the amount thereof, as near as practicable, the citizens determine in favor of a loan by a majority of two-thirds of the votes given at the election." A state law provided that, whenever any company shall receive the bonds of any city or county upon a subscription of stock by such city or county, they may bear interest at a rate not exceeding ten per cent. and may be sold by the company at such a discount as may be deemed expedient. *Held*, that under this state law the city had authority under its charter to issue negotiable coupon bonds in payment of its subscription to the capital stock of a railway company. *Meyer v. City of Muscatine*, §§ 921-925.

§ 835. Under the above provision in the charter, and in the absence of any provision as to where the bonds should be payable, they may be made payable in New York instead of at the city treasury. *Ibid.*

§ 836. In an action on bonds issued as above stated, it is no defense that no money was actually borrowed by the city on such bonds, but that they were delivered to the company and sold by the company to the plaintiff at a discount. *Ibid.*

[NOTES.—See §§ 926-969.]

ROGERS v. BURLINGTON.

(8 Wallace, 654-668. 1865.)

ERROR to U. S. Circuit Court for Iowa.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Corporation defendants were authorized by their charter to borrow money for any public purpose whenever in the opinion of the city council it should be deemed expedient to exercise that power. Material conditions annexed to the power, as conferred, were that the question of borrowing, when proposed, should be previously submitted to the citizens of the city, and that the loan should not be made unless two-thirds of all the votes polled at such election should be given in the affirmative. Pursuant to that authority the defendants voted to issue and lend to the Burlington & Missouri River Railroad Company \$75,000 in the bonds of the city, payable in twenty years, with an interest of ten per cent. per annum, and to be secured by the first mortgage bonds of the company on the second section of the road. Directions to the mayor of the city, as expressed in the ordinance, were that he should issue the bonds and execute with the company a contract of loan thereof, taking therefor the obligation of the company, and the stipulated mortgage as collateral security for the bonds. Ordinance under which the bonds were issued was passed on the 23d day of June, 1856, and the same is fully set forth in the record. The action was *assumpsit*, and the declaration was founded upon certain interest coupons annexed to the bonds, which had become due and payable prior to the commencement of the suit.

Declaration contained twenty counts, and the defendants demurred specially to the entire series. Principal causes shown for the demurrer were: 1. That the declaration did not aver nor show that the city had any power or authority to issue the bonds therein described. 2. That the bonds on their face showed that they were not issued for any municipal purpose, but as a loan from the city to the before-mentioned railroad. 3. That there is no law of the state authorizing the city to issue such bonds, or to loan her credit to any railroad. Parties were fully heard in the court below, and the court sustained the demurrer and rendered judgment for the defendants.

§ 837. *Where error is apparent on the face of the record, no bill of exceptions is necessary.*

I. Plaintiff excepted to both those rulings, and a bill of exceptions to that effect, in due form, is exhibited in the record; but it is unnecessary further to advert to it, as it is well settled that the ruling of the circuit court in sustaining or overruling a demurrer to a declaration and rendering judgment for the wrong party may be re-examined in this court by a writ of error without any formal bill of exceptions. *Gorman v. Lenox*, 15 Pet., 115; *Suydam v. Williamson*, 20 How., 436. Reason for the rule is, that the error is apparent on the record; and it is generally true that where the error is apparent on the face of the record a bill of exceptions is unnecessary. *Bennett v. Butterworth*, 11 How., 669; *Slacum v. Pomery*, 6 Cranch, 221; *Garland v. Davis*, 4 How., 131; *Cohens v. Virginia*, 6 Wheat., 410.

II. Substance of the defense in this case upon the merits, as presented in argument, may be stated in three propositions: 1. That the defendants, under their charter, had no lawful authority to issue the bonds described in the declaration, and that inasmuch as the bonds were issued without authority they were null and void, and, consequently, the plaintiff cannot in any point of

view maintain the suit. 2. That municipal corporations are limited as to their powers by the objects to be accomplished by their creation, and to the sphere of action prescribed in their charters; and that the corporation defendants, under a fair application of those rules, could not borrow money or issue their bonds for the object specified in the ordinance, because such an object was not a public purpose within the meaning of their charter. 3. That the defendants, even if they have authority to borrow money for objects other than those pertaining to the good order and proper government of the city, could not issue the bonds in this case, because the contract under which the bonds were issued was a contract of lending and not of borrowing, and that the power given to the defendants to borrow money did not authorize them to lend either their money or their credit.

§ 838. *A territorial legislature has power to charter a municipal corporation and confer upon it the usual franchises.*

1. Reasonable doubt cannot be entertained that the terms of the charter, if valid, are sufficiently comprehensive to confer upon the defendants the power to borrow money for such a public purpose as that described in the ordinance under which the bonds were issued, unless it be shown that those terms have in some way been shorn of their usual and ordinary signification. Charter of the defendants was granted on the 10th day of June, 1845, by the territorial legislature, acting under its organic act. 5 Stat. at Large, 235. Subject to certain exceptions, not material to be noticed, the sixth section of the act provided that the legislative power of the territory should extend to all rightful subjects of legislation; and there can be no question that the territorial legislature, acting under that general delegation of legislative power, had the authority to incorporate the defendants and confer upon them, as such corporation, the functions specified in their charter. *Vincennes University v. Indiana*, 14 How., 273. Citation of authorities in support of the proposition seems to be unnecessary, as it is not denied, and, therefore, it may be assumed in the further consideration of the case, that the corporate powers vested in the defendants, as expressed in their charter, were legitimately conferred. Power to borrow money for a public purpose, within the meaning of the provision, is conferred by the charter in express terms, and there is nothing in the constitution of the state which limits the authority so conferred, or renders it invalid. On the contrary, the constitution of the state, as originally adopted, provided that all laws in force in the territory which were not repugnant to the constitution should remain in force until they expired by their own limitation, or should be repealed by the general assembly of the state. Code 1851, p. 557. When the new constitution was adopted it contained no such provision, but the omission was shortly afterwards substantially supplied by a general law re-enacting and reviving all acts in force at the time it went into effect, except such as had been repealed by the general assembly or were repugnant to its provisions. Code 1860, p. 8. Validity of the charter, therefore, is established beyond the possibility of a doubt, unless it be assumed that the particular provision authorizing the defendants to borrow money for a public purpose exceeds the constitutional authority of the legislature. In considering this question it will not be necessary again to advert to the fact that the charter was granted by the territorial legislature, because it has already been shown that it has the same validity that it would have had if it had been re-enacted by the legislature of the state.

§ 839. *It is competent for a legislature to confer upon a municipal corporation the power to borrow money and issue bonds in aid of railroads.*

Municipal corporations are created by the legislature, and they derive all their powers from the source of their creation; and those powers are at all times subject to the control of the legislature. Such powers, also, in the absence of any constitutional regulation forbidding it, may be enlarged or diminished, extended or curtailed, or withdrawn altogether, as the legislature shall determine. Construction and repair of highways or streets for public travel within their limits are among the usual purposes of their creation, and the expenses of accomplishing those objects are among their usual and ordinary burdens. Railways, also, as a matter of usage, founded on experience, are so far considered by the courts as in the nature of improved highways, and as indispensable to the public interest and the successful pursuit even of local business, that a state legislature may authorize the towns and counties of the state through which a railway passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same with the view of aiding those engaged in constructing or completing such a public improvement; and that a legislative act conferring such authority is not in contravention of any implied limitation of the power of the legislature. Decisions to that effect have very much increased in number within the last few years, and are constantly increasing both in the state and federal courts, until it may be said that the rule here laid down pervades the jurisprudence of the United States. Exceptional opinions advancing the opposite doctrine may be found, but they cannot be regarded as sound, in view of the fact that the weight of authority is very greatly the other way.

Printed argument of the plaintiff shows that the supreme court of the state for a series of years held the same views, as appears in some seven or eight of their reported decisions; and it is proper to remark that the reasons given for the conclusions in those several cases are much more satisfactory than those assigned in the more recent decisions which adopt the opposite rule. Repeated determinations of this court, embracing a period of ten years, have expressed the concurrence of the court in the general current of the decisions upon the subject in the state courts, and it is vain for parties to expect that the court, in the face of those recorded judgments, can come to any different conclusion. Recent as many of those decisions are, it seems unnecessary to incumber the opinion with the names of the cases, or to reproduce the reasons assigned as the basis of the respective judgments. Irrespective of the state decisions it is quite obvious that the decisions of this court control the question under consideration, and, consequently, that no further remark upon the proposition is necessary, except to say that the decision in the case of *Gelpcke v. City of Dubuque*, 1 Wall., 202 (§§ 1367-1370, *infra*), although the opinion of the court contains a reference to other statutes, was chiefly founded upon the construction of a provision in the charter of that city expressed in the same words as the provision contained in the charter of the defendants. Decision, also, in the case of *Meyer v. City of Muscatine*, 1 Wall., 385 (§§ 921-925, *infra*), is to the same effect. Unless, therefore, it be assumed that no prior decision of this court can furnish the rule in a subsequent controversy, it would seem that the present case is controlled by those decisions.

§ 840. *"Public purpose" includes aid to railroads as well as the more ordinary operations of municipal corporations.*

2. Second proposition submitted is that the defendants could not borrow

money or purchase bonds in aid of the improvement specified in the ordinance, because such a work is not within the usual and ordinary objects to be accomplished by a municipal corporation, and consequently was not a public purpose within the meaning of that phrase as employed in the charter of the city. They admit that the construction of a railroad is a public improvement, and they insist that the phrase public purpose, as employed in the charter, must be limited in its signification to such public purposes as fall within the usual and ordinary sphere of municipal corporations. Undoubtedly there is much force in the latter suggestion; and it would seem that, as applied to many improvements of great public utility, the proposition may well be conceded. None of the decided cases which maintain the power of the state legislatures to authorize such material aid in the construction of railroads decide or even intimate that the power may be exercised without limit or be extended to a public enterprise entirely foreign to the general objects which the corporation was created to subserve. Those adjudications are not obnoxious to any such charge, but the theory maintained is that a railroad is nothing more than an improved highway, and that it is as competent for the legislature to authorize a municipal corporation to furnish material aid in the construction of a railroad connected with the same as to construct a highway. Regarded in that point of view, they are analogous objects, and experience shows that the railroad as well as the highway is promotive of the highest and best interest of the corporation. *Redfield on R'ys*, 533; *Rome v. Rome*, 18 N. Y., 38; *Prettyman v. Tazewell Co.*, 19 Ill., 406; *Bushnell v. Beloit*, 10 Wis., 195; *Reinboth v. Pittsburg*, 41 Penn. St., 278.

§ 841. *Issuing bonds is borrowing money, though the bonds be loaned to a railroad company.*

3. Third proposition is, in substance and effect, that the defendants, even if they could borrow money for the object described in the ordinance, could not lawfully issue the bonds in this case, because the contract under which they were issued was a contract of lending, and not of borrowing, within the meaning of the charter. Evidently the proposition admits that the defendants might borrow money in aid of the improvement described in the ordinance, but the argument is that in issuing the bonds and delivering them to the company they did not exercise the power in the manner which the charter authorized. Where a municipal corporation was authorized to subscribe to the stock of a railroad company and to borrow money to pay for the stock subscribed, the supreme court of Pennsylvania held, in the case of *Middleton v. Alleghany Co.*, 37 Penn. St., 241, that the issuing of their bonds as a means of making the payment was borrowing money for that purpose within the meaning of the provision conferring the power, especially as it appeared that the bonds had been received in payment of the subscription. Same court also held, in the case of *Reinboth v. Pittsburg*, 41 id., 278, that where an act of the legislature authorized a municipal corporation to subscribe for stock in a railway as fully as an individual, that the provision gave authority to the corporation to issue their negotiable bonds in payment of the stock, and this court, upon a re-examination of the case, came to the same conclusion. *Seybert v. Pittsburg*, 1 Wall., 372. Common experience shows that the issuing of bonds by a municipal corporation as material aid in the construction of a railroad is merely a customary and convenient mode of borrowing money to accomplish the object, and it cannot make any difference, so far as respects the present question, whether the bonds as issued by the defendants were sold in the market by their officers, or were first delivered to the company and were by their agents sold for the same

purpose. Money was what the company wanted, to be expended in the construction of the railroad, and the bonds were issued by the defendants to enable the company to accomplish that purpose. Technically speaking, it may be said that the transaction, as between the company and the defendants, was, in form, a contract of lending, but as between the defendants and the persons who purchased the bonds in the market, it was undeniably a contract of borrowing money; and the same remark applies to the transaction in its practical and legal effect upon all subsequent holders of the securities who have since become such for value, and in the usual course of business.

III. Viewed in that light it is unmistakably a contract of borrowing money in the open market, and the rule that a corporation, quite as much as an individual, is held to fair dealing with other parties, applies with all its force, and we repeat that corporations cannot by their acts, representations or silence, involve others in onerous engagements, and be permitted to defeat the calculations and claims which their own conduct has superinduced. *Bissell v. Jeffersonville*, 24 How., 287 (§§ 1449, 1450, *infra*). Perfect acquiescence in the action of the officers of the city seems to have been manifested by the defendants until the demand was made for the payment of interest. They never attempted to enjoin the proceeding, but suffered the bonds to be issued and delivered to the company, and when that was done it was too late to object that the power conferred in the charter had not been properly executed. *Knox County v. Aspinwall*, 21 id., 544 (§§ 1413-18, *infra*). Precisely the same objection was made in the case of *Meyer v. City of Muscatine*, 1 Wall., 392 (§§ 921, 925, *infra*), but the objection was overruled by this court upon the ground that the object of issuing the bonds was as effectually accomplished by their delivery to the company as they would have been if the defendants themselves had sold them in the market, and that the obligors were not injured by the transaction.

Judgment of the circuit court is reversed, with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

MR. JUSTICE FIELD dissented (the Chief Justice, and JUSTICES MILLER and GRIER, concurring), holding that the loaning of bonds is not borrowing money; that municipal corporations must act strictly within the power granted, and that the power granted must be exercised for the purpose designated. (*Head v. Prov. Ins. Co.*, 2 Cranch, 169; *McCracken v. San Francisco*, 16 Cal., 619; *Farmers' Loan and Trust Co. v. Carroll*, 5 Barb., 649; *New York Fire Ins. Co. v. Ely*, 5 Conn., 568; *Gould v. Town of Sterling*, 23 N. Y., 458, cited.)

TOWNSHIP OF EAST OAKLAND v. SKINNER.

(4 Otto, 255-258. 1876.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The defendant in error brought this suit in the circuit court of the United States for the southern district of Illinois against the township of East Oakland, to recover the amount of certain interest coupons issued with certain bonds by Charles Clement, supervisor, and as the agent of the said town, upon a subscription to the stock of the Paris & Decatur Railroad Company. The Paris & Decatur Railroad Company is a corporation of the state of Illinois, organized under an act of the general assembly of said

state, entitled "An act to incorporate the Paris & Decatur Railroad Company," approved February 18, 1861, with authority to construct, maintain and operate a railroad from the town of Paris to the town of Decatur, in said state.

§ 842. *Authority in the charter of a railroad for "the agent of any corporate body" to subscribe to its stock does not authorize a municipal corporation to subscribe.*

By the fifth section of said act it is provided that "said corporation shall cause books to be opened for subscriptions to the capital stock thereof, to be divided into shares of fifty dollars each, at such times and places as they may choose, and shall give at least thirty days' notice thereof by publication in a newspaper published in the town or city where said books may be opened; and if there be no newspaper published therein, then in the nearest newspaper thereto. It shall be lawful for all persons of lawful age, or for the agent of any corporate body, to subscribe any amount to the capital stock of said company." It was by the authority of this section that the subscription we are considering was made, and the bonds and coupons issued in payment therefor. Did this language, "the agent of any corporate body," give power to a municipal organization to subscribe and to issue its bonds as was here done? In the recent case of *Campbell v. Paris & Decatur R. Co.* (not yet reported), the supreme court of Illinois passed upon the effect of this statute. After quoting the section as given above, the court say: "This is the only provision in the charter in reference to subscriptions by either persons or corporations. It confers no power on municipal corporations to subscribe for such stock. The provision manifestly refers to private corporations when it authorizes agents to subscribe. It does not refer to counties, cities, towns or townships, and cannot be held to embrace them. No power is conferred to call the election, or for the town officer to make the subscription, or to issue these or any other bonds." We have not been furnished with a copy of this decision, but it is referred to in the briefs of both parties. While its effect or conclusiveness is a subject of difference, the decision itself is not denied.

§ 843. *When the supreme court follows decisions of state courts.*

If the supreme court of a state gives construction to the language of a statute, and there have been no conflicting decisions, this court, as a general rule, follows the construction thus given. *Township of Elmwood v. Marcy*, 92 U. S., 289 (§ 1668, *infra*). It is said that this decision was *ex parte*, and that the decision was given on a made-up case,—that the contest was not a real one. There is no evidence of the truth of these assertions, and we do not well see how evidence of that character could be produced to us. If the decision is to be attacked on such grounds, the proceeding must be had before the court that made it and upon notice to all interested.

§ 844. *Bonds issued in pursuance of an unauthorized subscription of stock are void.*

We are, however, all of the opinion that the unreported case to which we have referred was rightly decided, and, as an original question, we concur in the opinion given by the supreme court of Illinois. We think the authority to "the agent of any corporate body" to subscribe for stock in the railroad company was not intended to include, and did not include, municipal corporations. It meant private and money-making, trading or business corporations. It did not intend to give authority to any township, however remote from the road, to become one of its stockholders. A provision of the constitution of

the state of Illinois, which took effect on the 2d day of July, 1870, positively prohibited a subscription to the capital stock of a railroad corporation by any county, city, township, or other municipality, unless such subscription had been authorized under existing laws by a vote of the people prior to the date mentioned. The subscription in question was made after July 2, 1870. Had it before that date been authorized under existing laws by a vote of the people of that town? The record shows that a vote of the people had before that time been taken; but it does not show that it was authorized by existing laws. There was no authority for submitting that question to the people; and its absence in the fifth section of the act incorporating the Paris & Decatur Company is a strong argument that municipalities were not intended to be included under the general designation of corporations. We have held that a town cannot subscribe for stock in a railroad corporation unless it has the authority of the legislature for the act. The legislature usually requires the approval of the electors of the town, at an election for that purpose, as a condition to such subscription. Doubtless the legislature can impose or omit conditions in its discretion. But when the sanction of a popular vote is required it must be obtained. We are, therefore, compelled to hold that the subscription of the town of East Oakland had not been authorized under existing laws by a vote of the people prior to July 2, 1870.

§ 845. *No bona fide holding of municipal bonds issued wholly without authority.*

We have held that there can be no *bona fide* holding where the statute did not in law authorize the issue of the bonds. The objection, in such case, goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud, or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds, there can be no such thing as a *bona fide* holding.

Judgment reversed.

WELLS v. SUPERVISORS.

(12 Otto, 625-634. 1880.)

ERROR to U. S. District Court, Northern District of Mississippi.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—On the 10th of March, 1852, the legislature of Mississippi passed an act to incorporate the Mississippi Central Railroad Company. Secs. 17 and 18 of that act are as follows:

"SEC. 17. Be it further enacted, that the boards of police of the several counties of Madison, Holmes, Carroll, Yallabusha, Lafayette and Marshall, together with such other counties as are adjoining or adjacent to the counties through which said railroad may pass, may for their respective counties subscribe for capital stock in said railroad, not to exceed in amount \$200,000 for any one county: *Provided, however*, that an election shall be holden in the county for and on account of which said stock is proposed to be subscribed, by the qualified electors thereof, at the regular precincts of said county, ten days' notice of the time of holding such election, and of the amount proposed to be subscribed, being first given by the board of police; and if at such election a majority of the qualified electors voting shall be in favor of such subscription, then said board shall make such subscription for and in behalf of the county for the amount specified; but if a majority of those voting shall be opposed to such subscription the same shall not be made.

"SEC. 18. Be it further enacted, that said several boards of police, either before or after any election held as provided in the seventeenth section of this act, may direct that, whenever any tax shall be collected in their respective counties for the payment of the capital stock so subscribed by the county, which tax the several boards of police are hereby authorized to assess and collect from the taxable property or real property of the county as said board may elect, that the sheriff or tax collector shall issue to the person paying such tax a certificate specifying the amount of tax so paid, and on account of what railroad the same is paid, which said certificate or certificates shall be transferable by indorsement; and whenever any person, either by payment of taxes as aforesaid, or by indorsement as aforesaid, shall hold a certificate or certificates, in amount equal to one or more shares of the capital stock of said railroad company, he may present the same to the treasurer of said company, who shall thereupon take up the said certificate or certificates, and issue to the holder of them certificates for one or more shares of stock in said company, and such holder of said certificate of stock shall be for such stock substituted to the right of the county as a stockholder to the number of shares named in said certificate."

On the 19th of April, and during the same session of the legislature, a supplemental act was passed, by which, if the act should be approved by a vote of the several counties through which the road might be located, a tax of five per cent. on the assessed value of all lands lying within five miles, and two and one-half per cent. on all lying over five miles and under ten, of the road was to be collected annually for a term of four years to aid in the construction of the road. Section 4 of this act is as follows:

"SEC. 4. Be it further enacted, that whenever any sheriff or tax collector shall collect any tax by virtue of this act he shall give to the person or persons paying the same a certificate therefor, which certificate shall be transferable by indorsement; and whenever any person or persons, either by payment of taxes as aforesaid, or by indorsement as aforesaid, shall hold a certificate or certificates in amount equal to a share of the capital stock of said railroad company, he may present the same to the treasurer of said company, who shall thereupon take up the said certificate or certificates and issue to the holder of them a certificate for a share of stock in said company, which certificate shall entitle such person to all the rights and privileges of a stockholder in said railroad company."

On the 23d of November, 1859, the Memphis, Holly Springs & Mobile Railroad Company was incorporated. Section 7 of that act of incorporation gave authority to the board of directors "to issue, sell, negotiate, mortgage, pledge or hypothecate the bonds or notes of the company, as well as any notes, bonds, scrip, certificates or other property for the payment of money or other property which said company shall or may receive as donations, or in payment of subscriptions to the capital stock of said company or other dues thereto." Section 8 provided that the board of directors might require each subscriber, at the time of subscribing, or at any time thereafter, to pay a part, not exceeding ten per cent., of his subscription to the capital stock in cash, and that no further payment should be demanded until, in the opinion of the board, a sufficient amount of the capital stock had been subscribed, with the means and credits of the company, to construct the road. No calls were to be made, except on thirty days' notice, and the amount called for at any one time could

not exceed thirty per cent. to each subscriber of the amount of his subscription. Section 15 is as follows:

"SEC. 15. Be it further enacted, that the sections 17 and 18 of an act passed by the legislature of this state, and approved March 10, 1852, entitled 'An act to incorporate the Mississippi Central Railroad Company,' regulating county subscriptions to the capital stock of said company, be, and the same are, adopted as part of this act, so far as the provisions of the same may be applicable."

By section 16 the company was authorized to consolidate with other railroad companies. No organization is shown to have been perfected under this act, and February 20, 1867, another act was passed, of which the title and the only portion pertinent to this case are as follows:

"AN ACT to revive and amend an act entitled 'An act to incorporate the Memphis and Holly Springs and Mobile Railroad Company,' approved November 23, 1859, and for other purposes.

"SEC. 1. Be it enacted by the legislature of the state of Mississippi, that the above-recited act be, and the same is hereby, revived, and that the style of said railroad company shall hereafter be known as the 'Memphis, Holly Springs, Okolona & Selma Railroad Company;' and, as many of the original incorporators are now dead, that N. B. Forrest" [etc.], "all of the state of Mississippi, together with those who may hereafter become stockholders, their successors, etc., shall be said corporators.

"SEC. 2. Be it further enacted, that said company shall have sixteen years in which to construct the said road, and shall commence the same in three years from and after the passage of this act."

When these several acts were passed the constitution of Mississippi adopted in 1832 was in force. This constitution contained no limitation of the power of the legislature to authorize counties to become stockholders in, or to lend their credit to, railway or other corporations. A new constitution went into effect in 1868, article 12, section 14, of which is as follows: "The legislature shall not authorize any county, city or town to become a stockholder in, or lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto."

At a special election held for that purpose on the 20th of November, 1869, the people of the county voted a subscription to the capital stock of the Memphis, Holly Springs, Okolona & Selma Company, and on the 21st of July, 1870, the name of the company was changed by a special act of the legislature to the Selma, Marion & Memphis Railroad Company. On the 19th of April, 1872, a general act was passed "to authorize counties, cities and towns to subscribe to the capital stock of railroads," which gave any county through which any railroad should pass authority to subscribe any sum to the capital stock, if two-thirds of the legal voters should give their assent in the manner specially provided for. Such subscriptions were to be paid in the twenty-year coupon bonds of the county, bearing interest at the rate of seven per cent. per annum. Taxes were to be levied and collected to pay the principal and interest of these bonds as they matured; and it was further also provided "that certificates of shares in the capital stock of said companies shall be issued to all persons paying taxes for the principal and interest of said bonds, to the amount paid by them, whenever the receipts for the taxes so paid shall be equal to one or more shares of the capital stock."

Under date of July 1, 1872, the board of supervisors of Pontotoc county, which was the legal successor of the board of police, under the authority of the vote of November 20, 1869, issued to the Selma, Marion & Memphis Railroad Company coupon bonds having twenty years to run, and bearing interest, payable semi-annually, at the rate of eight per cent. per annum, amounting in the aggregate to \$150,000. The plaintiff being the holder for value of a large amount of the coupons of these bonds, payable January and July, 1873, and January, 1874, which were not paid on presentation at maturity, brought this suit for their recovery. The court below gave judgment against him as on demurrer to the declaration, which presented substantially the foregoing facts, and to reverse that judgment this writ of error has been brought.

§ 846. *Powers of county supervisors in Mississippi.*

The controlling question in this case is whether there was authority in law for issuing the bonds to which the coupons sued on were attached. If there was not, it has always been held that no recovery can be had in an action on the bonds or coupons. It is also settled that unless the power to issue bonds for the payment of municipal subscriptions to the stock of railroad companies is given in express terms, or by reasonable implication, no obligation of that kind can be created. In Mississippi, as a general rule, the boards of supervisors of counties have no other financial powers than "to levy such taxes as may be necessary to meet the demands of their respective counties," and to "direct the appropriation of the money that may come into the treasury." Code (1880), secs. 2148 and 2158; Code (1857), c. 59, sec. 4, arts. 16, 30. This, it has been held by the highest court of the state, gives no power to borrow money. In *Beaman v. Leake County*, 42 Miss., 247, decided in 1868, the court, referring to an act then under consideration, passed in December, 1863, but which in no manner affects this case, said, "The act just referred to is the only one of a general nature empowering boards of police to borrow money, and without some such act they could not lawfully do so in their official characters." The policy of the state from its earliest history seems to have been to require municipal organizations to meet their current liabilities by current taxation; and in *Hawkins v. Carroll County*, 50 id., 762, it was expressly declared that "the grant of power to such a body of an extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed."

§ 847. *Construction of Mississippi statutes.*

Such being the general law of the state, we come to consider the special legislation on which this case depends, that is to say, sections 17 and 18 of the act of 1852, in connection with the other provisions of the act of 1859, into which these sections were incorporated by adoption. Undoubtedly section 17 authorized a subscription to the stock of the railroad company for the county, after a majority of the electors of the county had in the proper way given their consent, and it is possible, if there had been nothing more, that, under the rule of construction stated in *Lynde v. The County*, 16 Wall., 6 (§§ 1051-55, *infra*), the subscription might have been paid in bonds. It seems to us, however, that the provisions of section 18 are such as to exclude any such presumption. By that section the boards of police (supervisors) were authorized to assess and collect a tax on the taxable property or the real property of the county, at their election, "for the payment of the capital stock so subscribed." No other mode of payment was provided for. This of itself, when considered in the light of the settled policy of the state to require the current liabilities of counties to be discharged by current taxation, would seem to indicate an in-

tention not to confer upon the counties the power of funding this kind of liability. But when it is taken in connection with the further provision of the same section, which authorizes the boards of police to direct that the railroad company issue to the tax-payers, in lieu of the county, stock to the amount of their taxes paid, the intention is even more apparent. As stock was to be issued by the company to an amount equal to the taxes paid, it would seem as though it could not have been supposed that before the tax was collected any payment of the subscription was to be made, or any stock issued, that could in any manner interfere with this privilege of the tax-payers. So, too, the company could only be required to issue stock upon and to the amount of the subscription. As the tax-payer was to be entitled to stock to the full amount of his payment, it follows that the tax must have been intended to pay the subscription, and not bonds. We are not unmindful of the fact that the language of this part of the section is such as to leave it optional with the board to give this direction or not; but it may nevertheless be referred to, as we think, to strengthen the presumption arising from the other provisions, that the subscription was not to be paid through taxation, directly or indirectly, until the money to be raised in that way had actually been collected. This statute conferred an extraordinary power on the boards of police. It authorized them to create a new liability for their respective counties, and provided a special way of discharging that liability. The liability and the mode of discharge were provided for in the same statute. This being so, the mode prescribed is exclusive of all others.

This case differs materially from *Lynde v. The County*, *supra*. There the tax voted was to be levied annually during a period not exceeding ten years, and the amount for each year definitely fixed. As this was done for the purpose of building a court-house, the court very properly held the vote implied permission to borrow money to accomplish the object in anticipation of the collection of the tax, which must necessarily be delayed a considerable number of years. Here the tax was to be levied to pay the subscription; that is to say, to pay the company the amount subscribed when, by the terms of the subscription, that obligation was to be met. As the statute on its face contemplated no delay in raising the money by taxation, no implication of a power to borrow in anticipation of the tax can arise. The subscription might be made, but the money must be raised by taxation to meet it. The railroad company cannot complain; for when it received the subscription it knew, or ought to have known, from what source the money was to come to meet the payment, and it impliedly gave its consent to such delays as were necessarily incident to the mode of collection. The other provisions of the charter, as to calls on subscribers to meet their subscriptions, were not necessarily applicable to counties. Counties were to pay as they agreed, and when the tax was collected. It may be true, as is urged, that the collection of the full amount of the subscription in a single year would be oppressive, but it by no means follows that this must necessarily have been done. These sections are to be construed in the act of 1859 precisely as they would be in that of 1852, except so far as they may have been modified by the other provisions in 1859. The original act of 1852 is to be considered in connection with the supplemental act passed a little later. Being *in pari materia*, and enacted at the same session of the legislature, they are to be taken together as one law. From the supplemental act it is apparent that the object of the legislature was to raise money by taxation to aid in the construction of the road, and to require the company to give the tax-payers

stock for the money they paid. This is entirely inconsistent with any idea of the payment of interest. As the special tax on adjoining lands was large, it was extended over a period of years. This amount was fixed, and not left to the discretion of any one. In respect to the country at large the plan adopted was different. There it was left for the people to determine for themselves how much the subscription should be, and for the county and the company to agree when it should be paid. In this way the tax might be extended over a series of years; but as stock was to be issued by the company for all payments made, it could not have been intended to tax beyond the actual amount of the subscription. Consequently, if time was given by the company to make the payment, it must be without interest.

§ 848. *Bonds issued by a county in Mississippi declared void.*

This construction of the act is strengthened by what actually happened. The revived and amended charter was passed in 1867, and the subscription voted in 1869. When the subscription was made does not appear, but certain it is that no bonds were issued to make the payment until after the policy of the state in respect to funding this class of liabilities was changed by the act of 1872. Then, although confessedly that act did not apply to this case and its provisions were not followed, the subscription was paid by binding the tax-payers of the county to pay in the aggregate \$390,000, instead of \$150,000, as was voted. This we think could not be done. It is further argued that, because the seventh section of the act of 1859 authorized the railroad company to sell any *bonds* it might receive as donations or in payment of subscriptions, the power of counties to issue bonds in payment of their subscriptions must be inferred. We cannot so understand that provision. This gave power to sell bonds if in the course of business they should get to be the property of the company, but the implied prohibition against their issue by counties still remains. It is also said that the provision in section 18 for giving individual tax-payers stock for the amount of their taxes paid cannot be considered as in any manner precluding an implication of the power to issue bonds, because the same provision is found in section 4 of the act of 1872. There is this difference between these provisions of the two acts: in that of 1852 the railroad company is to issue the stock to the tax-payer, while that of 1872 simply says that certificates of shares shall be issued, without saying by whom. But it is not for us at this time to determine the legal effect of that part of the act of 1872. Power to issue bonds is given in express terms by that act, and stock was to be issued to all persons "paying taxes for the principal and interest of said bonds;" while in the act of 1852 the tax was to be collected "for the payment of the capital stock so subscribed," and stock was to be issued by the company to the persons holding certificates of the payment of this tax.

On the whole, we think the court below was right in holding that the issue of bonds in this case was not authorized by law. Different questions will arise if the railroad company, or any one who has been subrogated to the rights of the company, shall attempt to enforce the payment of the original subscription by the county.

Judgment affirmed.

RAILROAD COMPANY v. COUNTY OF OTOE.

(16 Wallace, 667-678. 1872.)

CERTIFICATE OF DIVISION from U. S. Circuit Court for Nebraska.

STATEMENT OF FACTS.—Pursuant to a law of the territory of Nebraska, the county of Otoe voted in favor of issuing bonds to the amount of \$200,000, for

the purpose of securing an eastern railroad connection for Nebraska City. Subsequently, in 1867, the territory was admitted into the Union, and adopted a constitution, the provisions of which are recited by the court. On February 15, 1869, the legislature authorized the county to issue \$150,000 of the bonds voted, to the Burlington & Missouri River Railroad Company, or any other company that would afford an eastern connection, on such terms as the commissioners might impose. The bonds were accordingly issued, and the road was completed as contemplated. The questions certified are stated in the opinion.

Opinion by MR. JUSTICE STRONG.

The first question upon which the judges of the circuit court divided was whether the act of the legislature of Nebraska, approved February 15, 1869, authorizing the county of Otoe to issue bonds in aid of a railroad outside of the state, conflicts with the constitution of that state.

§ 849. *It is a legitimate exercise of legislative power to authorize municipal corporations to aid in the construction of railroads, etc.*

Unless we close our eyes to what has again and again been decided by this court, and by the highest courts of most of the states, it would be difficult to discover any sufficient reason for holding that this act was transgressive of the power vested by the constitution of the state in the legislature. That the legislative power of the state has been conferred generally upon the legislature is not denied, and that all such power may be exercised by that body, except so far as it is expressly withheld, is a proposition which admits of no doubt. It is true that, in construing the federal constitution, congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a state constitution. The legislature of a state may exercise all powers which are properly legislative, unless they are forbidden by the state or national constitution. This is a principle that has never been called in question. If, then, the act we are considering was legislative in its character, it is incumbent upon those who deny its validity to show some prohibition in the constitution of the state against such legislation. And that it was an exercise of legislative power is not difficult to maintain. No one questions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every state legislature upon which has been conferred general legislative power. These things are necessarily done by law. The state may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to establish them or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a state legislature or to some law that authorized a municipal division of the state to construct and maintain them at its own expense. They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways. And that authority given to a municipal corporation to aid in the construction of a turnpike, canal or railroad is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the states have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times. It is no longer open to debate.

§ 850. — *the Nebraska constitution did not prohibit such power to the legislature.*

Then what is there in the constitution of the state of Nebraska which denies this power to the legislature? There is no direct or express prohibition. General legislative power is vested in the legislature. None was reserved to the people of the state. There are, however, certain restrictions that may be noticed. The constitution declares that "the property of no person shall be taken for public use without just compensation," and it is earnestly contended that this prohibits the legislature from passing any laws in aid of the construction of a railroad that may result in the imposition of taxes. It is said that the act of February 15, 1869, is taking private property for a public use without compensation. It would be a sufficient answer to this to say that a similar provision is found in the constitution of almost every state, the legislature of which has been held authorized to legalize municipal subscriptions in aid of railroad companies. It has never been held to prohibit such legislation as we are now considering. But the clause prohibiting taking private property for public use without just compensation has no reference to taxation. If it has, then all taxation is forbidden, for "just compensation" means pecuniary recompense to the person whose property is taken equivalent in value to the property. If a county is authorized to build a court-house or a jail, and to impose taxes to defray the cost, private property is as truly taken for public use without compensation as it is when the county is authorized to build a railroad or a turnpike, or to aid in the construction and to levy taxes for the expenditure. But it is taken in neither case in the constitutional sense. The restriction is upon the right of eminent domain, not upon the right of taxation.

We find nothing else in the constitution of the state that can with any reason be claimed to restrain the power of the legislature to authorize municipal aid to railroads or other highways. There is a clause that declares "the credit of the state shall never be given to or bound in aid of any individual association or corporation," and another that ordains that the debts of the state shall never, in the aggregate, exceed \$50,000, but these refer only to state action and state liability. *Patterson v. Board of Supervisors of Yuba*, 13 Cal., 175. In view, therefore, of the organic law of the state, and of the decisions which have been made in regard to other similar constitutional provisions, both in the highest courts of the states and in this court, we think it cannot be doubted the legislature of Nebraska had authority to authorize its municipal divisions to incur indebtedness and to impose taxation in aid of railroad companies.

§ 851. *A county may be authorized to donate its bonds to a railroad.*

It is urged, however, against the validity of the act now under consideration that it authorized a donation of the county bonds to the railroad company, and it is insisted that if even the legislature could empower the county to subscribe to the stock of such a corporation, it could not constitutionally authorize a donation. Yet there is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the tax-payers of the county. The stock subscribed for may be worthless and known to be so. That the legislature of the state might have granted aid directly to any railroad company by actual donation of money from its treasury will not be contro-

verted. No one questions that in the absence of some constitutional inhibition the power of a state to appropriate its money, however raised, is limited only by the sense of justice and by the sound discretion of its legislature. If the power to tax be unrestricted, the power to appropriate the taxes is necessarily equally so. Accordingly nothing has been more common in the state and federal governments than appropriations of public money raised by taxation to objects in regard to which no legal liability has existed. State legislatures have made donations for numerous purposes; wherever, in their judgment, the public well-being required them, and the right to make such gifts has never been seriously questioned. As has been said, the security against abuse of power by a legislature in this direction is found in the wisdom and sense of propriety of its members, and in their responsibility to their constituents. But if a state can directly levy taxes to make donations to improvement companies, or to other objects which, in the judgment of its legislature, it may be well to aid, it will be found difficult to maintain that it may not confer upon its municipal divisions power to do the same thing. Counties, cities and towns exist only for the convenient administration of the government. Such organizations are instruments of the state created to carry out its will. When they are authorized or directed to levy a tax or to appropriate its proceeds, the state through them is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon only a single political division, but the legislature has undoubted power to apportion a public burden among all the tax-payers of the state, or among those of a particular section. In its judgment those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse or a hospital. It is not unjust, therefore, that they should alone bear the burden. This subject has been so often discussed and the principles we have asserted have been so thoroughly vindicated, that it seems to be needless to say more or even to refer at large to the decisions. A few only are cited. *Blanding v. Burr*, 13 Cal., 343; *Town of Guilford v. Supervisors of Chenango County*, 3 Kern., 149; *Stuart v. Supervisors*, 30 Ia., 9; *Augusta Bank v. Augusta*, 49 Me., 507; *Railroad Co. v. Smith*, a case decided by the supreme court of Illinois and not reported.

§ 852. — *or to aid a railroad beyond its limits and outside the state.*

One other objection to the constitutionality of the act is urged. It is that it authorized aid to a railroad beyond the limits of the county and outside the state. There is nothing in this objection. It was for the legislature to determine whether the object to be aided was one in which the people of the state had an interest, and it is very obvious that the interests of the people of Otoe county may have been more involved in the construction of a road giving them a connection with an eastern market than they could be in the construction of any road wholly within the county. But that the objection has no weight may be seen in *Gelpcke v. Dubuque*, 1 Wall., 175 (§§ 1367-70, *infra*), and in *Walker v. Cincinnati*, 21 Ohio, 14.

We conclude, therefore, that the act of the legislature of February 15, 1869, is not in conflict with the constitution of the state.

§ 853. *County commissioners authorized unconditionally to donate the bonds of the county for a specific purpose may issue them without any submission to a vote of the county.*

The second question upon which the circuit court divided was "whether the county commissioners of Otoe county could, under the act of February 15,

1869, lawfully issue the bonds from which the coupons in suit were detached, without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same being or having been submitted to a vote of the people of the county, as provided by the act of the territorial legislature of Nebraska, passed January 1, 1861."

This question we answer in the affirmative. If the legislature had power to authorize the county officers to extend aid on behalf of the county or state to a railroad company, as we have seen it had, very plainly it could prescribe the mode in which such aid might be extended, as well as the terms and conditions of the extension, and it needed no assistance from the popular vote of the municipality. Such a vote could not have enlarged legislative power. But the act of 1869 was an unconditional bestowal of authority upon the county commissioners to issue the bonds to the railroad company. It required no precedent action of the voters of the county. It assumed that their assent had been obtained. That prior to 1869 the sanction of approval by a local popular vote had been required for municipal aid to railroad companies, or improvement companies, is quite immaterial. The requisition was but the act of an annual legislature, which any subsequent legislature could abrogate or annul.

It must, therefore, be certified to the circuit court, *first*, that the act of February 15, 1869, is not unconstitutional; and *second*, that the county commissioners of Otoe county could lawfully issue the bonds from which the coupons in suit were detached, without any submission to a vote of the people of the county of the proposition to approve the bonds, or a tax for the payment thereof.

Certified accordingly.

CHASE, C. J., and JUSTICES MILLER and DAVIS, dissented.

TOWN OF QUEENSBURY v. CULVER.

(19 Wallace, 88-94. 1878.)

ERROR to U. S. Circuit Court, Northern District of New York.

§ 854. *A state legislature may empower a municipal corporation to issue and donate its bonds to aid the construction of a railroad, in absence of constitutional restrictions.*

Opinion by MR. JUSTICE STRONG.

In view of the numerous decisions made by the highest courts of most of the states, including New York, as also of those made by this court, it ought to be considered as settled that a state legislature may authorize a municipal corporation to aid in the construction of a railroad, in the absence of any express constitutional prohibition of such legislative action. There is no such prohibition to be found in the constitution of New York, and the courts of that state have many times held that the legislature has power to authorize cities and towns to subscribe for stock of a railroad corporation, to incur indebtedness for the subscription, and to impose taxes for the payment of the debt incurred. It is true no case in the highest court of that state has determined the precise question now presented, namely, whether a municipal corporation may be empowered to donate its bonds to a railroad company and collect taxes for the payment of the bonds. But subscriptions for stock, equally with donations, are outside of the ordinary purposes of such corporations, and the design of both is the same. It is to aid in the construction or maintenance of a public highway. It is for the promo-

tion of a public use. The inducement to a subscription may be greater than the inducement to a donation. In the one case there may be a hope of reimbursement by the stock obtained; in the other there can be no such expectation. In both, however, the warrant for the exercise of the power is the same. It may be that a mandatory statute requiring a municipal corporation to subscribe for stock in a railroad company, or to contribute to the construction of the railroad of such a company, is not a legitimate exercise of legislative power, and that it is not even an act of legislation. This was decided by the court of appeals of New York in the case of *The People v. Bacheller*, 8 Alb. L. J., 120. But the present is no such case. The legislative act by which the town of Queensbury was authorized to issue bonds in aid of the railroad from the village of Glenn's Falls to intersect with the Saratogo & Whitehall Railroad was not mandatory. It was merely enabling. It authorized the issue and donation of the bonds, if approved by a popular vote. It was a mere grant of power upon conditions, coupled with a prescription of the mode in which the power granted might be exercised. And that it was a constitutional exertion of legislative power must be considered as settled affirmatively by the decisions of this court in *Railroad Co. v. County of Otoe*, 16 Wall, 667 (§§ 849-853, *supra*), and *Olcott v. Supervisors of Fond du Lac County*, id., 678. It cannot, therefore, be maintained, as contended by the plaintiff in error, that the statute under which the coupons in suit were issued was transgressive of the power vested in the legislature. If the court of appeals of New York had decided otherwise we should feel constrained to follow its decision, but no such determination has been made.

§ 855. *An action lies against a town upon coupons attached to bonds issued by special commissioners.*

It is next insisted that, even if the statute under which the bonds were issued be valid, an action of *assumpsit* cannot be brought to recover the sums due on the coupons. The reasons given in support of this proposition are that the coupons do not purport to be, and that they were not, made in the name of the town; and that the town is not liable to an action at law for the failure to pay the instruments made and issued by the commissioners designated by the statute. Neither of these reasons is well founded. The bonds to which the coupons were attached do purport to bind the town. They acknowledge that the town of Queensbury is indebted to the bearer or his assigns in the sum mentioned, for value received in money borrowed, payable on the 6th day of February, 1878, "with interest thereon at the rate of seven per cent., on presentation and delivery of the coupons for the same, thereto attached." They are signed by the commissioners, who were by the statute made agents of the town for issuing them, and they are countersigned by the clerk of the town of Queensbury. The coupons attached are all headed "Town of Queensbury Interest Warrant." They are in the form of orders drawn upon a bank, but signed by the commissioners as commissioners and attested by the town clerk. Very plainly, therefore, both the bonds and the interest warrants are evidence of indebtedness by the town. They appear to have been issued in strict compliance with all the requisitions of the statute. It is vain to say the statute imposed no duty upon the town or its officers. No one can doubt that it is competent for the legislature to determine by what agents a municipal corporation shall exert its powers. The statute in question did designate the agents, and their acts within the authority conferred are binding upon their principal, upon the town of which they had been constituted the agents.

§ 856. *The town may be sued at law without first proceeding in the special mode provided to raise the money.*

Equally untenable is the position that an action at law is not maintainable, because the holders of the bonds and coupons are entitled only to that remedy for a default of payment which is provided by the statute. There are cases, it is true, which hold that where a statute creates a right and enjoins a duty, nothing may be done agreeably to the provisions of the common law to enforce the duty or assert the right further than is necessary to give effect to the statute. But we do not perceive that this principle has any bearing upon the present case. The fourth section of the act requires the commissioners designated as the agents of the town to report, annually, to the board of supervisors of the county, the amount required to pay the principal and interest on the bonds authorized to be issued, and makes it the duty of the supervisors to assess, levy and collect of the real and personal property of the town of Queensbury such sum or sums of money as shall have been reported to them by the commissioners. The money thus collected the supervisors are required to pay to the commissioners, to be applied by them to the payment of the bonds and interest. These are all directions given to the town and county officers and agents—not to the holders of the bonds and coupons. They prescribe duties to be performed after the amount of the debt due by the town has been ascertained, either by agreement or by judgment. That amount may be contested. It has been in this case. It could only be determined by an action at law. Only after such a determination could the commissioners report how much was required to be levied by taxation. The action, then, does not take the place of any remedy provided by the legislature. At most, it is a step to give effect to the statutory provision.

§ 857. *Disposing of bonds below par; statute construed.*

The only other error assigned which requires notice is that the court refused to direct a verdict for the defendants, because the bonds were not disposed of by the commissioners at not less than par, because no money was received for them by the commissioners, and because they were delivered directly to the railroad company. But a delivery to the railroad company was plainly authorized by the act of the legislature. True, the commissioners were not at liberty to dispose of them for less than their par value, and they did not. Had they done so, and had the plaintiff not been a holder—without notice, and for a valuable consideration,—there might have been a defense to the action. The third section, however, empowered the commissioners to “dispose of the bonds to such persons or corporation as they should deem most advantageous for the town, but not for less than par.” And it required them not to pay over “any money or bonds” to the railroad corporation, until certain satisfactory assurances should be furnished them. Thus it appears that delivery of the bonds to the railroad company was contemplated and authorized. There is, therefore, no error in the record, and the judgment is affirmed.

RITCHIE v. FRANKLIN COUNTY.

(22 Wallace, 67-77. 1874.)

APPEAL from U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS.—Franklin county issued bonds without submitting the matter to a vote of the people, for the purpose of building roads and bridges, under a law authorizing such issue, but declaring that the county court may,

"for the purpose of information," submit the matter to a vote of the people. In a suit between other parties these bonds were declared void, and the legislature of Missouri, March 21, 1868, passed another act authorizing the county courts of the state to issue bonds to pay for roads and bridges theretofore built, and Franklin county issued bonds under this act. This suit was brought to test the validity of these bonds, and the constitutionality of the law under which they were issued. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE DAVIS.

The acts of the general assembly of Missouri of 1865 and 1866 gave authority to the county courts to borrow money and issue bonds for road purposes where "the amount of proposed expenditure had been submitted to a vote of the people." The county court of Franklin county construed the provision on the subject of this submission as discretionary and not mandatory. Although this construction was wrong, the language used by the legislature gave color to it.

§ 858. When "*may submit to a vote of the people*" means "*must submit*," etc.

To declare that a court "may, for the purpose of information," submit its proposed action to the people, is not the best nor the usual way of instructing the court not to do the thing proposed unless the tax-payers approved it. Such language is well calculated to mislead any one unaccustomed to the construction of statutes, and it cannot be a matter of surprise that this county court treated the provision requiring a vote for information as discretionary. In doing this it doubtless acted as other county courts in the state had done under like circumstances. That this election clause should cause litigation was natural enough, and we therefore find it presented for adjudication in the case of *Leavenworth & Des Moines R. Co. v. County Court of Platte County*. In that case it was held that the power conferred upon the county courts could not be exercised unless the proposed expenditure was approved by the voters. This decision of necessity alarmed contractors, who had in good faith constructed roads, and equally so the holders of bonds issued for the purpose of paying the contractors for their work.

To relieve these persons from the predicament in which they were placed, the legislature passed a curative act. This act, on account of special legislation being forbidden by the constitution of the state, had to be general in its language and without reference to any particular county. It was eminently just that it should be passed. The value of good roads for the common use of every one can hardly be overestimated. As a general thing in this country, they are within the control and supervision of the township, county or other local authorities. Ordinarily they are improved and kept in repair by means of local taxation, but this mode will not suffice when the wants of the community require that they should be macadamized. Especially is this true of a new state like Missouri. It seems that the county court of Franklin engaged in a general scheme for macadamizing the roads of the county and bridging the streams in it. It is fair to presume that this enterprise was undertaken in obedience to a public sentiment on the subject, although the sense of the voters was not actually taken in conformity with the directions of the statute. This is the more probable on account of the well-known mania of the people to run in debt for public improvements. The tax-payers saw the large expenditures that were being made, and yet they took no steps to arrest them. Not until the works were completed and the securities had passed into the hands of *bona fide* purchasers did they move in the matter. If they had been incited to action as soon as the contract was made they would have been saved a heavy

debt and innocent persons would not have suffered. In this state of the case the legislature interposed and passed an act to authorize county courts to issue bonds for the purpose of paying for the building of bridges and macadamized roads which had been contracted for and built. This act refers to past transactions, and two days after its passage a new road law was passed, couched in such language that no one could mistake the character of the powers conferred.

§ 859. *Under the constitution of Missouri the legislature can authorize counties to issue bonds without a vote of the people to construct roads or to pay for those already constructed.*

Thus it will be seen the legislature intended to cure past errors, but left no room for future ones. In this way it was enabled to relieve the hardship caused by the construction placed on the imperfect language of a former legislature, and at the same time to put an end to expenditures like those made by Franklin county, unless a majority of the voters should approve of them. In many cases retroactive laws, although intended to effect a good purpose, have features of injustice about them. This is not that case. The bonds here were issued under a supposed authority, and no one interposed an objection. The tax-payers rested until the mischief was done and then tried to get relief. It is certainly not unjust to them that the legislature should say, "you must pay for an expenditure which you saw incurred and could have prevented, but did not." If the county court had acted wholly outside of its duties the aspect of the case might have been different. But the most that can be said is that the court mistook the nature of the powers conferred upon it, and that this mistake would never have occurred if the legislature had used language appropriate to the purpose. There is no provision in the constitution of Missouri restraining the general assembly from conferring on counties the authority to borrow money to improve their roads without asking the consent of the voters. If so, why cannot the legislature confer on counties the power to borrow money to pay for debts already contracted for this purpose?

§ 860. *Whether considered as a curative measure or an original power, the act of Missouri of March 21, 1868, was valid.*

We agree with the supreme court of Missouri that the act in question, being an authority to do a particular thing, may be construed as an original power. But whether it be treated as an original power or as curative and confirmatory legislation it is equally valid, and this is the view taken of the subject by that court. *Steines v. Franklin Co.*, 48 Mo., 175. If the act was valid, the court had the power to take up the bonds and issue others in lieu thereof. These bonds purport on their face to have been issued under the order of the county court of Franklin county, made in pursuance of the authority conferred on the court by the act of assembly in question, and as the defendants claim to be innocent holders, and this is true for the purpose of the exception, the complainant has no standing in a court of equity.

Decree affirmed.

TOWNSHIP OF PINE GROVE v. TALCOTT.

(19 Wallace, 666-679. 1873.)

ERROR to U. S. Circuit Court, Western District of Michigan.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The facts of the case are few and undisputed, and the legal question presented has been settled by this court. On the 22d of

March, 1869, the legislature of Michigan passed an act entitled "An act to enable any township, city or village to pledge its aid, by loan or donation, to any railroad company now chartered or organized under and by virtue of the laws of the state of Michigan, in the construction of its road." The plaintiff in error was the defendant in the court below. It is a body corporate in the county of Van Buren, in Michigan. The case made by the declaration is as follows: The Kalamazoo & South Haven Railroad Company is a corporation organized under the laws of Michigan, having for its object the construction of a railroad from the village of Kalamazoo to the village of South Haven, in that state. The line of its proposed route passed through the township of Pine Grove. Pursuant to the act of the legislature before mentioned, a meeting of the electors of the township was called to vote upon the proposition whether the township should, in aid of the construction of the road, give to the company its coupon bonds to the amount of \$12,000, bearing interest at the rate of ten per cent. per annum, one-sixth of the principal to be payable at the end of each succeeding year, from March 1, 1870, until the whole amount was paid; the interest to be payable annually from that time. A majority voted for the proposition, and the bonds were issued. They bore date June 1, 1869. The plaintiff, Talcott, was the holder and owner of a part of the bonds and coupons. They are described in the declaration, and were overdue. The township filed a demurrer. It was overruled by the court; and the township electing to stand by it, judgment was given for the plaintiff. The township thereupon sued out this writ of error, and has thus brought the case before this court for review. It is not alleged that the bonds were not issued in conformity to the act, nor that there has been any want of good faith on the part of the railroad company, nor that the plaintiff, Talcott, was not a *bona fide* holder. But it has been argued that the act of the legislature was void. This presents the only question in the case, and it is fundamental. If the foundation fails the entire superstructure reared upon it must fall. It is said the act is in conflict with the constitution of the state.

§ 861. *When a statute will be pronounced void, as being repugnant to the constitution.*

It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground, unless the repugnancy to the constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the constitution must be specified and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such a result is one of delicacy, and to be exercised always with caution. *Twitcheil v. Blodgett*, 13 Mich., 127; *Tyler v. The People*, 8 id., 320; *People v. Mahaney*, 13 id., 482. It must be admitted that the constitution here in question contains nothing directly adverse upon the subject.

§ 862. *Various provisions in the Michigan constitution held not to prohibit an act empowering townships, cities, etc., to aid railroads.*

But we have been referred in this connection to the following provisions: The thirty-second section of article VI declares that "no person, in any criminal case, shall be compelled to be a witness against himself, or be deprived of life, liberty or property, without due process of law." Here there is no imputation of crime. The clause is confined to judicial proceedings. Article XIV, clauses six, eight and nine, provide that the credit of the state shall not be granted to, or in aid of, any person, association or corporation; that the state

shall not be interested in the stock of any corporation, and that the state shall not subscribe to, or be interested in, any work of internal improvement, or engage in carrying on any such work, except in the expenditure of grants to the state of land or other property. In this case it is the township and not the state that is concerned. The state has done nothing and is in nowise liable.

The present constitution was adopted in the year 1850. Before that time numerous acts involving the same principle with the one here in question had been passed by seventeen states. Congress, by the act of June 3, 1856 (11 Stat. at Large, 21), granted a large quantity of land to Michigan, to be used in aid of the construction of railroads. This land was appropriated by the state to several different companies, pursuant to the provisions of the act. Other companies were subsequently aided in the same way. In 1863 began a series of special legislative acts authorizing the municipal subdivisions of the state named therein to give their aid respectively to the extent and in the manner prescribed. Between that time and the year 1869 thirty such statutes were enacted. In the latter year the general law was passed under which the bonds in question were issued. This summary shows the understanding in the legislature, and out of it, in the state, that there was no constitutional prohibition against such legislation. It does not appear that its validity was ever in any instance judicially denied until the year 1870. The case as to the constitution is a proper one for the application of the maxim, *expressio unius est exclusio alterius*. The instrument is drawn with ability, care and fulness of details. If those who framed it had intended to forbid the granting of such aid by the municipal corporations of the state, as well as by the state itself, it cannot be that they would not have explicitly said so. It is not to be supposed that such a gap was left in their work from oversight or inadvertence.

The eleventh clause of the same article declares that the legislature shall provide a uniform rule of taxation, except as to property paying specific taxes, and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being classified and taxed as classed, by different rules. All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be co-extensive with the territory to which the tax applies. If a state tax, it must be uniform all over the state. If a county or city tax, it must be uniform throughout such county or city. *Gilman v. City of Sheboygan*, 2 Black, 514. But the rule does not require that taxes for the same purposes shall be imposed in different territorial subdivisions at the same time. If so, a county could not levy a tax to build a court-house, jail or infirmary without rendering it necessary for every other county in the state to do the same thing without reference to the different circumstances of each one. So here one township through which the railroad was to pass, expecting to be largely benefited by its construction, might give its bonds and impose the tax requisite to meet the principal and interest, while another township similarly situated might refuse to do so. The rule would have no application to the latter. The second and fourteenth clauses of article XVIII prescribe that, when private property is taken for public use, just compensation shall be made to the owner. These provisions relate to the exercise of the right of eminent domain. The thirteenth clause of article XV declares that "the legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts and loaning their credit." The power here in question was exercised by a township. The lan-

guage of this clause clearly implies that the powers to be restricted may be exercised; and what is implied is as effectual as what is expressed. *United States v. Babbit*, 1 Black, 61. Congress can pass no laws but such as the federal constitution expressly, or by necessary intendment, permits.

§ 863. *Extent of the legislative power of a state.*

The legislative power of a state extends to everything within the sphere of such power, except as it is restricted by the federal constitution or that of the state. In the present case we have found nothing that in our judgment warrants the conclusion that the act in question is wanting in validity by reason of its unconstitutionality.

§ 864. *Railroads are works of a public character.*

But it has been argued that aside from any constitutional prohibition the legislature had no power to authorize the imposition of a tax for any other than a public purpose, and that this act is not within that rule. Conceding for the purposes of this opinion the soundness of the first proposition, the second can by no means be admitted. Though the corporation was private, its work was public, as much so as if it were to be constructed by the state. Private property can be taken for a public purpose only, and not for private gain or benefit. Upon no other ground than that the purpose is public can the exercise of the power of eminent domain in behalf of such corporations be supported. This view of the subject has been taken by the supreme court of Michigan. *Swan v. Williams*, 2 Mich., 427. But upon other grounds, we think the public character of such works cannot be doubted. Where they go they animate the sources of prosperity, and minister to the growth of the cities and towns within the sphere of their influence. Unless prohibited from doing so, a municipal corporation has the same power to aid in their construction as to procure water for its water-works, coal for its gas-works, or gravel for its streets, from beyond its territorial limits. *Meyer v. Muscatine*, 1 Wall., 389 (§§ 921-925, *infra*). Under the limited powers conferred by the federal constitution, congress has frequently given aid in such cases. The Pacific railroads and the Louisville canal furnish instances of such action by that body. The gift to the sufferers from the overflow of the Mississippi, and prior acts of the kind, must also be borne in mind. Cannot a state legislature do the same things?

§ 865. *Power of the courts.*

It does not belong to courts to interpolate constitutional restrictions. Our duty is to apply the law, not to make it. All power may be abused where no safeguards are provided. The remedy in such cases lies with the people, and not with the judiciary. We pass by without remark the point whether in cases like this the public or private character of the work is not a legislative rather than a judicial question.

§ 866. *Decisions of a state court holding a state statute invalid do not bind this court if negotiable bonds are involved.*

It is insisted that the invalidity of the statute has been determined by two judgments of the supreme court of Michigan (*The People v. Salem*, 20 Mich., 452; *Bay City v. State Treasurer*, 23 id., 499), and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one states. In all of them but two, it is believed their validity has been sustained by the highest local courts. It is not

easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise. It must hear and determine for itself. Here, commercial securities are involved. When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal. *Gelpcke v. Dubuque*, 1 Wall., 175 (§§ 1367-70, *infra*). The general understanding of the legal profession throughout the country is believed to have been that they were valid. The national constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery. *Butz v. Muscatine*, 8 Wall., 579.

The question here under consideration was fully considered by this court in *Railroad Co. v. County of Otoe*, 16 id., 667 (§§ 849-853, *supra*), and in *Oloott v. Supervisors*, id., 678. We have no disposition to qualify anything said in those cases. They are conclusive in the case before us. In *Sedgwick on Statutory and Constitutional Law* (page 90), it is said: "It must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception, that although a corporation in making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded on it to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains. And the principle of this exception has been extended to other cases. So a person who has borrowed money of a savings institution upon his promissory note, secured by a pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note upon the ground that the savings bank was prohibited by its charter from making loans of that description." The authorities referred to sustain the text. *Palmer v. Lawrence*, 3 Sandf. S. C., 162; *Steam Navigation Co. v. Weed*, 17 Barb., 378; *Chester Glass Co. v. Dewey*, 16 Mass., 94; *Steamboat Co. v. McCutcheon*, 13 Penn. St., 13; *Potter v. Bank of Ithaca*, 5 Hill, 490; *Suydam v. Morris Canal & Banking Co.*, id., 491; *Sackett's Harbor Bank v. Lewis County Bank*, 11 Barb., 213; *Mott v. United States Trust Co.*, 19 id., 568. But it is not necessary to place our judgment upon this ground. We rest it upon the other views which have been expressed, and the authority of our preceding adjudications.

Judgment affirmed.

JUSTICES MILLER and DAVIS dissent. WAITE, C. J., did not sit.

LOUISVILLE v. SAVINGS BANK.

(14 Otto, 469-479. 1881.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—Action on bonds issued by the township of Louisville, Clay county, Illinois, upon a vote of the inhabitants, which was given on July 2, 1870. Plaintiff was a *bona fide* holder without notice of anything impairing the apparent validity of the bonds. The bonds recited that they were issued pursuant to the act of the legislature, and on a vote of the legal voters under the law. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE HARLAN.

The bonds in question contain the same recitals as those of Harter township in the same county, the validity of which was determined in *Harter v. Kernochan*, 103 U. S., 562 (§§ 1421-30, *infra*). The same questions which arose on the validity, construction and scope of the enactments under which they were issued and delivered to the consolidated company are now presented for determination. We perceive no reason for withdrawing or qualifying the conclusions we then announced.

There is, however, one question of some importance which did not then arise. It appeared in that case that the election held under the act of February 25, 1867, on November 10, 1868,—at which the township voted a donation to be raised by special tax, payable in three equal annual instalments,—was supplemented by another, held, under the authority of the amendatory act, on the 20th day of May, 1870, at which Harter township directed bonds to be issued in payment of its donation previously voted. In the present case, while the election at which the township of Louisville voted a similar donation, to be raised by like special tax, was also held on the 10th of November, 1868, the one at which the township voted to issue bonds in payment of such donation was not held until the 2d of July, 1870. On the day last named the people of Illinois voted in favor of the adoption of a new constitution. The second of the additional sections, which is entitled "Municipal subscriptions to railroads or private corporations," was separately submitted, and is in these words: "No county, city, town, township, or other municipality shall ever become a subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of any such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." In *Town of Concord v. Portsmouth Savings Bank*, 92 U. S., 625, we held that donations by counties or other municipalities in Illinois to railroad companies could not lawfully be made after July 2, 1870, though authorized by a statute enacted and a popular vote cast before the adoption of the constitution. This ruling was made in ignorance of the fact, to which our attention was not at the time called, that the supreme court of Illinois had, in an unreported case, decided that the intention of the framers of the constitution was not to prohibit donations authorized under pre-existing laws by a vote of the people prior to the adoption of that instrument, but to place subscriptions and donations on the same footing. Consequently, in *Fairfield v. County of Gallatin* (100 U. S., 47; §§ 869-871, *infra*), the ruling was modified, and the construction placed upon the organic law of Illinois by its highest court accepted and enforced. It may therefore be regarded as the set-

tled law of Illinois that its constitution recognized as binding donations, as well as subscriptions, by a township in aid of a railroad corporation, which were authorized under existing laws by a vote of the people prior to the adoption of that instrument.

We have seen that the people of Louisville township did, prior to the adoption of the constitution of 1870, vote in aid of this railroad enterprise a donation to be raised by special tax for a limited period. That donation was, beyond question, unaffected by the constitutional provision prohibiting municipal aid to railroads or private corporations. When that instrument was adopted the township had ample authority, conferred by the vote of the people, to raise by special tax a specific amount to be donated for the purpose indicated. But the argument on behalf of the plaintiff in error proceeds upon these grounds: That this is not a suit to enforce the levy of a special tax in payment of the donation voted November 10, 1868, but a suit on the bonds voted on the 2d day of July, 1870; that by the settled course of decisions in the supreme court of Illinois the township officers could not legally issue *bonds* in payment of a donation previously voted to be raised by special tax, without the consent of the people expressed at an election duly called and held for the purpose of determining that question; that no election could confer authority to issue bonds unless held before the section of the constitution which we have mentioned took effect; that the section having been adopted by popular vote on the 2d of July, 1870, was in operation from the first moment of that day; and that, consequently, the township election held on the same day was, in view of the constitutional inhibition, unavailing to confer authority to substitute a donation of interest-bearing bonds maturing many years after date, for a donation to be satisfied by a special annual tax for three years. In other words, that a popular vote authorizing an issue of bonds, in order to escape that inhibition, must have been cast prior to the *day* on which the constitution was adopted.

Passing by, as unnecessary for determination, the propositions embodied in the first branch of this argument, and conceding them for the purposes of this case to be correct, we proceed to inquire as to the time when the constitution of 1870, including that section, became the fundamental law of the state, and what effect it had on the township election held on the 2d of July of that year. At what precise hour on that day the constitution was adopted by popular vote cannot be stated. But we know that it could not have occurred before sunset, since the schedule, providing for the submission of the constitution to the popular vote, expressly required the polls to be kept open for the reception of ballots until that hour. Nor are we able to ascertain from the record the exact moment when the township voted in favor of the issue of these bonds. The town meeting to determine whether they should be issued in lieu of a special tax was to be held at nine o'clock in the forenoon; it was so held, and only fifty-four votes were cast, of which fifty-two were in favor of the issue. The presumption may, therefore, be fairly indulged that the township had, in fact, voted for issuing bonds before the close of the general election, on the same day at which the people of the state voted on the adoption of the particular sections of the constitution, separately submitted, which relates to municipal subscriptions to railroad and private corporations.

The schedule provided that if a majority of the votes polled were for the constitution, so much of it as was not separately submitted should be the supreme law of the state on and after August 8, 1870. The supreme court of

Illinois, in *Schall v. Bowman*, 62 Ill., 321, declared that, although the result of the election could not have been officially ascertained and declared before the expiration of some weeks thereafter, the provision relating to municipal aid to railroad corporations "was so framed that it could appropriately and effectually become a part of the organic law, without the disturbance of any of its elements, and was a declaration of the people on the 2d day of July, 1870, that *from and after that day*, no matter what may become of the new constitution, no county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donations to, or loan its credit in aid of, such corporation." Further, in the same case it was said: "We are unable to find anything in the constitution itself, or in the schedule thereto, militating against the view we have taken, that this separate article of the constitution of 1870 went into full effect on the day of its adoption by a vote of the people; that is, on the 2d day of July, 1870. There is no provision of the constitution requiring a different construction." The subscription, the validity of which was there involved, we remark, in passing, was made in pursuance of a municipal election held on the 3d day of August, 1870. The next case was *Richards v. Donagho*, 66 id., 73. It related to a proposed municipal subscription in pursuance of an election called July 12, 1870, and held August 2, 1870. The court adhered to the decision in *Schall v. Bowman*. The remaining case, to which our attention has been called, is *Wright v. Bishop*, 88 id., 302. There the vote for an issue of bonds was given at an election held on the 2d day of August, 1870. The court, referring to the preceding cases, said: "This, we have held, was too late. The clause in the constitution, containing the prohibition against municipal subscriptions or donations in aid of railroad companies and other private corporations, took effect on the 2d day of July, 1870; and all such subscriptions or donations, not authorized by a vote of the municipality, prior to that time, are void."

It is thus seen that the cases related to an election held in the month of August, 1870. Neither of them involved the validity of a subscription or a donation made in pursuance of an election held on the 2d of July, 1870; and, consequently, that learned tribunal has not indicated its opinion as to whether the constitutional inhibition forbade a municipal subscription or donation, in pursuance of an election held on the very day of the adoption of the constitution. It is true that the court, in *Wright v. Bishop*, after saying that the provisions in question "took effect on the 2d of July, 1870," remarked that "all such subscriptions or donations, not authorized by a vote of the municipality, prior to that time, are void." But that language must be interpreted with reference to the facts of the particular case presented for judicial determination. It is not clear that the phrase "prior to that time" was intended to refer to the day on which the constitutional provision took effect, as distinguished from the precise moment of its adoption by the popular vote. The case involved no such question.

§ 867. *Where it is necessary to settle conflicting rights courts of justice will take cognizance of the fractions of a day.*

We are justified in so interpreting the decision in *Wright v. Bishop* by what was said in *Grosvenor v. Magill*, 37 id., 239, the doctrines of which have not, so far as we are able to find, been modified by any subsequent ruling of that court. The question involved was whether the law regards fractions of a day. The court, speaking by Mr. Justice Lawrence, said: "It is true that for many purposes the law knows no division of a day; but whenever it becomes impor-

tant to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into the fractions of any other unit of time. 2 Bl. Com., 140, notes. The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids us, in legal proceedings, to consider its component hours, any more than about a month, which restrains us from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules." The views expressed in the last case are consistent with sound reason and public policy. They accord with our own judgment, and are in line with the settled course of decisions in other courts.

In *Arnold v. United States*, 9 Cranch, 104, it was declared to be the general rule that, where computation is to be made from an act done, the day on which the act is to be done should be included. Hence, an act of congress, imposing additional duties to be levied and collected upon all goods imported from and after its passage, was adjudged to be in force on the day of its approval by the president. And, upon the principle that the law will not take cognizance of fractions of a day, it has been said in some cases that a statute is operative from the first moment of the day on which it takes effect. But to these general rules there are established exceptions, as an examination of adjudged cases and elementary treatises will show. Mr. Justice Story has discussed this question with fulness in *In re Richardson*, 2 Story, 571. By an act approved March 3, 1843, the statute establishing a uniform system of bankruptcy throughout the United States, approved August 19, 1841, was repealed. But it contained a proviso that the act should not affect any cause or proceeding in bankruptcy commenced before its passage, or any pains, penalties or forfeitures incurred under said act; but that "every such proceeding might be continued to its final consummation," in like manner as if that act had not passed. A petition in bankruptcy was filed by Richardson on the 3d of March, 1843, and the question arose whether it was cut off by the repealing act approved on the same day.

It appeared that the petition was filed about noon, while the repealing act was not, in fact, approved by the president until late in the evening of the same day, several hours after the filing of the petition. It was ruled, upon the case presented, that the act of congress should be held to have taken effect only from the act of approval by the president, and not by relation from the commencement of the day on which such approval was given. After a review of the English decisions, the court said: "So that we see that there is no ground of authority, and, certainly, there is no reason to assert, that any such general rule prevails as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purposes of substantial justice." In *Lapeyre v. United States*, 17 Wall., 191, it was said that an act of congress, unless it is otherwise declared by law, becomes operative from the first moment of the day of its passage; and, further, that "fractions of the day are not recognized," and "an inquiry involving that subject is inadmissible." In reference to that case we remark that the question presented for determination was not as to fractions of a day, but whether a proclamation of the president, bearing date June 24, 1865, took effect on that day or on the 27th of June, 1865, when it was first promulgated by publication in the newspapers. That case did not require a determination of the question of law now before us. The language quoted from the opinion must, therefore, be taken as

a declaration of the general rule which obtains when the evidence does not show the necessity of regarding fractions of a day.

In *United States v. Norton*, 97 U. S., 164, the court, while declaring, upon the authority of *Lapeyre v. United States*, that the president's proclamation of June 13, 1865, removing all restrictions upon internal, domestic and coastwise intercourse and trade, took effect as of the beginning of June 13, 1865, and covered all the transactions of that day to which it was applicable, said: "We do not think this is a case in which fractions of a day should be taken into account." This language of the chief justice clearly implies that there were cases in which the court would regard fractions of a day. Besides, there was no question in that case, nor any proof made, as to the particular hour of the day when the proclamation of the president was issued. At the same term *Burgess v. Salmon*, id., 381, was decided. An act of congress increased the tax on tobacco from twenty to twenty-four cents per pound, but contained a proviso that the increased tax should not apply to tobacco "on which the tax under existing laws shall have been paid when this [that] act takes effect." It was approved on the afternoon of March 3, 1875, while the tobacco of *Salmon* was stamped, sold and removed for consumption or use from the place of manufacture in the forenoon of the same day. It was ruled that the court could inquire as to the time of the day when the president approved the act, and that "the time of such approval points out the earliest possible moment at which it could become a law, or, in the words of the act of March 3, 1875, at which it could take effect." It was consequently adjudged that the tobacco was not subject to the increased tax imposed by a statute which was not in fact approved, and did not take effect, until after the removal on the same day of the tobacco. In that case the parties agreed as to the respective hours of the day when the tobacco was in fact stamped and removed, and when the act was approved by the president. But such an agreement could not have authorized an inquiry into fractions of a day, unless such inquiry were permissible by the established rules of law.

The cases in the state courts bearing upon this question, and taking substantially the same view, are numerous. We refer to only two of them. In *Kennedy v. Palmer*, 6 Gray (Mass.), 316, the question was as to the jurisdiction of a justice of the peace of a particular county to hear and determine an action, commenced May 7, 1865, on which day the governor of the state approved an act by which the exclusive jurisdiction of all such actions, "not already pending," was vested in a police court thereby established, the act providing that it should take effect from and after its passage. The evidence did not show either the hour of the day when the action was commenced, nor the hour when the governor approved the act. The court adjudged that the justice had jurisdiction until the precise point of time when the act was approved, and thus became a law; and that since it did not appear that the suit was instituted after the approval of the act, it must be treated as one pending at the passage of the act, and, therefore, as unaffected by its provisions.

The other case is *People v. Clark*, 1 Cal., 406. The facts of that case were these: Clark was elected county judge at an election regularly appointed and held. On that day the legislature passed an act repealing the one by virtue of which the election was held, and conferring upon the governor the power of appointment. The repealing act was approved the same day, but at what hour of the day did not appear. Some days thereafter the relator was by the governor appointed county judge. The court sustained the validity of the election,

remarking that "the time of the approval of the executive is a fact which can be ascertained and proven, and in all cases where the rights of parties are in any manner to be affected by the time of the approval, an investigation of the question, when the event — the passage of the act — occurred, should be had." There are decisions in the English courts to the same effect. In *Wrangham v. Hersey*, 3 Wils., 274, the court characterized, as a mere fiction of law, the general proposition that there were no fractions of a day; that, "by fiction of law, the whole time of the assizes and the whole session of parliament may be, and sometimes are, considered as one day; yet the matter of fact shall overturn the fiction in order to do justice between the parties." *Fictio cedit veritati; fictio juris non est ubi veritas*. In *Combe v. Pitt*, 3 Burr., 1423, 1434, Lord Mansfield expressed similar views. He said: "But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour of the day may not be so, too, when it is necessary and can be done; for it is not like a mathematical point which cannot be divided."

§ 868. *Where on the same day two elections are held, it is competent for a court, where justice requires it, to inquire which of the two was first concluded, and upon that principle whether a vote of a township on bonds, or that of the state on a new constitution, first became effectual.*

In view of the authorities it cannot be doubted that the courts may, when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the executive. But it may be argued that the rule does not apply where the inquiry is as to the time when constitutional provisions became operative by popular vote; that a popular vote given at an election covering many hours of the same day should be deemed one indivisible act, effectual, by relation, from the moment the electors entered upon the performance of that act, to wit, from the opening of the polls. But we are of opinion that no such distinction can be maintained. In determining when a statute took effect no account is taken of the time it received the sanction of the two branches of the legislative department, which sanction is as essential to the validity of the statute as the approval of the executive. We look to the final act of approval by the executive to find when the statute took effect, and, when necessary, inquire as to the hour of the day when that approval was, in fact, given. So, in ascertaining when a constitutional provision was adopted, we perceive no sound reason why the courts may not, in proper cases, inquire as to the hour when such approval became effectual, to wit, as to the time when, by the closing of the polls, the people had adopted such provision. In this case all difficulty is removed by the fact, made certain by the schedule of the constitution requiring the polls to be kept open until a certain hour of the day of election. That fact should not be disregarded or ignored in ascertaining when the constitutional provision was adopted, especially since it expressly saved the obligations and rights of the municipalities which had, before its adoption, under the authority of pre-existing laws, voted subscriptions or donations.

We are of opinion that, within the fair meaning of the state constitution, the township election of the 2d of July, 1870, was held prior to the adoption of the section forbidding municipal subscriptions or donations in aid of railroad corporations, and under the authority of valid enactments in force when such election was held. The bonds, the coupons of which are in suit, were conse-

quently unaffected by the prohibitions of the state constitution. All other material objections to their validity have been considered and overruled in *Harter v. Kernochan*.

Judgment affirmed.

FAIRFIELD v. COUNTY OF GALLATIN.

(10 Otto, 47-55. 1879.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.— The facts of this case, so far as they are needed to exhibit the question presented by the writ of error, are very few. The defendant, on and prior to February 28, 1868, was a lawfully organized and existing county of the state of Illinois, through which was located the railroad of the Illinois Southeastern Railway Company, a company incorporated on the 25th of February, 1867. The county was authorized by the legislature of the state to donate to the railroad company, as a bonus or inducement towards the building of the railroad, any sum not exceeding \$100,000, and was authorized to order the clerk of the county court or board of supervisors of the county to issue county bonds to the amount donated, and deliver them to the company, provided that no donation exceeding \$50,000 should be made until after the question of such larger donation should have been submitted to the legal voters of the county, at an election called and conducted in the usual manner. The statute further enacted that if a majority of the ballots cast at such an election should be in favor of a donation, it should be the duty of the county court or board of supervisors to donate some amount, not less than \$50,000 nor more than \$100,000, to the company, and to order the issue of county bonds for the amount so donated. On the 28th of February, 1868, in pursuance of these statutory enactments, an election of the legal voters of the county was held to determine whether the county would donate \$100,000 of its bonds in aid of the said road, and the election resulted in authorizing their issue. The bonds were accordingly issued by the county judge and county clerk, under the direction of the county court, and they were delivered to the railroad company on the 6th or 8th of October, 1870, after the conditions precedent to their delivery had been fulfilled. The plaintiff is the holder of coupons belonging to said issue, having purchased them before due in the usual course of his business.

The defense set up is, in substance, that, in consequence of a provision in the new constitution of the state, which came into force July 2, 1870, the authority to issue and deliver the bonds had ceased to exist before the issue was made. The section of the constitution relied upon is in the following words: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation; *provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption." The question presented, then, is whether a donation to a railroad company by a county empowered by the legislature to make such a donation, when approved by a majority of the legal voters of the county at an election held for that purpose, is forbidden by this clause of the constitution,

if it was authorized under laws then existing by a vote of the people of the county prior to the adoption of the constitution? What should be the answer to the question depends upon the construction that must be given to the section thus quoted. Are donations thus authorized by a popular vote within the prohibition, or are they excepted out of it by the proviso?

§ 869. *In Illinois it is settled that donations of county bonds authorized by popular vote before July 2, 1870, are not invalidated by the state constitution which went into effect on that day.*

In *Town of Concord v. Portsmouth Savings Bank*, 92 U. S., 625, we had occasion to construe this section of the state constitution. We then held that donations by counties or other municipalities to railroad companies were prohibited by it, and that they could not lawfully be made after July 2, 1870, though they had been authorized by a prior statute and by a vote of the people of the county or municipality before the adoption of the constitution. We were fully aware that it is the peculiar province of the supreme court of a state to interpret its organic law as well as its statutes, and that it is the duty as well as the pleasure of this court to follow and adopt that court's interpretation. But we were not informed, when the case was decided, that any judicial construction had been given to the constitutional provision. It now appears that the supreme court of Illinois had previously considered it, and decided that donations, equally with subscriptions, if sanctioned by a popular vote before the adoption of the constitution, are not prohibited by it, and that they are excepted from the prohibition by the proviso. This was decided by that court in 1874, more than a year before *Town of Concord v. Portsmouth Savings Bank* came before us; but the decision was not called to our notice, and it was not reported until 1877. It may now be found in *Chicago & Iowa R. Co. v. Pinckney*, 74 Ill., 277. The language of the court is very positive. We quote it at some length, as follows: "At the time the section of the constitution referred to was framed, large sums of money in different parts of the state had been voted by municipalities to be subscribed and donated to railroad companies, on condition that railroads then being constructed should be completed within a given time; and the country, whether wisely and judiciously or not, seemed to demand that, in cases where the people in these municipalities had, under then existing legislation, voted to aid railroads by subscription or donation prior to the adoption of the constitution, such subscription or donation should not be affected by the formation of the constitution. And we have no doubt it was in view of this demand of a large portion of the state that the proviso was engrafted in the foregoing section." . . . "A reasonable construction of the whole section will embrace donations as well as subscriptions. In one sense of the term, a donation is a subscription to the capital stock of a company. We have no doubt, at the time this section was framed, there were then in the state quite as many donations voted as there were subscriptions to stock in any other manner, and if a necessity or reason existed to protect a subscription there was also the same reason and demand to protect a donation; and we entertain no doubt it was the intention of the framers of the constitution, by adding the proviso to the section, to place subscriptions and donations on the same footing." This authoritative exposition of the meaning of the constitution of the state by its highest court has repeatedly been recognized by that tribunal. *Town of Middleport v. Aetna Life Ins. Co.*, 82 Ill., 562; *Lippincott v. Town of Pana*, decided October 1, 1879, not yet reported. It has also been the understanding of the legislature of the state that donations as well as

subscriptions, if authorized by a vote of the people before the adoption of the constitution, are saved by the proviso. In 1874 an act of the general assembly was passed which declared that the liability of all counties, cities, townships, towns or precincts that had voted aid, *donations* or subscriptions to the capital stock of any railroad company, in conformity with the laws of the state, should cease and determine at the expiration of three years after July 1st of that year, and that after that time no bonds should be issued on account of or upon authority of such vote. This implied that up to July, 1877, donations voted before July 2, 1870, were lawful, and might be completed by the issue of bonds. It was an expression of the legislative understanding that such donations were not forbidden by the constitution. Act of March 17, 1874. A similar act was passed on the 29th of May, 1877, extending the time for issuing bonds for donations upon the authority of a vote of the people until July 1, 1880. It thus appears to have become a rule of property in the state that municipal bonds, issued to railroad companies on account of donations voted by the people before the adoption of the constitution, are valid, though not issued until after the adoption. Such was the earliest exposition of the constitution made by the court of last resort in the state, twice since recognized by it, and recognized also by repeated legislative action. There is every reason to believe that the rule has been relied upon, and that on the faith of it many municipal bonds have been issued, bought and sold in the markets of the country.

§ 870. *This court follows the decisions of state courts construing their own constitutions or statutes, no federal question intervening.*

In view of all this, ought this court to adhere to the construction we gave to the state constitution in ignorance of the fact that the supreme court of the state had previously construed it in a different manner? At a very early day it was announced that in cases depending upon the constitution or statutes of a state this court would adopt the construction of the statutes or constitution given by the courts of the state, when that construction could be ascertained. *Polk v. Wendal*, 9 Cranch, 87. In *Nesmith v. Sheldon*, 7 How., 812, it is declared to be the "established doctrine that this court will adopt and follow the decisions of the state courts in the construction of their own constitution and statutes, when that construction has been settled by the decisions of its highest tribunal." In *Walker v. State Harbor Commissioners*, 17 Wall., 648, we said, "This court follows the adjudications of the highest court of the state" in the construction of its statutes. "Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness." See, also, *Elmendorf v. Taylor*, 10 Wheat., 152; *Green v. Neal*, 6 Pet., 291; *Leffingwell v. Warren*, 2 Black, 599; *Sumner v. Hicks*, id., 532; *Olcott v. The Supervisors*, 16 Wall., 678; *State Railroad Tax Cases*, 92 U. S., 575.

§ 871. — *exceptions to the rule.*

Such has been our general rule of decision. Undoubtedly, some exceptions to it have been recognized. One of them is, that when the highest court of a state has given different constructions to its constitution and laws, at different times, and rights have been acquired under the former construction, we have followed that, and disregarded the latter. The present case is not within that exception, for there have been no conflicting interpretations by the state court of the section of the constitution we are now called upon to construe. And we are not constrained to refuse following the decision of the state court in order to save rights acquired on the faith of our ruling in *Town of Concord v. Portsmouth Savings Bank*. *Groves v. Slaughter*, 15 Pet., 449, may seem to be an

exception to the rule, but if carefully examined it will be found to be no exception. In that case, this court held that the constitution of Mississippi did not, *ex proprio vigore*, prohibit the introduction of slaves into that state as merchandise or for sale, after the 1st day of May, 1833, and, therefore, that a promissory note given for the price of slaves thus introduced was not void. This was held, though it appeared that prior to the decision the chancellor of the state had refused to enjoin a judgment at law recovered upon a bond for the purchase of slaves brought into the state for sale after May 1, 1833, and the court of errors, two judges against one, had affirmed the refusal of the chancellor. But the decision of the chancellor was rested entirely upon the ground that the matter relied upon to obtain the injunction should have been set up as a defense in the suit at law. This was all that was really decided. The opinions expressed in the court of errors by the judges upon the question whether the introduction of slaves after May 1, 1833, was prohibited by the constitution, were extra-judicial, and were so regarded by this court. It was said they were not sufficient to justify this court in considering that the construction of the constitution in Mississippi had become so fixed and settled as to preclude the federal supreme court from regarding it as an open question. *Groves v. Slaughter*, therefore, is not an exception to the rule that this court will follow the construction given by the highest court of a state to its constitution. On the contrary, the court assented to the rule.

Subsequently, the provision of the constitution of Mississippi was brought before the courts of the state, and it was settled by the highest tribunals that it did of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale, and render all contracts for the sale of slaves, made after May 1, 1833, illegal and void. *Rowan v. Runnels*, 5 How., 134, then came up to this court, where the same question was presented, and the construction given by this court to the state constitution was adhered to in order to support a contract for slaves purchased, and apparently only for that reason. Chief Justice Taney, in delivering the opinion of the court, said that in *Groves v. Slaughter* the court was satisfied that the validity of these sales had not been brought into question in any of the tribunals of the state until long after the contract was made, and that as late as the beginning of 1841, when *Groves v. Slaughter* was decided, it did not appear from anything before the court that the construction of the clause in question had been settled either way, by judicial decision, in the courts of the state. He added: "Undoubtedly this court will always feel itself bound to respect the decisions of the state courts, and, from the time they are made, will regard them as conclusive in all cases upon the construction of their own constitution and laws. But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which, in the judgment of this court, were lawfully made."

That case is totally unlike the present. The bonds in question now were issued in October, 1870. In 1874 the highest court of the state decided that such bonds could be lawfully issued, and that they were not forbidden by the constitution. It was, therefore, conclusively settled, more than a year before *Town of Concord v. Portsmouth Savings Bank* was decided by us, what the meaning of the constitution was. We are now asked to decline following the construction given and since recognized by the state court, and to adhere to that adopted by us in ignorance of the prior judgment of the state court, and that not, as in *Rowan v. Runnels*, to uphold contracts, but to strike them down,

though they were made in accordance with the settled law of the state. We recognize the importance of the rule *stare decisis*. We recognize, also, the other rule that this court will follow the decisions of state courts, giving a construction to their constitutions and laws, and more especially when those decisions have become rules of property in the states, and when contracts must have been made or purchases in reliance upon them. And it has been held that this court will abandon its former decision construing a state statute if the state courts have subsequently given to it a different construction. In *Green v. Neal*, 6 Pet., 291, the question raised was whether the court would adhere to its own decision in such a case, or would recede from it and follow the decisions of the state court. In two previous cases, a certain construction had been given to a statute of Tennessee in supposed harmony with decisions of the state court. But subsequently it was decided otherwise by the state supreme court; and it appeared that the decisions upon which this court had relied were made under peculiar circumstances, and were never in the state considered as fully settling the construction of the act. This court, therefore, overruled its former two decisions, and followed the later construction adopted by the state court. See, also, *Suydam v. Williamson*, 24 How., 427. With much more reason may we change our decision construing a state constitution when no rights have been acquired under it, and when it is made to appear that before the decision was made the highest tribunal of the state had interpreted the constitution differently, when that interpretation within the state fixed a rule of property and has never been abandoned. In such a case, we think it our duty to follow the state courts, and adopt, as the true construction, that which those courts have declared.

The judgment of the circuit court will be reversed and the record remitted, with instructions to give judgment for the plaintiff below on the findings made; and it is so ordered.

COUNTY OF MOULTRIE v. ROCKINGHAM TEN-CENT SAVINGS BANK.

(2 Otto, 631-637. 1875.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—This case differs very materially from *Town of Concord v. Portsmouth Savings Bank*, 2 Otto, 625. We there held that the bonds were void because the legislative authority to issue them as a donation to the railroad company had been annulled by the constitution of the state before the donation was made. In the present case the authority exercised was given to the county by the act of March 26, 1869, incorporating the railroad company. The tenth section of the act was as follows: "The board of supervisors of Moultrie county are hereby authorized to subscribe to the capital stock of said company, to an amount not exceeding \$80,000, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent. per annum, said bonds to be issued in such denominations and to mature at such times as the board of supervisors may determine: *Provided*, that the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid."

§ 872. *Power of corporation to issue bonds; constitutional amendment.*

No approving popular vote was required. It is not to be doubted that this section gave to the county complete authority to make a subscription to the

capital stock of the company. The power was fettered by no conditions or limitations, except as to the amount which might be subscribed; but the payment of the subscription was directed to be postponed until the railroad should be opened. And, of course, as a greater power includes every constituent part of it, the legislative act empowered the board of supervisors to agree to subscribe preparatory to an actual subscription. The power thus granted was never revoked, unless it was by the new constitution of the state, which did not take effect prior to July 2, 1870. Whatever was done in pursuance of the power before that time, if anything was, could not be affected by the constitution, subsequently adopted. Subscriptions, or contracts to subscribe, made in pursuance of it before it was abrogated, remained binding; for a constitution can no more impair the obligation of a contract than ordinary legislation can. It must be conceded, that, had no subscription been made, or engagement to subscribe entered into, before the new constitution took effect, none could have been made after. But the special finding of facts shows that one was made in 1869. On the 16th of December of that year, the board of supervisors met and informally resolved to subscribe \$80,000 to the capital stock of the railroad company; and the resolutions were referred to a lawyer to be put in form before being recorded on the records of the board. They were accordingly prepared from minutes furnished by the chairman of the board, and entered by the clerk upon the records, as of the date of the December meeting of the board, and duly attested. This must have been done prior to the first Tuesday in March, 1870. The record, as it appears under date of December 14, 1869, is as follows:

“And it is further ordered by the board of supervisors of Moultrie county, that, under and by virtue of the authority conferred upon said board by an act approved March 26, A. D. 1869, entitled ‘An act to incorporate the Decatur, Sullivan & Mattoon Railroad Company,’ the county of Moultrie subscribed to the capital stock of the Decatur, Sullivan & Mattoon Railroad Company the sum of \$80,000 to aid in the construction of a railroad by said company, in pursuance of their charter. And be it further ordered by the board of supervisors aforesaid, that, when said railroad shall be ‘open for traffic’ between the city of Decatur and the town of Sullivan aforesaid, there be issued \$80,000 of the bonds of said county, in denominations of not less than \$500, payable to said company, drawing interest, to be paid annually, at the rate of eight per cent. per annum; the principal to be due and payable ten years after date, or sooner, at the option of the county; and that said bonds be delivered to said railroad company in full payment of the subscription of said county so made as aforesaid.”

§ 878. *What amounts to a subscription by a county to stock in a railroad.*

It is true, there was no further order of this board to enter the resolutions of record, but it was the clerk's duty to make the entry. The substance of them had been adopted. They required no further action except to put them in form. No further action appears to have been contemplated. They remain of record still, and the board has never taken any action to correct the record. On the contrary, it has been recognized by subsequent action. At the December meeting of 1872, a special committee was appointed to examine the records of subscriptions of railroad donations, and report. The committee did report on the 25th of December, 1872, that the subscription of \$80,000, under the act of the general assembly of March 26, 1869, to aid in the construction of the Decatur,

Sullivan & Mattoon Railroad, was in accordance with law. Under this action of the board, and the report of the committee, the bonds were delivered. It is impossible, therefore, to doubt that the resolutions adopted in December, 1869, as recorded, must be treated as the action of the board at that time. And, if so, they amounted to a subscription to the stock of the company, and created an obligation for the payment of the subscription in county bonds. It is true no subscription was made *on the books* of the railroad company until July, 1871, when one was made by Mr. Titus, chairman of the board, without any express authority, and then made for the purpose of enabling him to vote at an election. But a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869. The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act; its immediate subscription. *Western Saving Fund Society v. City of Philadelphia*, 31 Penn. St., 174; *Sacramento v. Kirk*, 7 Cal., 419; *Logansport v. Blakemore*, 17 Ind., 318. In *Justices of Clarke County Court v. Paris, W. & K. R. Turnpike Co.*, 11 B. Mon., 143, it was ruled that an order of the county court, by which it was said the court subscribed, on behalf of Clarke county, for fifty shares of stock in the turnpike company, if concurred in by a competent majority of the magistrates, was itself a subscription, and bound the county. There was no subscription on the books of the company, but the court of appeals said, "We cannot, therefore, regard this order as a mere offer or pledge to subscribe the fifty shares in this particular road, but as actually taking, and, in substance and legal effect, subscribing for that number of shares." So in *Nugent v. Supervisors of Putnam County*, 19 Wall., 241 (§§ 1215-17, *infra*), it was said that to constitute a subscription by a county to stock in a railroad company, it is not necessary that there be an act of manual subscribing on the books of the company. These cases lead directly to the conclusion that the action of the board of supervisors in December, 1869, was in substance and in legal effect a subscription.

§ 874. *Constitutions are prospective in their operation where vested rights are concerned.*

And if this conclusion could not be reached, it would make but little difference to the present case; for it could not be doubted that the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the railroad company. The resolutions were entered of record by the clerk and president of the railroad company; and the company made an appropriation of the bonds to be received in payment for the subscription, by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new constitution came into operation. No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the constitution. The delivery of the bonds was no more than performance of the contract. For these reasons, it is in vain to appeal to the decisions made in *Aspinwall v. County of Daviess*, 22 How., 364 (§§ 1127-28, *infra*), and *Town of Concord v. Portsmouth Savings Bank*, 2 Otto, 625. In neither of those cases was there any contract made be-

fore the authority to make one was annulled. We do not assert that the constitutional provision did not abrogate the authority of the board of supervisors to make a subscription for railroad stock. On the contrary, we think it did. But we hold that contracts made under the power while it was in existence were valid contracts, and that the obligations assumed by them continued after the power to enter into such contracts was withdrawn. The operation of the constitution was only prospective. Indeed, it is expressly ordained in its schedule that "all rights, actions, prosecutions, claims and contracts of the state, individuals or bodies corporate, shall continue to be as valid as if this constitution had not been adopted." It is hardly necessary to say that, under the act of the general assembly, the authority to make a subscription was coupled with an authority and a duty to issue county bonds for the sum subscribed. No action of the board was needed after the subscription was made.

§ 875. *A county cannot set up against a bona fide holder of its bonds, that its authority to issue the same had expired, in the face of recitals in the bonds and of the county records to the contrary.*

This disposes of the only material question in the case. There is, however, another consideration that is worthy of notice. The findings of the court are, that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity, and without notice of any defense. They were executed by the president of the board of supervisors and the county clerk. They recite that they are issued by the county of Moultrie, "in pursuance of the subscription of the sum of \$80,000 to the capital stock of the Decatur, Sullivan & Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, in December, A. D. 1869, in conformity to the provisions of an act of the general assembly of the state of Illinois, approved March 26, A. D. 1869." Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further and inquire what was the authority for the issue, where was he to look? Had he looked to the act of the general assembly of March 26, 1869, he would have found plenary authority for a stock subscription, and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding, notwithstanding the constitution, and that bonds issued in payment of it were therefore lawful. If, then, he had inquired whether a subscription had been made before July 2, 1870, at the only place where inquiry should have been made,—namely, at the records of the board,—he would have found an order to subscribe, equivalent to a subscription made in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made inquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can the county be permitted to set up against a *bona fide* holder of the bonds, that the authority to make a subscription with all its legitimate consequences had expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law; and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired.

It is unnecessary to say more. Some matters which we have not noticed were assigned as errors, but they were not mentioned in the argument, and in our opinion they exhibit no error in the court below.

Judgment affirmed.

JUSTICES MILLER, DAVIS and FIELD dissent.

COUNTY OF CALLAWAY v. FOSTER.

(8 Otto, 567-575. 1876.)

ERROR to U. S. Circuit Court, Western District of Missouri.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—This is one of the bond cases of which so many have been brought before this court within the last few years. The county of Callaway, in the state of Missouri, subscribed to the stock of a railroad to be built through the county, and issued its bonds to raise the money to make payment therefor. The road has been built, is in full operation upon the route selected by the county, and the county holds its stock. The county court making the subscription paid the interest for two years upon the bonds and a portion of the principal. Another county court has since been elected, which refuses to pay either principal or interest. The plaintiff below, a citizen of the state of Kentucky, paid his money for a portion of these bonds, and brings the present suit to recover the amount. The court adjudged that the bonds must be paid. The county appeals to this court.

The bonds were issued under the act of the general assembly of Missouri, entitled "An act to incorporate the Louisiana & Missouri River Railroad Company, approved March 10, 1859" (see Acts Mo. 1858, p. 406), as amended by an act approved March 24, 1868. Acts Mo. 1868, p. 97. Section 29 provided that "it shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and issue bonds of such county to raise funds to pay the stock thus subscribed." Section 22 of the amendatory act of March 24, 1868, is as follows: "It shall be lawful for the company to mark out, locate and construct a branch of its road. . . . And all subscriptions to the capital stock of said company intended to be used in the construction of said branch shall be made in separate books."

On the 16th of January, 1868, the county court of Callaway county authorized a subscription of \$500,000 to the capital stock of the said railroad company. The record shows that on the same day,—to wit, on the 16th day of January, 1868,—Harris, the authorized agent, subscribed for the stock, and received the certificates therefor.

The following is a copy of one of the bonds issued by the county, with coupon attached, to raise the money to pay such subscription, and which is now held by the plaintiff below:

"No. —.]

STATE OF MISSOURI.

[\$100.

"CALLAWAY COUNTY RAILROAD BOND.

"On the 1st day of January, A. D. 1873, the county of Callaway promises to pay to the Louisiana & Missouri River Railroad Company, or bearer, the sum of \$100, to bear interest from date at the rate of nine per cent. per annum, payable semi-annually on the 1st day of January and July in each

year, as per coupons attached hereto, and after maturity to bear the same rate of interest until paid, said principal sum and interest being payable at the Missouri Bond and Stock Board of St. Louis, in the city of St. Louis, Mo. This bond is issued by Callaway county, by authority of the act of the general assembly of the state of Missouri, approved March 10, 1859, as amended by an act approved March 24, 1868.

"Witness my hand, with the seal of said county affixed, this 1st day of January, 1869.

[L. s.]

"GEO. BARTLEY,

"Presiding Justice of Callaway County Court.

"Attest: W. H. BAILEY,

"Clerk of Callaway County Court.

"COUPON.

"On the 1st day of January, 1873, Callaway county will pay to the bearer the sum of \$4.50 at the Missouri Bond and Stock Board of St. Louis, Mo., interest on railroad bond No. —.

"GEO. BARTLEY,

"Presiding Justice of Callaway County Court.

"W. H. BAILEY,

"Clerk of Callaway County Court."

If this subscription was made by virtue of the act of March 10, 1859, before referred to, it is not contended that the bonds are invalid. This is understood to be conceded in the second point made in the brief of the plaintiff in error. On the other hand, if the subscription depends solely for its validity upon the act of March 24, 1868, it is contended that the subscription was without the authority of law, and that the bonds issued in its fulfilment are void. The distinction is this: On the 8th of March, 1859, a county might legally be empowered by the legislature of Missouri to make a subscription to railroad stock upon its own motion, and to issue bonds in fulfilment of the obligation. Before the 24th of March, 1868,—to wit, in July, 1865,—a constitutional provision was adopted, in these words: "The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." It is not pretended that the assent of the voters of Callaway county to the subscription in question was given. The facts upon this branch of the case are that the subscription to the railroad stock was authorized by the county court, and actually made by their agent before the act of March, 1868, was passed; that the certificates of stock in said company were issued to and received by the county at the time of making such subscription, but that the bonds of the county in question were not issued until a date after the passage of the latter act—to wit, in January, 1869,—and that the original charter was in several particulars altered by the amending act of 1868.

§ 876. *The provision of the Missouri constitution of 1865 touching county subscriptions is not retroactive.*

1. It has been held in many cases by the supreme court of Missouri that the provision of the constitution of 1865, prohibiting loans or subscriptions for stock, except with the assent of the electors, is prospective, not retroactive; that the charter of a company which is in existence before the adoption of the constitutional provision is not affected by it, but the powers given by it remain.

as if no such constitution existed. *State v. Macon County Court*, 41 Mo., 453; *Smith v. County of Clark*, 54 id., 58. Although put into execution by making the subscription or issuing the bonds after the adoption of the constitution, the power remains valid.

§ 877. *The rights of railroads to have bonds issued by counties under acts prior to 1865 are not impaired by the constitution of that year.*

2. The constitution of 1865 contains, in connection with the provision already quoted, the following: "All statute laws of the state now in force, not inconsistent with the constitution, shall continue in force until they shall expire by their own limitations, or be amended or repealed by the general assembly." In *State of Missouri v. Cape Girardeau & State Line Railroad*, 48 Mo., 468, it was held that the constitutional provision prohibiting special enactments did not extend to amendments of laws in force when it was adopted, but that additional power given to the Cape Girardeau Railroad, by the means of an amendment to its charter, was a lawful exercise of authority. The cases before cited show that the act we are considering is not inconsistent with the constitution, as it continued in force after its adoption as before. It is difficult to discover any principle which can distinguish an amendment to the charter of the Louisiana & Missouri River Railroad Company, altering its terms and conditions within its original limits, and of the general nature and scope of its original charter, from the Cape Girardeau case. The case of *State v. Saline Co.*, 51 Mo., 350, does not conflict with this principle.

3. The act of March, 1868, referred to in the Callaway county bonds, in connection with the act of March 10, 1859, was an amendment of the latter act. It expressly declares itself to be an amendment of the first act. Its title is, "An act to amend an act entitled an act to incorporate the Louisiana & Missouri Railroad Company, by increasing the amount of the capital stock of the said company, defining more explicitly the power of the board of directors to fix the western terminus of said road, authorizing the location and construction of a branch road, and conferring upon said board the necessary powers to carry into effect the several objects contemplated by their charter, and also by striking out sections 11, 18, 30 and 31 of said act." Laws of Mo., 1868, p. 103. That the title may properly be examined, and is competent, see *Cin. L. I. C. v. Abbott*, 39 Mo., 181; *State v. Saline Co.*, 51 id., 392; 14 id., 205. The several objects seem to be legitimate subjects of amendment, and it would ill become us to impute to the legislature of a state an intention to evade the provisions of its own constitution, under the guise of an amendment. There is no indication of such an intention in the case we are considering. The form in which the amendment is made, by a new act throughout, is explained by that article of the Missouri constitution which requires that no amendment of an act can be made by striking out and inserting any words, but that "the act or part of act amended shall be set forth and published at length as if it were an original act." Accordingly, the amendment is here made, not by making provision merely for the new points, but by re-enacting the whole of the original act in all its details, with the alterations, where they are intended to be made. A collation of the provisions of the two acts make this point quite clear.

The amended charter attaches to itself all the qualities and privileges of the old one. *State v. Greene Co.*, 54 Mo., 540; *State v. Callaway Co.*, 51 id., 395; *State v. Sullivan Co.*, id., 522. This view is an answer to the objections that the transfer of the subscription was made to a branch road, and an issue of bonds made under that subscription, and that such authority only existed under the

power conferred by the act of 1868. The branch was the original road, so far as Callaway was concerned, with a change of name simply, and the amendment became a part of the original act. We find no difficulty, therefore, in holding that a county, included in the terms of the original act, had power upon its own authority to subscribe for the stock, and that a submission of the question to the electors of the county was not necessary. The power of this county to subscribe as one of the counties intended to be included within the terms of the original act is reasonably plain. The twenty-ninth and thirty-fifth sections are as follows:

"SEC. 29. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in stock of said company, and issue the bonds of said county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and any city, town or incorporated company may subscribe to the stock of said railroad company, and appoint an agent to represent its interest, give its vote, and receive its dividends, and may take proper steps to guard and protect the interest of said city, town or incorporation."

"SEC. 35. Said company shall have power to mark out, locate and construct a railroad from the city of Louisiana, in the county of Pike, by the way of Bowling Green, in said county, to some suitable point on the North Missouri Railroad, intersecting said road between the southern limits of the town of Wellsburg, in Montgomery county, and the northern limits of the town of Mexico, in Audrain county, thence to the Missouri river at the most eligible point, on a line the most suitable and advantageous as regards distance, grade, cost of road, and permanent value of same."

The starting point of the road was fixed at Louisiana, in the county of Pike. Two points only in the route were indicated, to wit, Bowling Green, and the crossing of the Missouri Railroad between the outer limits of the towns of Wellsburg and Mexico. The termination was to be upon the Missouri river at the most eligible point, distance, grade, cost of road, and permanent value considered. The county of Callaway furnished all the requisites thus set forth. The road as ultimately built did pass through Bowling Green, across the Missouri road between the towns of Mexico and Wellsburg, thence through the whole length of the county of Callaway to a point opposite Jefferson City on the Missouri river. We discover nothing to show that this point might not properly have been decided by the company to have been a more suitable and advantageous place at which to terminate its road than any other upon the Missouri river. The statute already quoted provides that "it shall be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company." "May be" what? This expression is incomplete, and is to be construed with reference to the situation of the subject matter. If used in a statute where a railroad already built was the subject, it would no doubt refer to the presence or existence there of the road. It would be equivalent to the word "exists," or "is built," or "in operation," or the like. But when used in reference to a railroad not yet built, not located or surveyed, and indeed not yet organized, it must have quite a different meaning. Certain points were given for the location of the road; as, that it must start from a city named, it must pass through one place mentioned, and must pass between two others, and must terminate on the Missouri river.

The map given in evidence shows that there was a large room for choice thus left in the company. It might pass through Howard and Boone counties, terminating at Glasgow, and omitting Callaway, or it might pass through Callaway, terminating opposite Jefferson City, omitting Howard and Boone. This was the intention of the legislature; for the double purpose, no doubt, of enabling the company to select the best route, and of stimulating rivalry among the different localities which might wish to obtain the benefit of the location. A broad construction of the language would be to say that it meant to authorize a subscription by any county in which the road may by law be located. This would include all the counties before named. It might be held to authorize a subscription by any county in which the road may be in fact ultimately located. It is, perhaps, not necessary to pass upon this point with any more precision than to say, that, upon any reasonable construction of the language, it embraces Callaway, which was one of the possible sites, and a site ultimately occupied, in fact.

§ 878. *Where a county is authorized by two acts to issue bonds, the second act not impairing in terms the power vested by the first act, its issuance of bonds must be held to be under the first act.*

We are of the opinion, therefore, that the subscription actually made by the county of Callaway, in January, 1868, was legal, and that the circumstance that the bonds were issued at a later date is an immaterial one. We are of the opinion, also, that the amendments of the charter, and the subsequent action by which the portion of road from Mexico through Callaway county, and under such amendments, was made a branch road, and the portion from Mexico to Glasgow was called the main road, and that the bonds were issued both under the act of 1859 and the act of 1868, if such were the fact, do not affect the case. The latter act is an amendment and continuation of the former, and refers to what was then termed a branch road. Nor do we perceive that it is necessary to invoke the principle of *bona fides*. If our views are sound, the bonds were legally issued under the authority of a legislative act, and are valid in the hands of any one who has a legal title to them. We are of the opinion that the case was well decided by the circuit court.

Judgment affirmed.

JUSTICES MILLER, DAVIS, FIELD and BRADLEY dissent.

LOUISIANA v. TAYLOR.

(15 Otto, 454-459. 1881.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—Taylor, a citizen of Illinois, brought this action against the city of Louisiana, a municipal corporation of Missouri, to recover the amount alleged to be due upon certain bonds and coupons issued by the latter in payment of a subscription to the capital stock of the Louisiana & Missouri River Railroad Company, a corporation authorized by law to construct, and which has constructed in pursuance thereof, a railroad from the city of Louisiana to the Missouri river. The bonds sued on were dated, some in September, others in October and November, 1869. They matured on January 1, 1876, 1877 and 1878, and, together with the coupons falling due since January, 1876, remain unpaid. All coupons maturing previously, together with the princi-

pal of a portion of the whole issue of bonds, had been paid by taxes regularly levied and collected by the proper authorities of the city from the year 1867 to 1876. Certificates of the stock in the railroad company were issued in pursuance of the subscription and were accepted by the city, which has ever since exercised its rights as a stockholder. The defense was that the bonds were void for want of power in the municipal corporation to issue them. There was a judgment in favor of the plaintiff below, to reverse which this writ of error is prosecuted. Each of the bonds sued on contains a recital that it "is issued by the city of Louisiana under authority of the general assembly of the state of Missouri entitled 'An act incorporating the Louisiana & Missouri River Railroad Company,' approved March 10, 1859; also an ordinance of the city council of the city of Louisiana, No. 502, passed June 12, 1866."

The reference to the railroad charter is to the twenty-ninth section of the act of incorporation, which reads as follows: "Sec. 29. It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and it may invest its funds in stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and any city, town or incorporated company may subscribe to the stock of said railroad company and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard and protect the interests of said city, town or incorporation."

The tenth section of the act incorporating the city of Louisiana, passed February 16, 1865, was as follows: "The city shall have power to subscribe for stock in any incorporative railway company connecting with the city of Louisiana, or give any bonus to any institution of learning, by submitting an ordinance making the appropriation or authorizing the issue of bonds for any such purpose to a vote of the qualified voters of the city at any general election held in the city, or at any special election expressly ordered, at which election the majority of the votes cast shall be for such ordinance; *provided*, the debt of the city shall never exceed one hundred and fifty thousand dollars."

In pursuance of this provision of the city charter the city council, on June 12, 1866, passed ordinance No. 502, recited in the bonds in suit, providing for an election to be held on the first Tuesday in July, 1866, on the proposition to subscribe for stock in the Louisiana & Missouri River Railway Company for an amount not exceeding \$50,000. The election provided for by this ordinance was in fact held, the result of which was that one hundred and seventy-six votes were cast in favor of the proposition and forty-six against it. Thereupon the city council passed an ordinance authorizing the subscription of \$50,000 to the capital stock of the railway company, and the issue of bonds for the payment of the same. The subscription was made and the bonds were delivered.

§ 879. *Section 14, article XI, of the constitution of Missouri of 1865, does not curtail any authority possessed by municipal corporations to subscribe for stock or loan their credit to railroad companies.*

The constitution of Missouri that went into operation July 4, 1865, sec. 14 of art. 11, contains the following provision: "The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held

therein, shall assent thereto." Section 3 of article 2 is as follows: "All statute laws of this state now in force not inconsistent with this constitution shall continue in force until they shall expire by their own limitation or be amended or repealed by the general assembly." At its first session after the adoption of this constitution the general assembly of Missouri passed a general railroad law (R. S. Missouri, 1865, p. 372), which, it is claimed, went into effect March 19, 1866, and which contained the provision following, to wit: "It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such city, county or town, in, or to loan the credit thereof to, any railroad company duly organized under this or any law of this state; *provided*, that two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription." At the same session of the legislature it was also enacted (Rev. Laws of Missouri, c. 224, sec. 6, p. 882) that "all acts and parts of acts of a private, local or temporary nature, or specifically applicable to particular cities or counties, in force on the 1st day of November, A. D. 1865, not repealed by, or repugnant to, the provisions of the general statutes or some act of the present general assembly, shall continue in force or expire, according to their respective provisions or limitations." These are all the statutory provisions supposed by counsel for the respective parties to have any material bearing upon the question at issue.

§ 880. *Powers of the city of Louisiana, Mo., to subscribe for stock in the Louisiana & Missouri Railroad Company were not affected by the general railroad law of 1866.*

The power to subscribe to the capital stock of the railroad company is expressly given to the city of Louisiana by the twenty-ninth section of the charter of the former. Whether that grant of power carries with it the incidental authority to pay its subscription by an issue of bonds, or whether, upon a fair construction of the terms of that section, the exercise of such an authority is within the meaning of the law, it is not necessary for us to discuss or decide; for whatever might be a proper construction of the section, if it stood by itself, we think it must, at the time when the bonds in suit were issued, be interpreted in connection with the tenth section of the city charter, which had in the mean time been enacted. That section, in explicit terms, recognized and thereby conferred upon the city the power to issue bonds in payment of its subscription to the stock of any railway company connecting with it, upon condition, however, of the approval of the ordinance authorizing the issue by a majority of the votes cast at an election held for that purpose; and we think that limitation must be taken thereafter as imposed upon the power granted to the city in the railway charter. Such was, in fact, the construction put by the city upon its own powers, for the bonds in suit purport to be issued in pursuance of authority conferred by a majority of the votes cast at such an election, approving the ordinance passed to that end.

The ordinance submitted to the vote of the electors at that election, authorizing the issue of the bonds, was, we think, in all respects, in conformity with the law, and sufficient. But it is contended by the plaintiff in error that the provision of the city charter, in accordance with which it was passed, had been repealed before the vote was taken and the subscription made. It has been repeatedly held by the supreme court of Missouri, in decisions approved and followed uniformly by this court, that such repeal is not the direct and immediate result of the constitution itself; that, on the contrary, the prohibition contained

in that instrument is a limitation merely upon the power of the legislature for the future, so that it should not thereafter grant to municipal corporations authority to become stockholders in companies except upon the terms expressly mentioned, and that all previous grants of such authority remain in their original force until duly revoked, unaffected by the constitutional provision. *County of Callaway v. Foster*, 93 U. S., 567 (§§ 876-878, *supra*); *County of Scotland v. Thomas*, 94 id., 682 (§§ 1210-14, *infra*); *County of Henry v. Nicolay*, 95 id., 619 (§§ 889-892, *infra*); *County of Ray v. Vansycle*, 96 id., 675 (§§ 1190-93, *infra*); *County of Schuyler v. Thomas*, 98 id., 169; *County of Cass v. Gillett*, 100 id., 585.

It is argued, however, that the repeal of the provision in question was effected by the seventeenth section of the general railroad law, which, it is claimed, took effect March 19, 1866, before the passage of the ordinance No. 502, June 12, 1866. But this position, in our opinion, is also untenable. The act in question is an enabling statute, passed in execution of the powers authorized by the constitution then recently adopted. It was general in its provisions, conferring power upon any county, city or town to take stock in, or to loan its credit to, any railroad company, duly organized under any law of the state, upon the assent of two-thirds of the qualified voters thereof. It does not revoke any previous grants of similar authority. It repeals no existing provisions of law. It contains no words of prohibition. The sixth section of chapter 22 of the same session, "of the general statutes and their effect," etc. (Rev. Stat. Mo., 882), expressly continues in force "all acts and parts of acts of a private, local or temporary nature, or specifically applicable to particular cities or counties, in force on the 1st day of November, A. D. 1865, not repealed by, or repugnant to, the provisions of the general statutes or some act of the present general assembly" until they expire, according to their respective provisions or limitations. There is no repugnancy between the tenth section of the charter of the city of Louisiana and the seventeenth section of the general railroad law. One is a definite, express and special provision, in reference to such railways only as connect with the city; the other has relation to possible proposals for subscription to the stock of any railroad company, whether its railroad connected with the city or not. The subjects of the two statutes are not the same; and there is no such inconsistency between them as that both may not stand and operate. It would not be legitimate to construe the seventeenth section of the general railroad act as if it forbade everything it did not authorize; and it is only by such a construction that the repugnancy with the tenth section of the charter of the city can be made to arise.

The very question mooted here was decided by the supreme court of Missouri at the October term, 1867, in the case of *The State v. Macon County Court*, 41 Mo., 453. It was there said by the court: "There is no such inconsistency between the acts that they may not both stand and be carried into operation. A general prohibition against subscribing for stock in any corporation may well subsist with a permission to subscribe for stock in a particular corporation. Besides, the seventeenth section of the general railroad law, with which the enabling act is supposed to conflict, uses no negative words. It uses words to express and permit future acts, and there is nothing to show that it intended to operate on existing or past laws even by implication. It was framed after the constitution was adopted, and the conclusion is undeniable that it was intended simply to make the law conform to and carry out the fourteenth section of the eleventh article of that instrument." This decision is

upon the very point, and is a judgment of the supreme court of the state in a case which, in its circumstances, we find it impossible to distinguish from the present. Its authority was confirmed by the same court in *Smith v. County of Clark*, 54 id., 58. This view of the case disposes of all objections to the judgment of the circuit court. It is accordingly affirmed.

SUPERVISORS v. GALBRAITH.

(9 Otto, 214-220. 1878.)

ERROR to U. S. District Court, District of Mississippi.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The question presented for our determination in this case is as to the validity of certain bonds issued and delivered by the board of supervisors of Calhoun county, in the state of Mississippi, in payment for stock of the Grenada, Houston & Eastern Railroad Company, for which the supervisors subscribed in behalf of the county. In the court below they filed numerous pleas, presenting the points of defense upon which they relied. The pleas were all demurred to, the demurrers were sustained and judgment was rendered for the plaintiff. Here the assignments of error are not numerous. We shall respond as far as we deem necessary without formally restating them.

The act of February 10, 1860, authorized the subscription, provided a majority of the voters of the county signified their approval. That sanction was given, and the stock was subscribed. The amendatory act of March 25, 1871, declared that when bonds were issued in payment for such stock they should be "signed by the president of the board of supervisors issuing the same, and be made payable to the president and directors of the Grenada, Houston & Eastern Railroad Company, and their successors and assigns, and may be assigned, sold and conveyed with or without guaranty of payment by said president and directors, or may be mortgaged in like manner, at their discretion, as they may deem best for the company." The bonds here in question bore date September 1, 1871, and were payable to "*the Grenada, Houston & Eastern Railroad Company, or bearer*, at the agency of said company in the city of New York, two years from date." Each bond was for \$500, with interest coupons attached, which matured half-yearly. On their face is this recital:

"This bond is one of a series of bonds issued and delivered to the Grenada, Houston & Eastern Railroad Company by Calhoun county, to meet and pay off the amount subscribed by said county to the capital stock of the railroad company aforesaid, in pursuance of an act of the legislature of the state of Mississippi, entitled 'An act to aid in the construction of the Grenada, Houston & Eastern Railroad,' approved February 10, 1860, and of an act amendatory thereof, passed March 25, 1871, and in obedience to a vote of the people of said county at an election held in accordance with the provisions of said acts."

§ 881. *The fact that bonds are payable to payee "or bearer" does not vitiate them, the law requiring that they be payable to payee "or assigns."*

An objection is made to the form of the bonds. It is said they should have been made payable to the railroad company and "their successors and assigns," and not to the company "*or bearer*," and it is insisted that this divergence from the prescribed formula is a fatal defect. To this there are several answers. The statutory requirement in this particular is only directory. *Indianapolis R. Co. v. Horst*, 93 U. S., 291; *Township of Rock Creek v. Strong*, 96 id., 271 (§§ 1010-12, *infra*). The defect is one of form and not of substance. The

irregularity was committed by the servants of the county, and the county is estopped to take advantage of it. *Bargate v. Shortridge*, 5 Clark (H. L.), 297. The recital in the bonds of conformity to the statutes is also conclusive. A buyer was not bound to look further. *Bigelow, Estoppel*, 266; *Commissioners of Knox County v. Aspinwall*, 21 How., 539 (§§ 1413-18, *infra*); *Moran v. Commissioners*, 2 Black, 722 (§§ 1439-42, *infra*). No place of payment of the bonds being designated by the statute, it was competent for the supervisors to make them payable in New York. *Meyer v. Muscatine*, 1 Wall., 384 (§§ 921-925, *infra*). The law of the place of performance governed the construction and effect of the contract. *Brabston v. Gibson*, 9 How., 263; *Cook v. Moffat*, 5 id., 295. By the law of New York such bonds may be assigned in blank, and any holder can fill the blank with his own name or otherwise. In the meantime, after such assignment in blank, they pass by delivery from hand to hand, and have all the properties of commercial paper. *Hubbard v. New York & Harlem R. Co.*, 36 Barb. (N. Y.), 286. The result is, therefore, the same that it would have been if they had been drawn in literal conformity to the statute. The requirement of the statute in this particular is evidently the result of inadvertence. It applies to the securities spoken of the language necessary in a deed intended to vest in a corporation a fee-simple title to real estate. They were obviously intended to be made negotiable instruments. *Mayor of Vicksburg v. Lombard*, 51 Miss., 111.

§ 882. *Where there is no prohibition, it does not vitiate bonds that after the authority to issue them had been refused by a vote of the people, they were issued under the authority of a second election.*

It appears by the record that the proposition for subscription was twice submitted to the voters. The first time it was rejected; the second, it was approved by a majority. It is contended that the first submission exhausted the power to submit, and that the second was a nullity. We cannot concur in this view. The first section of the act of 1860 gave ample power to the proper officers (then the board of police, afterwards the board of supervisors) to subscribe, upon conditions thus expressed: "*Provided, however, that an election shall be held in the county for and on account of which stock is proposed to be subscribed by the qualified electors thereof, at the regular precincts of said county, twenty days' notice of the time of holding such election, and of the amount proposed to be subscribed, and in what number of instalments, being first given by the board of police; and if, at said election, a majority of the qualified electors voting shall be in favor of such subscription, then said board shall make such subscription for and in behalf of the county, for the amount specified, by the president of said board of police subscribing the amount so specified to the capital stock of said company, but if a majority of those voting shall be opposed to such subscription, the same shall not be made.*"

The remaining sections provide for the collection of the amount subscribed, by taxation, the mode of collection, etc., if the subscription should be made. There is no limitation as to the time when, or the number of times, the voters might be called upon to decide the question of subscription. We cannot recognize any restriction as to the latter, in this respect, without adding to the statute what it does not contain. Our duty is to execute the law, not to make it. Such an interpolation would involve the "judge-made law" which Bentham so earnestly denounces. If authority be needed in support of our construction of the clause, it will be found in *The Society, etc., v. New London*, 29 Conn., 174.

§ 883. *Provision in the Mississippi constitution touching municipal aid to corporations is prospective.*

The present constitution of the state of Mississippi, ratified December 1, 1869, declares: "Section 14. The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto."

The learned counsel for the plaintiff in error insists that this section abrogated the act of 1860, and avoids the bonds. It will be observed that the language of the section is wholly prospective. It is, in effect, that the legislature shall not in the future authorize any county, city or town (without the consent of two-thirds of the legal voters) to do either of two things: 1. Become a stockholder in any company, association or corporation. 2. Lend its credit to any company, association or corporation. The restraint is upon the legislature. It is forbidden to do thereafter either of the two prohibited things. The act which authorized the subscription here in question, and under which it was made, was passed more than nine years before the constitution took effect. As to this act there is no room for any doubt or question. It provided for the payment of the subscription by a tax equal to the amount subscribed.

The amendatory act of 1871, as regards the point under consideration, only changed the mode of payment for the stock. Instead of payment by a tax imposed for that purpose, it provides "that it shall and may be lawful" for the supervisors to issue bonds for such sums as "may be deemed necessary to meet, pay off, and discharge the subscriptions" made theretofore or thereafter under the prior act of 1860. The eighth section requires the levy and collection of sufficient taxes to pay in due time the amount due upon such subscriptions, or upon the bonds given for their payment. In neither case was there to be a loan of any kind to the railroad company, and certainly none of "the credit of the county." The constitutional prohibitions do not, therefore, apply in any wise to this case. The act of 1871 recognizes the distinction between subscriptions made under it and those made under the act of 1860. The former permitted subscriptions by towns, which were not authorized by the latter. In relation to such subscriptions the constitutional majority of two-thirds of the voters was required. Our construction of the clause here in question has been given to like language in constitutions elsewhere, under similar circumstances. There are several adjudications of this court exactly in point touching the constitution of Missouri. *County of Henry v. Nicolay*, 95 U. S., 619 (§§ 889-892, *infra*); *County of Callaway v. Foster*, 93 id., 567 (§§ 876-878, *supra*); *County of Scotland v. Thomas*, 94 id., 682 (§§ 1210-14, *infra*); *County of Macon v. Shores*, 97 id., 272. See, also, *State v. Macon County Court*, 41 Mo., 453; *State v. Greene County*, 54 id., 540; *Cass v. Dillon*, 2 Ohio St., 607. We find no error in the record.

Judgment affirmed.

JUSTICES MILLER, BRADLEY and HARLAN dissent.

RAILROAD COMPANY v. FALCONER.

(18 Otto, 821-828. 1880.)

ERROR to the Supreme Court of the State of New York.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—The first of these cases was a petition filed by certain tax-payers of the town of Ellicott, in Chatauque county, New York, on

behalf of themselves and others, against the Buffalo & Jamestown Railroad Company and Weeks, Breed and Jones, commissioners to issue bonds for the town, seeking to restrain the issue and delivery of certain town bonds to the railroad company, and to prevent a subscription to its capital stock on behalf of the town. In this case a decree was made in favor of the petitioners, awarding a perpetual injunction against the issue of the bonds and the subscription of stock; and this decree was affirmed by the court of appeals. The second case was commenced by submitting to the supreme court of the state, in a special statutory procedure, an agreed statement of facts in relation to the issue of the bonds and the subscription of the stock which form the subject of the first action, with a prayer on the part of the railroad company, as plaintiffs, for an order directing the issue of the bonds and the subscription of the stock, and a prayer of the town commissioners, as defendants, for a decree against such issue and subscription. In this case a decree was made as prayed by the defendants, which was also affirmed by the court of appeals. To reverse the decrees in both of these cases, the present writs of error were sued out by the Buffalo & Jamestown Railroad Company, the plaintiff in error.

The jurisdiction of this court to review the decision of the state court of appeals is based upon the effect given by said court to the amended constitution of the state of New York, which went into operation on the 1st day of January, 1875, whereby, as is alleged by the plaintiff in error, said constitution was made to impair the obligation of a contract previously entered into by the town of Ellicott with the railroad company, to subscribe to the capital stock of the latter to the amount of \$200,000, and to deliver to it the bonds of the town in payment of said subscription. The clause of the amended constitution to which such effect is alleged to have been given is that which declares as follows: "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in or bonds of any association or corporation, nor shall any such county, city, town or village be allowed to incur any indebtedness, except for county, city, town or village purposes." The court of appeals held that there was no such contract in existence, as alleged by the plaintiff in error, when the amended constitution went into effect, and, therefore, that the prohibition contained in the clause just quoted was conclusive against the right and power of the town of Ellicott to issue the bonds and subscribe for the stock which form the subject of this litigation. The question for us to consider, therefore, is whether any such contract, valid and binding on the town, did exist.

§ 884. *The law of New York in force in 1872 concerning municipal bonds issued in aid of railroads.*

Briefly stated, the facts of the case were as follows: In 1872, when the proceedings took place out of which the present controversy arose, the laws of New York in relation to giving municipal aid to railroad companies like that of the plaintiff in error were contained in three acts of the legislature passed respectively, one on the 10th of May, 1869, by way of amendment to the general railroad law; an amendment to this amendment, passed April 28, 1870; and a further amendment, passed May 12, 1871. By the first of these statutes it was provided that, whenever a majority in number and amount of taxable property of the tax-payers of any municipal corporation should make application to the county judge, by petition, expressing a desire that the corporation

should create and issue bonds to any amount named in the petition (not exceeding one-twentieth of the taxable property in the corporate limits), and should invest the same, or the proceeds thereof, in the stock or bonds of any designated railroad company in the state, the said county judge should give public notice of a hearing to be had before him for the purpose of ascertaining whether the petition was, in fact, signed by the requisite majority of tax-payers; and, having determined this to be the fact, he should then appoint from the freeholders, residents and tax-payers of the corporation, three commissioners to carry out the request of the petitioners. The duties imposed upon these commissioners were limited and specific, and were, to prepare and execute the proposed bonds in the name and under the seal of the corporation, and in its name to subscribe to the stock of the railroad company designated in the petition, and to pay for the same by exchanging the bonds therefor, or the proceeds thereof. They were also authorized, after subscribing the said stock, to represent the town as a stockholder at all meetings of the railroad company. The act of 1870 also authorized the commissioners and the railroad company to enter into an agreement for limiting and defining the times when and proportions in which the bonds should be delivered, and the places where and purposes for which they should be applied. By the act of 1871 the act of 1869 was modified by inserting the following clause in the first section, namely: "The petition authorized by this section" [that is, the petition of the tax-payers presented to the county judge] "may be absolute or conditional; and, if the same be conditioned, the acceptance of a subscription founded on such petition shall bind the railroad company accepting the same to the observance of the condition or conditions specified in such petition."

In the present case the petition of the tax-payers of the town of Ellicott was dated March 25, 1872, and expressed their desire in the following terms, to wit: "Your petitioners desire that the said town of Ellicott shall create and issue its bonds to the amount of \$200,000, and invest the same, or the proceeds thereof, in the stock of the Buffalo & Jamestown Railroad Company, upon the condition that the line of the railroad of said company to be constructed from the city of Buffalo to the line of the state of Pennsylvania, in said county, shall be located and constructed through the village of Jamestown in said town of Ellicott, before said bonds shall be delivered to said company or sold." The petition contained the usual averment that the petitioners were a majority of the tax-payers, etc., and, after the proper proceedings had, the county judge appointed the commissioners before named to carry out the purposes of the petition. On the 14th of June, 1872, the commissioners entered into an agreement with the railroad company (the plaintiff in error), by which they agreed that when the said company should have located and constructed through the village of Jamestown, in said town of Ellicott, their proposed railroad running from Buffalo to the state line of Pennsylvania, they, the said commissioners, or their successors in office, would immediately subscribe, in the name of the town, to the capital stock of the company to the amount of \$200,000, and would pay for it by delivering to the company the bonds of the town, to be executed by the commissioners or their successors in office, and to bear date of the time of such subscription; and in consideration thereof the railroad company agreed that they would receive such subscription and payment, and issue proper certificates for the stock so to be subscribed. The agreement contained a reference to the petition and proceedings under which the commissioners were appointed, and a declaration on their part that they did not undertake or agree to perform

the conditions of the contract except as empowered and authorized by said proceedings.

The defendants in error contend that this agreement was *ultra vires* of the commissioners, and wholly without force or effect as against the town of Ellicott. On the 26th of August, 1874, the commissioners caused to be prepared and executed bonds of the town of Ellicott to the amount of \$200,000, payable to the railroad company or bearer, and delivered them to Robert Newland and A. F. Allen, as trustees, taking from them a receipt in which it was declared that Newland and Allen should, upon the completion of the road through Jamestown, and upon the commissioners having subscribed \$200,000 to the capital stock of the railroad company, and having received the certificates therefor, deliver said bonds to the railroad company, in payment of such subscription. It is manifest that this deposit of bonds cannot affect the rights of the parties. By the terms of the deposit, they were only to be delivered when the stock was subscribed; and, if that cannot be lawfully done, the bonds must be returned to the town to be canceled. The railroad was not constructed through Jamestown until the 20th of October, 1875. On the 1st of January, 1875, when the amended constitution went into effect, nothing had been done except to survey the route and file a map thereof.

§ 885. *Where commissioners are authorized to subscribe for stock and issue bonds upon the completion of a railroad, any contract to that effect made in anticipation of such completion is ultra vires.*

The question then is whether, at that time, under the circumstances above detailed, the railroad company had acquired by contract a vested right to have and receive the town's subscription to its stock, and a delivery of the bonds in payment thereof. We are clearly of opinion that the agreement made by the commissioners with the railroad company in June, 1872, was *ultra vires*. Their powers were confined to subscribing for the stock and making and issuing the bonds in payment thereof when and as the petition of the tax-payers directed; that is, after the road was completed through Jamestown. By the act of 1870 they might also stipulate as to the instalments in which the bonds should be delivered, and the purposes for which they might be applied. But the power to do this being but an incident of the principal power to make and issue the bonds, and being only intended to enable the commissioners to prescribe the times and manner of their issue and the uses to which they should be applied, would not properly arise, and could not be effectively exercised, until the principal power itself arose and became exercisable. Whilst, however, the commissioners had the power, or, rather, would have the power, at the prescribed time, to subscribe for the stock and to execute and issue the bonds, neither the statutes nor the tax-payers' petition gave them any power to make a contract to subscribe for stock, nor a contract to deliver bonds to the railroad company. They were not charged with any such duty; they were not invested with any such power.

§ 886. *No contract is made by the giving of an authority and direction to an agent to subscribe upon the happening of a future event.*

The case of the railroad company, therefore, must stand upon the effect of the tax-payers' petition and the proceedings had thereon before the county judge. If, under the operation of existing statutes, these proceedings amounted to a contract between the town and the railroad company, no subsequent legislation or constitutional amendment could lawfully impair its obligation. But it is difficult to see how the said petition and proceedings, including the ap-

pointment of commissioners, can be construed as amounting to such a contract. All that was done by the town, through the action of its tax-payers and the county judge, was to appoint agents for making a subscription and issuing bonds on the happening of a certain event. When that event should happen, it would be the duty of those agents, under the fifth section of the act of 1869, to execute their commission. The words of the section are: "Such commissioners are further empowered and *directed* to subscribe," etc. But to whom did they owe this duty? Evidently to the town which appointed them; not to the railroad company. The latter came under no obligation, and acquired no rights, until the commissioners should subscribe to its stock. Had no conditions been imposed by the petition, the duty of the commissioners to subscribe stock and issue bonds would have arisen immediately after their appointment; but it would have been an obligation owed to their principals alone. The conditions which were in fact imposed required, it is true, something to be done by the railroad company before the commissioners could act; but no stipulation was demanded of the company, or given by it, that this something should be done. The two parties were not brought together. There was no mutuality between them. Each was free to act as it listed.

§ 887. *A constitutional amendment prohibiting municipal aid to corporations abrogates a power to subscribe upon a future contingency.*

This was the condition of things on the 1st of January, 1875, when the new constitution went into operation, prohibiting all municipal aid to corporations or individuals, by subscription of stock or otherwise. It seems to us, therefore, that the New York court of appeals was right in deciding that no contract existed at that time. After the amendment took effect, no county, city, town or village could subscribe for railroad stock; and, of course, no agent or attorney of any such corporation could do so. What had not been done before, in this regard, could not be done afterwards, unless some valid contract required it to be done. But, as we have shown, no such contract existed in this case. The action on the part of the town was voluntary up to the time of the constitutional amendment. The railroad company may have expected a subscription when their road should be completed; but they had no subscription, and had no valid agreement that any would be made. Everything was inchoate and undetermined up to the 1st day of January, 1875; and then all power to subscribe for stock was taken away from the town.

§ 888. *Case cited and a distinction taken.*

County of Moultrie v. Savings Bank, 92 U. S., 631 (§§ 872-875, *supra*), is confidently relied on by the plaintiffs in error to sustain their position that a contract did exist. But an examination of that case will show that it was very far from being parallel to the present. There the statute of Illinois authorized the board of supervisors of the county of Moultrie to subscribe to the stock of a particular railroad company by name, to an amount not exceeding \$80,000, and to issue bonds therefor when the road should be opened for traffic between certain points. Before this event took place, the board ordered that a subscription to the stock of the company in the sum of \$80,000 be made, and that, in payment therefor, bonds should be issued to the company when the road should be open for traffic. This resolution was acted upon by the railroad company as a subscription, and was entered on its minutes, and the promised bonds were disposed of by contract. This court held that the board of supervisors itself had complete authority to make a present subscription, and that this included the power to agree to subscribe, and that the resolution amounted to a sub-

scription, or, at least, to an agreement to subscribe, which, being accepted and acted upon by the railroad company as such, created a contract between the county and the company. In the case before us, no act equivalent to the action of the board of supervisors of Moultrie county was ever done by any person or body of persons, having, at the time of such act, a present power to subscribe for stock or to issue bonds of the town of Ellicott. The tax-payers had no authority to make a subscription of stock, or to issue bonds, or to make any contract to do so; they could only express their desire that it should be done, and that commissioners should be appointed to do it; and when they did express such desire, it was conditional, as before stated. The commissioners, as we have seen, had no power to act, for no power was given them to act, until the railroad was located and completed through Jamestown. It follows that nothing which was done in the present case can be fairly regarded as equivalent to the action of the parties in the case of Moultrie county. The circumstances of the two cases were essentially different. We think that there is no error in the record of either of the cases, and that the decrees in both must be affirmed.

COUNTY OF HENRY v. NICOLAY.

(5 Otto, 619-627. 1877.)

ERROR to U. S. Circuit Court, Western District of Missouri.

STATEMENT OF FACTS.—This was an action for the recovery of the sums due on coupons of the bonds of Henry county, Missouri, issued in aid of a railroad company. The defense was that the bonds were illegally issued; that the railroad never had a legal existence. Plaintiff demurred to defendant's evidence. The demurrer was sustained and judgment rendered for the plaintiff. Further facts appear in the opinion of the court.

§ 889. *Provision of Missouri constitution touching municipal subscriptions to railroads, prospective.*

Opinion by MR. JUSTICE BRADLEY.

Since the decision of this court in *County of Scotland v. Thomas*, 94 U. S., 682 (§§ 1210-14, *infra*), little remains to be considered in this case. It is conceded that the charter of the Tebo & Neosho Railroad Company, passed January 16, 1860, gave the power to establish a railroad through Henry county, and to extend branch railroads into and through any counties that the directors might deem advisable; and it was made lawful for the county court of any county in which any part of the route of said railroad or branches might be, or any county adjacent thereto, to subscribe to the stock of the company, and for such stock to issue bonds of the county to raise funds to pay for the same. This charter being granted prior to the constitution of Missouri, adopted in 1865, according to the settled law of the state did not become subject to the provision in that constitution which requires the assent of two-thirds of the lawful voters of a county to a subscription of stock in aid of the railroad.

§ 890. *Law of Missouri as to county subscriptions of stock to branch roads.*

But it is objected that the project of the branch road, in aid of which the stock was subscribed in this case, was undertaken as an independent enterprise under the act of March 21, 1868, and, consequently, that the constitutional provision applies to it. It is true that the branch in question was projected, and the organization for its construction was made under the provisions of that act. It is necessary, therefore, to inquire whether branches of railroads thus projected are thereby made subject to the constitutional provision relied on; for

the bonds sued on in this case show on their face that they were issued in pursuance of that act as well as under the authority of the original charter, and being made "to the use and in the name of the Clinton & Memphis Branch of the Tebo & Neosho Railroad, . . . to aid in building said branch railroad." The supreme court of Missouri has decided this question, holding that the constitutional provision does not apply to branch roads built under the act of 1868. *State v. Green County*, 54 Mo., 540, is precisely in point. That was the case of a branch road authorized by the original charter of the Kansas City, etc., Railroad Company, but constructed as an independent interest under the act of 1868; and in that case, also, the original company had consolidated with the Hannibal & St. Joseph Railroad Company, before the subscription to the stock for the branch was made. The court said: "This branch road commences and ends in the same places designated for the branch road in the original charter. It proposes nothing but what was intended to be accomplished by the act creating it, and its union with another company is in name only; no new powers are granted to either the branch or the company with which it is consolidated, and no original powers are taken away. I see nothing that alters, affects or changes the power of the county court to subscribe the stock. I think the power existed when the subscription was made, the same as it did when the act of incorporation of 1857 was passed."

§ 891. *It is not incumbent on a purchaser of bonds to inquire whether the company has taken the proper course to obtain them.*

It is true, in that case, that the board of directors of the parent company, before it consolidated with the Hannibal & St. Joseph Railroad Company, and the latter company afterwards, passed resolutions authorizing the construction of the branch, and that this was not done in the present case; the branch in the present case being organized and undertaken only with the consent of the directors of the parent company. But, under the decisions of this court, the purchasers of the bonds were not bound to know whether or not the proceedings of the company were regular. The charter of the Tebo & Neosho Company contained the power to construct the branch, and gave the county court power to subscribe stock for it; and the act of 1868 authorized such branch and stock to be an independent interest; and the bonds on their face simply showed that they were made to the parent company, "to the use and in the name of the Clinton & Memphis branch," "to aid in building said branch." The purchaser, therefore, was apprised by the law that power existed in the county court to issue such bonds, without any election of the people; and there was nothing on their face to show that they were not regularly issued. It was not incumbent on him to inquire whether the railroad company had pursued all the regular steps necessary to entitle it to receive the bonds. Its agents, that is, the agents of the branch road, had them for sale, and he had a right to presume that they were lawfully entitled to them.

§ 892. *It is immaterial that after the subscription and before the issuance of the bonds the company had transferred its franchises to another corporation.*

The fact that before bonds were issued, but not before the subscription was made, the parent company sold and assigned a portion of its route, and all franchises connected therewith, to the Missouri, Kansas & Texas Railroad Company, does not alter the case. So far as appears, the Tebo & Neosho Company did not cease to exist. In the deed of sale it expressly reserves a very material portion of its franchises; namely, all those belonging to "the extension of the Tebo & Neosho line north from Sedalia, via Booneville, Fayette and Mo-

berly, to the railroad bridge at West Quincy, declared July 2, 1869, certificate of which, dated July 3, 1869, was filed in the office of the secretary of state." But had the company ceased to exist, it would make no difference. Its franchises were not extinguished, but only transferred, and the subscription had been ordered before the sale took place. It is unnecessary to discuss this point further, as the grounds on which it rests were sufficiently considered in the case of Scotland County, already referred to. In our judgment, the defense set up by the county was properly overruled, it not being shown that the plaintiff, when he purchased the bonds, had any knowledge or notice of the facts relied on.

Judgment affirmed.

COUNTY OF MOULTRIE v. FAIRFIELD.

(15 Otto, 370-380. 1881.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—Action upon coupons of bonds issued by the county of Moultrie in aid of two railroads to which donations had been voted. There was judgment for the plaintiff.

Opinion by MR. JUSTICE WOODS.

We shall first consider the objections raised by the plaintiffs in error to the recovery upon the bonds of the county of Moultrie issued to the Decatur, Sullivan & Mattoon Railroad Company. The charter of this company took effect March 26, 1869. The ninth section provides as follows: "The several incorporated towns, cities, counties and towns organized under the township organization law, along or near the route of said road, or that are in any way interested therein, may, in their corporate capacities, subscribe to the stock of said company or make donations thereto to aid in constructing or equipping said railroad." Then follows a proviso making subscriptions to the stock and donations conditional upon a vote of the people, and prescribing the mode of holding elections, etc. Section 10 declares: "The board of supervisors of Moultrie county are hereby authorized to subscribe to the capital stock of said company to an amount not exceeding \$80,000, and to issue the bonds of the county therefor bearing interest at a rate not exceeding ten per cent. per annum, said bonds to be issued in such denominations, and to mature at such time, as said board of supervisors may determine; *provided*, that the same shall not be issued until said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid."

It appears from the records of the board of supervisors, as stated in the findings of the court, that, on November 2, 1869, an election was held according to law in the county, at which a majority of the votes cast was in favor of a proposition to donate to the company the sum of \$75,000, to be paid in the bonds of the county when the road should be completed and in running order through it; and that, in pursuance of the vote, the board, December 19, 1869, passed an order that there be donated by the county to the company the sum of \$75,000, and that, when the road should be completed through the county, there be issued and delivered to the company the bonds to that amount, payable in ten years, in satisfaction of such donation; and that, on November 1, 1871, the chairman of the board of supervisors and the clerk of the county issued and delivered to the company seventy-five bonds of \$1,000 each in satisfaction of the donation. These bonds recite on their face that they are "issued

by said county of Moultrie by virtue of a vote of a majority of the legal voters of said county voting at an election held in said county of Moultrie on the 2d day of November, 1869, which election was authorized by, and conditioned according to the provisions of, an act of the general assembly of the state of Illinois, approved March 26, 1869, entitled an act to incorporate the Decatur, Sullivan & Mattoon Railroad Company."

The court further found that Fairfield was a *bona fide* purchaser for value before maturity of the bonds issued to the company, from which the coupons offered in evidence were detached. The facts above stated, as found by the court, and the authority conferred by the charter of the company to issue the bonds, establish *prima facie* their validity and the right of Fairfield to recover. The county insists, however, that there are other facts set forth in the findings which show the invalidity of the bonds. These are that, at the December special term, 1869, of the board of supervisors of Moultrie county, an order was passed that the county subscribe to the capital stock of the company, by authority of section 10 of its charter above recited, the sum of \$80,000; that said subscription was then and there made; and that, on December 31, 1872, the road being then open for traffic between Decatur and Sullivan, the bonds of the county were issued and delivered to the company in payment of its subscription of stock.

§ 893. *The charter of the Decatur, etc., Railroad Company of Illinois, March 26, 1869, authorized the county of Moultrie to subscribe to the capital stock and also to make a donation to the railroad.*

The contention of counsel for the county is that the board of supervisors having, in December, 1869, subscribed to the capital stock of the company the sum of \$80,000, by authority of section 10 of the charter of the company, it had given all the aid to the railroad company which the law authorized. In other words, it is insisted that the county could not subscribe the full amount of stock authorized by section 10 and also make a donation under section 9; that it could only do one of these two things. The inference which is drawn from this position is that the bonds issued in satisfaction of the donation, voted for by the people of the county and subscribed by the board of supervisors, were issued without authority, and are, therefore, void. We cannot, for several reasons, concur in his views. *First*, it is conceded that the board could either subscribe any sum not exceeding \$80,000 to the stock of the company, under section 10 of its charter, and issue the bonds of the county in payment thereof, or it could make a donation, under section 9 of the charter, of any amount which had been voted for by the voters of the county, and issue the bonds of the county in satisfaction thereof. As the county sets up as matter of defense against the donation bonds issued to the company, the fact that a subscription of stock had also been made, in payment of which the county had issued its bonds, it stands it in hand to show that the obligation of the county to issue bonds in payment of its subscription antedated its obligation to issue bonds to satisfy its donation. This the findings fail to show. They do not show which was first voted by the board, the donation or the subscription. They do show, however, that before any action was taken by the board in reference to either, to wit, on November 2, 1869, the electors of the county had voted in favor of the donation. They further show that the county agreed to issue its bonds in satisfaction of its donation when the company had completed its road through the county, and to issue its bonds in payment of its stock when the railroad should be open for traffic between the city of Decatur and the town of Sulli-

van; that the road was completed through the county as early as October 20, 1871, and that the donation bonds were issued and bore date November 1, 1871; that the road was not open for traffic between Decatur and Sullivan until December 31, 1872; and that on that day, fourteen months after the issue of the donation bonds, the subscription bonds were executed and issued. If either class of bonds, therefore, has any advantage over the other on the question of authority for their issue, it would seem to be the donation bonds. *Secondly*, as there was authority for the issue of the donation bonds, which is recited on their face by reference to the law from which it was derived, the purchaser before maturity was not bound to look further. The county having authority to issue bonds like those purchased by him, he was under no obligation to inquire whether the county had issued more bonds than the law authorized. *Lynde v. The County*, 16 Wall., 6 (§§ 1051-55, *infra*); *City of Lexington v. Butler*, 14 id., 282 (§§ 1377-81, *infra*); *Marcy v. Township of Oswego*, 92 U. S., 637; *Humboldt Township v. Long*, id., 642 (§§ 1451-53, *infra*). *Thirdly*, we are clearly of opinion that under section 10 of the charter of the company the county might subscribe for stock to an amount not exceeding \$80,000, and issue its bonds in payment thereof, and under section 9 of the same charter make a donation to the same company, and issue its bonds in satisfaction thereof.

It is clear, and it is conceded in the brief of plaintiff in error, that the county is included within the terms of section 9, which applies to counties along or near the route of the road, or that are in any way interested therein. It is also clear that, independently of the provisions of section 10, the county might, upon a vote of the people authorizing it, make a donation of any amount to the company. Section 10, which authorizes a subscription to the stock within certain limits, and without any vote of the people, does not preclude a donation under section 9. The obvious construction of the two sections, taken together, is that any county along the line of the railroad, upon a vote of the people, may, without limit, either subscribe to the stock of the company or make it a donation to be paid for in bonds, and that the county of Moultrie may subscribe to the stock of the company, without a consenting vote of the people, any sum not exceeding \$80,000. We must give this construction to the two sections if we allow both to have their full effect; and, if possible, they should be so construed as to give full effect to both, without any limitation or condition not incorporated in them by the legislature. The authority granted to Moultrie and other counties by section 9 to make donations is not restrained or repealed because authority is granted to Moultrie county, by another section and upon different conditions, to subscribe stock. One section is not inconsistent with the other, and therefore does not repeal it.

§ 894. *Where, before the adoption of the Illinois constitution of 1870, a county had voted a donation to a railroad, bonds to pay the donation might thereafter be issued.*

The next reason upon which the invalidity of the bonds and coupons under consideration is based is the section of the constitution of Illinois of 1870 which declares: "No county, city, town or township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, when the same have been authorized under existing laws, by a vote of the people of

such municipalities under existing laws." First additional section. The proviso of this section has been construed by the supreme court of Illinois — and this court has followed that construction — to extend to donations as well as subscriptions of stock. *Chicago & Iowa R. Co. v. Pinckney*, 74 Ill., 277; *Midleport v. Ætna Life Ins. Co.*, 82 id., 562; *Lippincott v. Town of Pana*, 92 id., 24; *Fairfield v. County of Gallatin*, 100 U. S., 47 (§§ 869–871, *supra*). According to the findings of the court below, the records of the board of supervisors of the county of Moultrie show that, before the adoption of the constitution of 1870, an election was held, whereby the donation was authorized, which the bonds in suit were issued to satisfy, and we have already seen that such election was authorized by section 9 of the charter of the railroad company. The prohibition of the constitution does not, therefore, extend to the donation made in this case, or the bonds issued in satisfaction thereof.

§ 895. *A vote cannot be held for naught because of errors in the notice and petition, provided the meaning is clear.*

An attempt is, however, made by the plaintiff in error to show that no election by which said donation was authorized was ever held; because in the petition for the election, and in the notice of the election, the railroad company to which the donation was to be made was designated as the Mattoon, Sullivan & Decatur Railroad Company, and not by its true name, to wit, the Decatur, Sullivan & Mattoon Railroad Company. And the contention is, that as there was no vote of the people which authorized the donation in question to the Decatur, Sullivan & Mattoon Railroad Company, the power of the county to make the donation was cut off by the constitution of 1870. There can be no doubt to what company the people intended to make their donation. The statute books of the state of Illinois will be searched in vain to find an act incorporating a railroad company by the name of the Mattoon, Sullivan & Decatur Railroad Company. There can be no question that in the petition for, and the notice of, the election, the company intended was that known and chartered as the Decatur, Sullivan & Mattoon Railroad Company; for the petition and notice designated the route upon which the road was to be built, and afterwards was built, and they refer to the provision of the charter of that company, which authorized the donation upon the making of which the voters were to express their will. But a conclusive circumstance against the county to show to what company the donation was voted is found in the records of the board of supervisors, set out in the findings of the court, in which it is distinctly stated that the petition for the election requested that an election be held in pursuance of an act entitled an act to incorporate the "Decatur, Sullivan & Mattoon Railroad Company," to decide whether a donation of \$75,000 should be made to that company, and that such election was held on November 2, 1869, and resulted in favor of donating the sum of \$75,000 to that company. It was therefore ordered that said sum be donated to the Decatur, Sullivan & Mattoon Railroad Company, and when said company should have completed its road through the county that the bonds of the county should be delivered to it in satisfaction of such donation.

These records show what the understanding of the representative body of the county was in respect to the company to which the donation was voted. There can, therefore, be no doubt about the identity of the company which the voters of the county had in view when the election was held. It is certain that on November 2, 1869, an election was held by the voters and a donation of \$75,000 voted to some railroad company. The circumstances to which we have

adverted do not leave the least doubt that it was the Decatur, Sullivan & Mattoon Railroad Company. Upon such a state of facts the law is well settled. Even a contract is not avoided by misnaming the corporation with which it is made. *Hoboken Building Association v. Martin*, 2 Beas. (N. J.), 427. And if a corporation is misnamed in a statute the statute is not thereby rendered inoperative if there is enough from which to ascertain what corporation is meant. *Chancellor of Oxford's Case*, 10 Rep., 53. "Although the names of corporations are not merely arbitrary sounds, yet if there be enough to show that there is such an artificial being, and to distinguish it from all others, the body politic is well named though the words and syllables are varied from." *Bacon's Abr.*, tit. Corporation, C. 2. And it has been held by the supreme court of Illinois that the transposition of words comprising the name of a corporation is unimportant if it be evident what corporation is intended. *Chadsey v. McCreery*, 27 Ill., 253.

We are, therefore, of opinion that in the petition for and notice of the election the transposition of two of the words of which the name of the corporation to which the aid was to be voted was in part composed cannot render the election invalid and void. It is therefore clear that the donation voted for at that election is taken out of the operation of that clause of the constitution of the state which declares that no municipality shall make donations to or loan its credit in aid of any railroad or private corporation. In our opinion none of the objections which we have noticed, to the validity of the bonds under consideration, are well taken.

§ 896. *Construction of Illinois constitution of 1870, art. 9, sec. 8, with reference to limitations imposed upon the levying of taxes by counties.*

The remaining objection to their validity is also urged against a recovery on those issued to the Bloomington & Ohio River Railroad Company, and is the only ground of defense against the last named bonds. This objection we shall now consider. It is based on section 8 of article 9 of the constitution of Illinois, which declares: "County authorities shall never assess taxes, the aggregates of which shall exceed seventy-five cents per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county."

To show the applicability of this provision to the question in hand, the plaintiff in error offered evidence in the court below, on which the court made the following findings: "That at the time of the issuing of said bonds the indebtedness of said county, including said bonds, was \$275,000, and the valuation of the taxable property of said county was \$2,279,084, and that the sum of \$10,000 per annum was required to defray the necessary ordinary expenses of said county, and that at the time of the rendition of the judgment in this cause the indebtedness of the county including accrued interest was \$375,000, and the valuation of the taxable property therein was \$3,589,251, and that it required \$12,000 per annum to defray the necessary ordinary expenses of said county. That to enable said county to pay the indebtedness created by said donations to said Bloomington & Ohio River Railroad Company, and to said Decatur, Sullivan & Mattoon Railroad Company, evidenced by said bonds still outstanding, the interest coupons upon which were sued on and offered in evidence in this case, will require the annual assessment of taxes, which will exceed seventy-five cents per \$100 valuation of the taxable property in said county of Moultrie."

The argument of the plaintiff in error is that the indebtedness evidenced by

the bonds issued by the county of Moultrie, in aid of the two railroads mentioned, does not fall within the exception found in section 8 of article 9 of the constitution, and that the above recited findings of the court below show that the authorized tax of seventy-five cents on the \$100 would not be sufficient to pay the expenses of the county and the principal and interest on the bonds. And it is, therefore, contended that the bonds are void. The authority cited to sustain this position (*Loan Association v. Topeka*, 20 Wall., 655; §§ 1162-68) merely decides that the bonds are void where there is no power in the legislature to authorize a tax in aid of the purpose for which they were issued. But here it is conceded that there is power, within certain limits, to levy a tax to pay these bonds. They cannot, therefore, be void. *Marcy v. Township of Oswego, supra*. Moreover, it appears from the findings of the court that at the time the bonds in question were issued a levy of seventy-five cents on every \$100 valuation of the taxable property of the county would produce a sum sufficient to pay the ordinary expenses of the county, and leave a surplus of over \$7,000 to be applied to the payment of the bonds, and that at the commencement of this suit such annual surplus, by reason of the increase in the taxable property of the county, would amount to nearly \$15,000,—a sum almost sufficient to pay the judgment rendered in this case. So that the defense now under consideration is reduced to this: that because the whole judgment cannot be at once collected, there should be no judgment at all.

But it nowhere appears in the record that the county has not ample means out of which the judgment could be collected besides its revenues derived from taxation. We know from the record that the county at one time owned \$80,000 of the stock of the Decatur, Sullivan & Mattoon Railroad Company, and it does not appear that it is not still the owner of this stock, and that it may not now be subjected to the payment of the judgment recovered in this case, or that the county may not have other similar assets sufficient to pay all its debts. Therefore, even if the county, by reason of the limit on its taxing power, could not levy a tax to pay these bonds, nevertheless, they having been authorized, the holder is entitled to judgment on them, and to collect it out of any property of the county which could be subjected to the payment of its debts. Whether the indebtedness evidenced by the bonds which are the basis of this suit falls within the exception of section 8, article 9, of the constitution of Illinois, so that taxation for their payment is without limit, is a question which does not necessarily arise upon this record, and which we are not now required to decide. We are of opinion that there is no valid defense against a recovery on the coupons sued on. The people of the county almost unanimously voted for the issue of the bonds. The conditions upon which the donations were made were fully performed. The railroads which they were intended to aid were completed and in use before they were executed, and they were regularly and honestly issued by the public officers charged with that duty. They are in the hands of *bona fide* holders for value. Common honesty demands that the county should apply its available means to their payment, and there is no obstacle to a recovery upon the coupons.

Judgment affirmed.

WEIGHTMAN v. CLARK.

(18 Otto, 256-261. 1890.)

APPEAL from U. S. Circuit Court, Southern District of Illinois.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—By the constitution of Illinois, adopted in 1848, counties were recognized as existing political subdivisions of the state, and the general assembly was authorized to provide by a general law for a township organization, under which any county might come, whenever a majority of the voters should, at any general election, so determine. If a county did adopt a township organization, the management of its fiscal affairs by the county court might be dispensed with, and the business of the county transacted in such manner as the general assembly should provide. Art. 7, sec. 6. Under the authority of this provision of the constitution, an act was passed by the general assembly authorizing such an organization, by which townships could be established and made bodies corporate, with certain defined governmental powers. Gross, Stat. 1869, p. 741. By another statute each congressional township in the state was "established a township for school purposes." *Id.*, p. 691. The business of such a township was to be done by three trustees, to be elected from time to time by the legal voters of the township, and who were made "a body politic and corporate by the name and style of 'trustees of schools of township —, range —,' according to the number." The powers of these trustees related exclusively to the business of the public schools in the township. They had authority to lay off the township into school districts and apportion the school funds, and were charged with certain other duties connected with school affairs and school lands within their jurisdiction. They had no power to levy taxes. That was to be done by the directors of the several school districts which should be created.

Article 9, section 5, of the constitution of 1848 is as follows: "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the general assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

The Illinois Farmers' Railroad Company was incorporated February 28, 1867, and by an amendment to its charter, passed April 15, 1869, the following provisions were made: "SEC. 2. It shall be lawful for the corporate authorities of the towns, townships, cities and counties through which said road shall pass, to take stock in the said company; and shall also be empowered to make assessments, levy taxes and collect the same in the manner in which the said several towns, townships, cities and counties assess and collect taxes, for the purpose of paying the said assessments on the subscriptions to the said stock or the interest accruing thereon, and the said towns, townships, cities and counties may issue bonds, bearing interest, at any point they may designate, either within or without the state of Illinois, at a rate not exceeding ten per cent. per annum, payable annually or semi-annually, as they may elect: *Provided*, that the said townships, cities or towns shall not subscribe to the stock of the said company without submitting the said proposed subscription to a vote of the legal voters of their

respective towns, townships or cities, thirty days' notice of which shall be given, elections held and returns made as provided by the general election laws of this state: *And provided further*, that no such bonds shall issue, nor shall any interest be payable thereon or accrue until said road is completed through the said town, township, city or county: *And provided further*, that the subscriptions on the part of the said counties shall not be for a sum exceeding \$2,000 per mile of the line of the said road in the said counties.

"Sec. 3. In counties not under township organization it shall be lawful for the trustees of schools to make subscriptions for their respective townships, and issue bonds as provided in the preceding section; and for the purpose of paying the said subscriptions or bonds, or the interest thereon, shall levy a tax, not exceeding the rate of one per cent. per annum, upon the taxable property of their respective townships, and shall, through their treasurer, certify the said assessment to the clerk of the county court of their respective counties, and it shall be the duty of the said clerk of the county court to carry out the tax so assessed upon the collector's book; and the amount so raised by taxation shall remain in the hands of the treasurer of the proper county, and shall be employed by him in paying, first, the interest due on the said bonds, and then the principal, if any funds shall remain in his hands, and for no other purpose."

The county of Morgan, through which the road of this company passed, was not under township organization, and on the 1st of February, 1870, at an election called, the voters of congressional township No. 14 N., of range 9 W. of the third principal meridian, within that county, voted to subscribe to the stock of the company in accordance with the provisions of section 3 of the amended charter. Upon the authority of this vote the trustees of schools of the township made the subscription and issued thirty-two bonds of \$1,000 each, bearing date October 1, 1870, to make the required payment. These bonds were afterwards registered with the auditor of public accounts, and upon his certificate to the clerk of the county court of Morgan county, taxes were levied on the taxable property in the township to meet the interest as it fell due. In this way the interest for the years 1871, 1872, 1873 and 1874 was paid; but in 1875 the tax-payers of the township commenced this suit in a state court to enjoin any further taxation to meet the bonds, on the ground that there was no authority in law either for the subscription or the issue of the bonds. That suit was transferred by the bondholders from the state court to the circuit court of the United States for the southern district of Illinois, where, on final hearing, the prayer of the tax-payers, complainants, was granted. To reverse that decree this appeal was taken.

§ 897. *The constitution of Illinois limits the power of the legislature to authorize municipal taxation.*

It is clear that article 9, section 5, of the constitution is a limitation on the power of the legislature to authorize taxation by public corporations or the political subdivisions of the state. The supreme court of the state has uniformly so decided. *Johnson v. Campbell*, 49 Ill., 316; *Harward v. St. Clair Drainage Co.*, 51 id., 130; *Madison County v. People*, 58 id., 456. The same court also decided, in *Trustees, etc., v. People*, 63 id., 299; *People v. Dupuyt*, 71 id., 651, and *People v. Trustees of Schools*, 78 id., 136, that statutes substantially like the one now under consideration were unconstitutional, and consequently void, because the tax required was not for a corporate purpose. It is conceded that if these decisions are to be followed, the judgment below was right.

§ 898. *A congressional township of land is not a municipal subdivision of a county, and cannot issue bonds in aid of railroads.*

The first of these cases was decided at the January term, 1872, and the court then took occasion to say it was the first instance in which the right of the trustees of schools to embark in railroad enterprises had been brought to their attention. The law then under consideration, like the one here, was not passed until 1869; and we infer from this and other circumstances that such legislation had not been common in the state before that time. The decisions since on the same question have all been one way; and this of itself would make it highly improper for us to depart from them, unless they were clearly wrong. As a rule, we treat the construction which the highest court of a state has given a statute of the state as part of the statute itself. It is only when, by giving such construction a retroactive effect, it will invalidate contracts which, in our opinion were lawfully made, that we disregard them. Here, however, we find nothing of the kind. Taxation by municipal or public corporations must be for a corporate purpose. It is not always easy to decide whether a certain kind of tax is within or without this limitation; but we think it may be safely said that, as a general rule, a corporate purpose must be some purpose which is germane to the general scope of the object for which the corporation was created. Such we understand to be the effect of the Illinois decisions which are collected and commented on in *Hackett v. Ottawa*, 99 U. S., 86 (§§ 1160-61, *infra*). A congressional township is one of the principal subdivisions which congress has provided for in the survey of the public lands of the United States for the purposes of entry and sale. It is not necessarily a political subdivision of a state or of a county. When Illinois was admitted into the Union, section numbered sixteen in every surveyed township, or its equivalent, if the section had before that time been sold or otherwise disposed of, was granted the state "for the use of the inhabitants of such township, for the use of schools." 3 Stat., 430, c. 67, sec. 6. It was eminently proper, therefore, that the state should make these donations the points around which the public school system should be organized. Hence the congressional or original surveyed townships were made public corporations for that purpose, and apparently for that alone. Taxation for school purposes only would be germane to such corporations, and no one would or could reasonably suppose that they were created for managing the general affairs of a political subdivision of the state. As was very properly said in *People v. Trustees of Schools*, *supra*, "their creation is purely to aid in the great scheme of accomplishing universal education." They are pre-eminently public school corporations, and in the absence of legislative power under the constitution can no more tax the people to build railroads than an ordinary school district or an incorporated academy can use its funds in that way. A railroad may help the people in a school district, but it can hardly be said that the construction of a railroad is a school purpose. The existence of railroads may, and undoubtedly will, make schools more necessary, and school property more valuable; but the construction of railroads is not necessary either to the establishment or maintenance of schools. Railroads are the effect rather than the cause of schools.

Congressional townships under the name of the "trustees of schools" were incorporated for "school purposes" only. So the act of incorporation in terms declares. Taxation by the corporate authorities, therefore, on persons and

property within the jurisdiction of such a township, to build railroads, is not taxation for a corporate purpose, and the decree below, which followed the decisions of the state court, was consequently right.

Decree affirmed.

HARSHMAN v. BATES COUNTY.

(2 Otto, 569-575. 1875.)

ERROR to U. S. Circuit Court, Western District of Missouri.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.— This is an action brought to recover the amount due on certain coupons attached to bonds of Bates county, Mo., issued at the request and on account of Mount Pleasant township in said county, in payment of a subscription, on behalf of the township, to the capital stock of the Lexington, Lake & Gulf Railroad Company. The subscription was made under a law of Missouri, called the "Township Aid Act," passed in 1868, by which, on the application of twenty-five tax-payers and residents of any township, for election purposes, in any county, the county court may order an election to be held in such township to determine whether and on what terms a subscription to any railroad to be built in or near the township shall be made; and if two-thirds of the qualified voters of the township, voting at such election, are in favor of the subscription, the county court shall make it in behalf of the township, and if bonds are proposed to pay the subscription, the court shall issue such bonds in the name of the county, but to be provided for by the township.

§ 899. *Provision of Missouri constitution restricting legislation empowering counties, cities or towns to aid corporations, etc., extended by implication to townships. (a)*

It is contended that this law is repugnant to the fourteenth section of article 11 of the constitution of Missouri, adopted in 1865, by which it is declared that "the general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." Now, the law of 1868 only requires the assent of two-thirds of the qualified voters who vote at such election. This is certainly a broad difference, and if the constitutional restriction extends, by implication, to townships as well as to counties, cities and towns, an election not conforming to the requirements of the constitution would be invalid and confer no authority to make a subscription. The petition in this case only alleges that two-thirds of the qualified voters voting at the election voted in favor of the subscription, which does not satisfy the demands of the constitution. The question, therefore, arises, whether townships are within the restriction of the constitutional provision. A township is a different thing from a town in the organic law of Missouri; the latter being an incorporated municipality, the former only a geographical subdivision of a county. As said in *The State v. Linn County Court*, 44 Mo., 510, "it has no power by itself to make independent contracts, or to become bound in its separate capacity. The law has not invested it with that power. It forms an integral part of the county, and the county to a certain extent controls and acts for it." That the framers of the constitution intended to require the

(a) See *County of Cass v. Johnston*, §§ 901-908, *infra*, where the ruling on the constitutional question is overruled.

assent of two-thirds of all the qualified voters of a "county, city or town," as a prerequisite to a subscription to a railroad or other company, and did not intend the same thing with regard to townships, seems almost absurd. It was undoubtedly supposed that every case was provided for. The thirteenth section of article 11 declared that the credit of the state should not be given or used in aid of corporations; the fourteenth section then imposes the restriction referred to with regard to counties, cities and towns. This specification embraced every political organization which could be supposed capable of making a subscription. To contend that the mere subdivision of counties into townships enabled the legislature to defeat the constitutional provision is to ignore the manifest intention and spirit of that instrument. It cannot be possible that it was intended to restrict the legislature as to counties, and not to restrict it as to mere sectional portions of counties. Had counties alone been mentioned, there might have been no restriction as to cities and towns, because they are separate and distinct organizations, corporate in character, and often clothed with legislative functions. But in Missouri, in 1865, when the constitution was adopted, a township had no corporate character; but, as before stated, was a mere geographical section of a county, partitioned off for purposes of local convenience in the matter of elections and a few other things. They had no power to act as corporate bodies. If the legislature could clothe these geographical portions of a county with power to subscribe to stock companies at all, it certainly could not set at naught the constitutional requirement of the people's consent thereto. The court below did not decide the case on this ground, probably in consequence of certain decisions of the state courts which were deemed inconsistent with it. But we are not aware of any decisions of those courts which hold that the constitutional restriction in question could be ignored with regard to townships, any more than with regard to counties, cities or towns.

§ 900. *If a township vote a subscription to one company, which subsequently by consolidation with another forms a third company, the subscription to the latter is not authorized.*

Another objection to the validity of the subscription for which the bonds were given in this case is, that the township voted a subscription to one company and the county court subscribed to another. This is sought to be justified on the ground that the former company became consolidated with another, thereby forming a third, to whose stock the subscription was made. This consolidation was effected under a law of Missouri authorizing consolidations, and declaring that the company formed from two companies should be entitled to all the powers, rights, privileges and immunities which belong to either; and it is contended that this provision of the law justified the county court in making the subscription, without further authority from the people of the township. But did not the authority cease by the extinction of the company voted for? No subscription had been made. No vested right had accrued to the company. The case of *The State v. Linn County Court*, *supra*, only decides that, if the county court refuses to issue bonds after making a subscription, a *mandamus* will lie to compel it to issue them. There the authority had been executed, and a right had become vested. But, so long as it remains unexecuted, the occurrence of any event which creates a revocation in law will extinguish the power. The extinction of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent. It may transfer the vested rights of one railroad company to an-

other, upon a consolidation being effected; but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such a change. It does not profess to do so, and we think that it does not do so by implication. As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on inquiry, we think that there was no error in the judgment of the circuit court.

Judgment affirmed.

COUNTY OF CASS v. JOHNSTON.

(5 Otto, 380-372. 1877.)

ERROR to U. S. Circuit Court, Western District of Missouri.

STATEMENT OF FACTS.—Johnston sued Cass county, of Missouri, as trustee for Camp Branch township, upon overdue coupons of bonds issued by that county under the "Township Aid Act." The answer of the county denied the validity of the bonds because two-thirds of the qualified voters of the township did not vote in favor of the bonds, although more than two-thirds of them voted at the election. There was a demurrer to the answer, which was sustained, and judgment rendered against the county.

§ 901. *The "Township Aid Act" of Missouri authorizing townships to vote aid to railroads is held constitutional.*

Opinion by WAITE, C. J.

The first question presented for our determination in this case is whether the "Township Aid Act" of Missouri is repugnant to article 11, section 14 of the constitution of that state, inasmuch as it authorizes subscriptions by townships to the capital stock of railroad companies whenever two-thirds of the qualified voters of the township voting at an election called for that purpose shall vote in favor of the subscription, while the constitution prohibits such a subscription "unless two-thirds of the qualified voters of the . . . town, at a regular or special election to be held therein, shall assent thereto."

In *Harshman v. Bates County*, 92 U. S., 569 (§§ 899, 900, *supra*), we incidentally decided the act to be unconstitutional; but the point then specially in controversy was as to the applicability of this constitutional prohibition to township organizations. It was impliedly conceded upon the argument that, if the constitution did apply, the law could not be sustained; and we accepted this concession as truly stating the law of Missouri. Now, however, the question is directly presented whether the provisions of the constitution and the statute are not substantially the same. On the one hand, it is contended that the constitution requires the actual vote of two-thirds of the qualified voters of the township in favor of the subscription; and, on the other, that the requisite assent is obtained if two-thirds of those voting at the prescribed election shall vote to that effect. The supreme court of Missouri has often been called upon to construe and give effect to this statute, and has never in a single instance expressed a doubt as to its validity. The first case was that of *The State v. Linn County*, 44 Mo., 504, decided in 1869, the year after the law was passed. That was an application for a *mandamus* to compel the county court to issue bonds upon a subscription made pursuant to a vote under the law; and it was contended that the act was repugnant to article 11, section 14 of the constitution, because the bonds to be issued were the bonds of the county and not of the township, and the voters of the county had not given their assent; but the

court held that they were the bonds of the township, and granted the writ. Following this are the cases of *Ranney v. Baeder*, 50 Mo., 600; *McPike v. Pen*, 51 id., 63, decided in 1872; *State v. Cunningham*, 51 id., 479; *Rubey v. Shain*, 54 id., 207, decided in 1873; *State v. Bates County*, 57 id., 70, decided in 1874; *State v. Clarkson*, 59 id., 149, decided in 1875; *State v. Daviess County*, 64 id., 31; and *State v. Cooper County*, id., 170, decided in 1876,—in all of which the act was in some form brought under consideration, and in no one was there a suggestion of its unconstitutionality by either court or counsel.

It is true that the objection now made to the law was in no case presented or considered; but this is sufficiently explained by the fact that in other cases a construction adverse to such a position had been given to language similar to that employed in the constitutional prohibition. In *State v. Winkelmeier*, 35 id., 103, decided in 1864, just previous to the adoption of the constitution, under a law which empowered the city authorities of St. Louis to grant permission for the opening of establishments for the sale of refreshments on any day in the week, "whenever a majority of the legal voters of the city" authorized them to do so, it was held that there must be a majority of the voters participating in the election at which the vote was taken, and not merely a majority of those voting upon that particular question. The judge who delivered the opinion of the court did, indeed, say: "The act expressly requires a majority of the legal voters; that is, of all the legal voters of the city, and not merely of all those who at a particular time choose to vote upon the question." But this must be read in connection with what follows, where it is said that "it appeared that more than thirteen thousand voters participated in that election, and that only five thousand and thirty-five persons voted in favor of giving to the city authority, . . . and two thousand and one persons voted against it. . . . It is evident that the vote of five thousand out of thirteen thousand is not the vote of a majority." Taking the opinion as a whole, it is apparent that there was no intention of deciding that resort must be had elsewhere than to the records of the election at which the vote was taken to ascertain whether the requisite majority had been obtained. But, however this may be, in 1866 a similar question was presented to the same court in *State v. Mayor of St. Joseph*, 37 id., 270. There it was provided that the mayor and council of St. Joseph should cause all propositions "to create a debt by borrowing money" to be submitted "to a vote of the qualified voters of the city," and that in all such cases it should require "two-thirds of such qualified voters to sanction the same." A proposition to borrow money for the improvement of streets was submitted to a vote of the voters at an election called for that purpose, and resulted in a majority in favor of the measure. The mayor declined signing the necessary bonds, because "he was in doubt whether the matter was to be determined by two-thirds of all the votes polled at the special election, or by two-thirds of all the voters resident in the city, absolutely, whether voting or not." Thereupon a suit was instituted to settle this question, and to compel the mayor, by *mandamus*, to issue the bonds. In giving its decision, the court said: "We think it was sufficient that two-thirds of all the qualified voters who voted at the special election, authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters of the city upon that question. There would appear to be no other practicable way in which the matter could be determined." The writ of *mandamus* was accordingly issued. The same year the question came up again in *State v.*

Binder, 38 id., 450. In that case the point arose under the refreshment act of St. Louis, which was considered in *State v. Winkelmeier*. It appeared that the authority to grant the permission in question was given at a special election called for that purpose, and that out of a vote of seven thousand and eighty-five, five thousand and fifty-one were in favor of the grant, and two thousand and thirty-four against it. The cases of *State v. Winkelmeier* and *State v. St. Joseph* were both referred to; and, after quoting from the opinion in the latter case, it was said: "We think the case made here comes within the reasoning and the principles of that decision, namely, that an election of this kind, authorized for the very purpose of determining that question, on public notice duly given, was the mode contemplated by the legislature, as well as by the law, for ascertaining the sense of the legal voters upon the question submitted, and that there could not well be any other practicable way in which such a matter could be determined." These decisions had all been made, and had never been questioned, when the act of 1868, now under consideration, was passed. They were also in force, as evidence of the law of the state, when the bonds in controversy were issued; and, so far as we are advised, there has been no disposition since on the part of the courts of the state to modify them. In *State v. Sutterfield*, 54 id., 391, the question was as to the construction of another clause in the constitution; and the decision was placed expressly on the ground of a difference between the two provisions. That court has in the strongest language intimated its unwillingness to interfere with its previous adjudications when property has been acquired or money invested under them. *Smith v. Clark County*, id., 58; *State v. Sutterfield*, *supra*.

§ 902. *All qualified voters not voting are presumed to vote with the majority of those who do vote, at an election for township aid bonds.*

In *St. Joseph Township v. Rogers*, 16 Wall., 644 (§§ 1674-77, *infra*), this court gave the same construction to the phrase "a majority of the legal voters of a township," as used in an Illinois municipal aid statute; and Mr. Justice Clifford, in delivering the opinion, uses this language: "It is insisted by the plaintiff that the legislature, in adopting the phrase 'a majority of the legal voters of the township,' intended to require only a majority of the legal voters of the township voting at an election notified and held to ascertain whether the proposition to subscribe for the stock of the company should be accepted or rejected; and the court is of the opinion that such is the true meaning of the enactment, as the question would necessarily be ascertained by a count of the ballot." Among other authorities cited in support of this proposition is the case of *State v. Mayor of St. Joseph*, *supra*. This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted unless the legislative will to that effect is clearly expressed. *Louisville & Nashville R. Co. v. County Court of Davidson*, 1 Sneed (Tenn.), 638; *Taylor v. Taylor*, 10 Minn., 107; *People v. Warfield*, 20 Ill., 159; *People v. Garner*, 47 id., 246; *People v. Wiant*, 48 id., 263. We conclude, therefore, that the supreme court of Missouri, when it decided the case of *The State v. Linn County*, and held the law in question to be constitutional, did not overlook the objection which is now made, but considered it settled by previous adjudications. That case is, therefore, to be considered conclusive

upon this question as well as upon that which was directly considered and decided, and, as a rule of state statutory and constitutional construction, is binding upon us. It follows that our decision in *Harshman v. Bates County*, in so far as it declares the law to be unconstitutional, must be overruled.

§ 903. *It is no objection to the validity of township bonds that the railroad was not incorporated until the day of election.*

It is further insisted that the bonds sued upon are invalid, because the railroad company to which the subscription was voted was not incorporated until the day of the election; and *Rubey v. Shain*, 54 Mo., 207, is cited in support of this objection. That case only decides, if it is to be regarded as authority, that a subscription cannot be made by a township until the company is incorporated, or, rather, that township subscriptions cannot be used to bring the company into existence. They are, to use the language of the judge in his opinion, not to be made the "nucleus around which aid is to be gathered." Here the company had been incorporated when the subscription was made. The decision relied upon, therefore, does not apply, and we are not inclined to extend its operation. This makes it unnecessary to inquire whether this defense could be maintained as against an innocent holder.

§ 904. *An action upon township bonds held maintainable against the county.*

It is finally objected that, as the bonds are in fact the bonds of the township, no action can be maintained upon them against the county. Without undertaking to decide what would be the appropriate form of proceeding to enforce the obligation in the state courts, it is sufficient to say that in the courts of the United States we are entirely satisfied with the conclusions reached by the court below, and that a judgment may be rendered against the county, to be enforced, if necessary, by *mandamus* against the county court or the judges thereof, to compel the levy and collection of a tax in accordance with the provisions of the law under which the bonds were issued. The reasoning of the learned circuit judge in *Jordan v. Cass County*, 3 Dill., 185, is to our minds perfectly conclusive upon this subject, and we content ourselves with a simple reference to that case as authority upon this point.

Judgment affirmed.

JUSTICES BRADLEY and MILLER dissented, the former contending, in a brief opinion, that under the constitution of 1865 a subscription was not valid, except by the consent of a majority of the people qualified to vote in the district to be affected. (*Harshman v. Bates Co.*, 2 Otto, 569; *State v. Winkelmeier*, 35 Mo., 103; *State v. Sutterfield*, 54 Mo., 391; *State v. Linn Co.*, 44 Mo., 504, cited.)

OGDEN v. COUNTY OF DAVIESS.

(12 Otto, 634-641. 1880.)

ERROR to U. S. Circuit Court, Western District of Missouri.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—On the 4th of January, 1860, the general assembly of Missouri incorporated the Platte City & Des Moines Railroad Company, now, by statutory change of name, the Chicago & Southwestern Railway Company. Section 7 of the charter is as follows: "Section 7. Upon the presentation of a petition of the president and directors of said company to the county court of any county through which said road may be located, praying

that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road; that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same,—it shall be the duty of said county court to order an election therein, and shall prescribe the time, place and manner of holding said election; and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from all other funds and appropriated to no other purposes, and as fast as collected shall cause the same to be paid to the treasurer of said company.”

On the 4th of July, 1865, a new constitution of Missouri went into effect, section 14, article 11, of which is as follows: “The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.”

By an act to facilitate the construction of railroads, passed March 23, 1868, municipal townships in any county of Missouri were authorized to subscribe, through the county court of the county, to the stock of railroad companies, with the assent of two-thirds of the qualified voters of the township, and to pay their subscriptions with bonds in the name of the county, payable out of a special tax to be levied on the real estate of the township. On the 24th of March, 1870, the general assembly amended this law by adding the following as section 7: “In all cases where, by the provisions of the charter of any railroad company organized under the laws of this state, the taxable inhabitants of a portion of a municipal township of any county in this state have voted, or may hereafter vote, to take stock in such railroad company, they are hereby declared entitled to, and shall have, all the privileges, rights and benefits in said act conferred upon counties or townships, and the county court of such county shall exercise the same powers and perform the same duties in issuing bonds, levying, collecting and paying over the taxes which it is required to in the case of a county or township under the provisions of said act: *Provided, however,* that no part of such township outside the limits of the district voting shall be taxed to pay any of the bonds or coupons so issued by the county court. This act shall take effect from its passage.”

After the passage of this act the Daviess county court, on the petition of the Chicago & Southwestern Railway Company, ordered an election on the 21st day of June, 1870, to obtain the assent of the “taxable inhabitants living within a strip of five miles on each side of the line of said railway to be built through the county of Daviess, . . . to the subscription by the county of Daviess, for and on behalf of the taxable inhabitants of said strip, of the sum of \$60,000 of the capital stock of said railway company, on such terms and conditions as” the court “should deem proper.” Thereupon the court fixed, as one of the conditions of the subscription, that “in payment of said subscription sixty bonds shall be issued by said county to the Chicago & Southwestern Railway Company, . . . of \$1,000 each, payable ten years after date, with interest at the rate of eight per cent. per annum, evidenced by semi-annual coupons,” etc. The election was held, and resulted in five hundred and sixty-eight votes for the subscription, and four hundred against it. The county court subscribed the stock, and to pay the subscription issued and delivered to the company bonds in the following form:

"UNITED STATES OF AMERICA.

"\$1,000.]

STATE OF MISSOURI, COUNTY OF DAVIESS.

[\$1,000.

"Davies County Ten Year Bond, No. 3.

"Know all men by these presents, that the county of Daviess, in the state of Missouri, acknowledges itself to owe and be indebted to, and promises to pay, the bearer the sum of one thousand dollars, on the 1st day of August, in the year of our Lord one thousand eight hundred and eighty, for value received, negotiable and payable without defalcation or discount at the Metropolitan National Bank, in the city and state of New York, with interest thereon from the 1st day of August, A. D. 1870, at the rate of eight per centum per annum until paid, which interest shall be due and payable semi-annually on the 1st day of February and August in each year, on the presentation of the proper interest coupon, as annexed hereto, attested by the signature of William M. Bostaph, clerk at the said Metropolitan National Bank. This is one of sixty bonds of like date, amount and effect, numbered from one to sixty, both numbers inclusive, issued in payment of the indebtedness of said county of Daviess to the Chicago & Southwestern Railway Company, incurred on account of an election held in said county on the 21st day of June, A. D. 1870, by certain taxable inhabitants of said county.

"In testimony whereof, the said county of Daviess, by order of its county court, has caused these presents to be executed by the signature of the presiding justice of said court, attested by the clerk thereof, with the seal of said county affixed, at office in Gallatin, Daviess county, Missouri, this 27th day of July, A. D. 1870.

"PETER BEAR, Presiding Justice.

"Attest: WILLIAM M. BOSTAPH, Clerk."

{ SEAL OF DAVIESS }
{ COUNTY COURT, MO. }

The coupon is in words and figures following, to wit:

"\$40.]

GALLATIN, MO., July 27, 1870.

"County of Daviess, in the state of Missouri, will pay to the bearer forty dollars on the 1st day of February, 1873, at the Metropolitan National Bank, in the city and state of New York, for value received, being the semi-annual interest due on bond No. 3 of said county, issued to Chicago & Southwestern Railway Company.

"WILLIAM M. BOSTAPH, Clerk."

When the delivery of the bonds was made, the interest coupons were canceled to September 1, 1871. The coupons for 1873 were not paid, and this suit was brought to recover what was due on that account. The plaintiff is a *bona fide* holder of the coupons. On the trial the judges of the circuit court were divided in opinion on several questions which have been certified here, the principal of which is whether there was lawful authority for the issue of the bonds. The presiding judge being of the opinion that there was not, judgment was given in favor of the county, and to reverse that judgment this writ of error was brought.

§ 905. *An act authorizing "a strip of country" to vote taxes on itself does not empower the county in which it lies to issue bonds to be paid by such taxes.*

We think the presiding judge was right in the view he took of the controlling question in this case. Without doubt, section 7 of the charter of the

company authorized the taxable inhabitants of the "strip of country" designated to vote a tax upon themselves to take stock, and required the county court to levy and collect such a tax, if voted, and pay over the money as fast as collected to the treasurer of the company; but in this we find no authority for the county to issue bonds in anticipation of the tax. The taxable inhabitants of the strip of country could not themselves make a bond, and all the county court could do was to collect and pay over the tax they voted. The inhabitants were not even organized by themselves, much less made a body politic for any purpose. They could vote the tax, if called upon to do so by the county court, but that was all. The effect of their vote was nothing more than to authorize the county court to levy, collect and pay over to the treasurer of the company the special tax they had determined upon. The requirement of the law — that the money, when collected, should be paid over to the treasurer of the company — is entirely inconsistent with any idea that the obligations to be met in this way were to be in the form of negotiable paper afloat on the market as commercial securities. Under the provisions of section 6 of the charter, counties, towns and cities were expressly authorized to issue bonds in payment of their subscriptions. The omission of any such power in section 7 is conclusive evidence that nothing of the kind was intended in case of "strip" subscriptions. In this particular the case is even stronger than that of *Wells v. Supervisors*, 12 Otto, 625 (§§ 846-848, *supra*).

§ 906. *The "Township Aid Act" of March, 1870, does not give any authority to counties to issue bonds to fund the taxes of "strips of country."*

Neither did the act of March 24, 1870, give the power to issue bonds. That was an act amending what is commonly known as the "township aid law" of Missouri, which related only to subscriptions by municipal townships. The amendment granted no new power of subscription, but simply provided that where, under the charter of any railroad company, the taxable inhabitants of a portion of a municipal township had voted or might vote to take stock in the company, the county court might issue bonds for the stock so taken, to be paid out of taxes levied on property within the limits of the district voting. In the charter of the Chicago & Southwestern Company, authority was not given the taxable inhabitants of any portion of a township to take stock, but to the taxable inhabitants of any strip of country through which the road might pass, not exceeding ten miles on either side. This strip was not necessarily part of a township. It might include parts of several townships, or the whole of some and parts of others. As the act amended related entirely to municipal townships as such, and there had before been legislation in relation to strips of country without any reference to townships, it must be presumed that the amendment applied only to parts of townships separately, and not to the aggregation of townships or parts of townships which would almost necessarily be included in a strip of country twenty miles wide or less along a railroad as it runs through a county. The bonds which this statute authorizes were to be issued on behalf of a portion of a township, not on behalf of a "strip of country." Under the charter, the taxable inhabitants of the strip were to take the stock, and they were to be taxed. We cannot, without a perversion of language, apply the act of 1870 to this provision of this charter. It follows that neither in the charter nor in the amending act relied on can there be found authority to issue the bonds in question.

§ 907. *Construction of the Missouri act of March 24, 1868.*

On the 24th of March, 1868, the general assembly of Missouri passed an act

"to enable counties, cities and incorporated towns to fund their respective debts." Section 1 of that act is as follows: "That the various counties of this state be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities or towns in this state which have or shall hereafter subscribe to the capital stock of any railroad company may in payment of such subscription issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached. The bonds authorized by this act shall be payable not more than twenty years from date thereof."

It is claimed that authority for the issue of the bonds can be found in this law. We do not agree to this. Neither the county, nor a city, nor a town, took the stock now in question. The county did not owe any debt. The taxable inhabitants of the "strip of country" had authority to vote to tax themselves for the stock. In this way they could bind themselves; but that did not create a debt of the county, as such, for which funding bonds might be issued. The debt, if any, was of the "strip" only, and not the county. As no bond could be issued under the original vote, the county assumed no obligation whatever. The county court and other officers of the county could be compelled to levy, collect and pay over the tax, but that was all the county or its officers were required to do.

§ 908. *The holder of municipal bonds is chargeable with notice of the terms of the statutes authorizing their issuance.*

We have always held that every holder of a municipal bond is chargeable with notice of the provisions of the law by which the issue of his bond was authorized. If there was no law for the issue there can be no valid bond. On the face of these bonds it appears that they were issued to the Chicago & Southwestern Company on account of an election held by "certain taxable inhabitants of the county." This clearly connects the bonds with the Chicago & Southwestern charter, and indicates unmistakably that they were put out on account of a "strip" subscription. The holder is, therefore, chargeable with notice of the want of legal authority for their issue. The principal question certified is answered in the negative, and, without specially replying to the others, further than may be implied from this opinion, the judgment is affirmed.

GREEN v. TOWN OF DYERSBURG.

(Circuit Court for Tennessee: 2 Flippin, 477-502. 1879.)

STATEMENT OF FACTS.—On the 10th day of May, 1873, the town of Dyersburg, Tennessee, issued certain bonds in payment of a subscription to the Memphis & Paducah Railroad Company. The bonds bore interest at the rate of seven per cent. per annum, and had ten years to run. Interest coupons in the usual terms were attached to the bonds. Upon the face of the bonds was an express condition that the railroad should be built to the town of Dyersburg, and that a depot should be located within half a mile of the court-house. Suit was brought against the town by a holder of coupons of the bonds, and recovery was resisted upon grounds expressed in six pleas, to five of which pleas plaintiff demurred. The grounds of defense and all other material facts appear sufficiently in the opinion of the court.

Opinion by HAMMOND, J.

Some of the grounds of this demurrer, as stated, are rather in the nature of replications, but I shall treat it as raising the questions made in the argument. The first question is as to the power of the town to issue these bonds. The supreme court have declared that "a municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril." *Town of South Ottawa v. Perkins*, 94 U. S., 260-262 (§§ 1353-60, *infra*). And they are equally invalid in the hands of innocent purchasers. *Marsh v. Fulton County*, 10 Wall., 676 (§§ 1186-89, *infra*). The argument of the defendant's counsel denying the legislative authority to issue these bonds is based upon a distinction between paying for a subscription to the capital stock of the railroad company by levying taxes and paying the money, and issuing bonds in payment of the subscription; and it is contended that there being no express power granted to issue bonds in payment of subscription to stock, none will be implied; and the case of *The Police Jury v. Britton*, 15 Wall., 566, and the cases cited in *Dillon on Municipal Corporations*, § 407 and note, and *Folsom v. School District*, 11 Ch. Leg. N., 226, are relied on. The plaintiff contends that the statutes referred to in the statement of the case confer express power to issue these bonds, and, if not, then that the power is a necessary implication from the authority given to make the subscription to the capital stock of the railroad company.

The act of March 13, 1868, amending the code, would undoubtedly have been sufficient to support these bonds, if it had not been subsequently modified by the act of December 9, 1868, chapter 11, section 26. The act of December 16, 1871, does not confer any new power, or enlarge the powers of the town in the matter of issuing bonds. It clearly contemplates subscription under the code, section 1142 *et seq.*, and only removes the restrictions there found as to the amount allowed to be subscribed by the town. The recital in the record of the town proceedings, referring to the election of September, 1871, and the act of December 16, 1871, authorizing them to re-vote the subscription, shows conclusively that the town authorities supposed that they were making this subscription under the provisions of the code, section 1142 *et seq.*, as modified by the special acts relating to this particular town, as no doubt they were. Neither is there anything in the act of December 15, 1871, chapter 129, which confers on this town the power to issue these bonds, nor anything from which such power may be implied.

§ 909. *Where a town was authorized to subscribe to the capital stock of a railway, and to issue "short bonds" at six per cent. interest, the issuance of ten year bonds, bearing seven per cent., is ultra vires.*

The act of February 26, 1869, chapter 59, section 20, as modified by the act of February 8, 1870, chapter 55, section 18, unquestionably authorizes the town to issue *short bonds*, whatever that may mean, bearing six per cent. interest, "in anticipation of the collection of the annual levies." By the very terms of these acts the subscription is payable in four or six years, and I think the proper construction is that the bonds shall not be longer running to maturity than the time within which the subscription is payable. The bonds are only to anticipate the annual collections of taxes to pay the subscription, which must all be paid "in not exceeding" four or six years. The legislature did not contemplate that the people should be burdened with a long debt, bearing interest from date, when the statute required that the taxes to pay the subscription should be levied and paid within a time specified in the act itself. If

bonds were issued under the power conferred by these statutes, necessarily they must be payable when the taxes levied to pay them are collected, for it is not to be supposed that the town would be required to levy and collect the taxes and keep them in the treasury idle to meet bonds maturing years after the collections are made. It is not like the case of *Ross v. Anderson County*, Supreme Court Tenn., MSS. opinion, 1874, at Knoxville, not yet reported, where the statute authorized thirty years' bonds to be issued, and the county, in exact compliance with the statute, issued bonds for that time, but upon a vote of the people proposing to pay the subscription in six annual instalments. At the time the vote was taken in that case, the statute made no other requirement as to the time of payment than that not more than thirty-three and one-third per cent. of the subscription should be collected in one year. Act 1852, ch. 117, § 8; Code, § 1154. Here the requirement of the statute was that the amount should be paid in six years. There a subsequent statute varied the terms which the vote had fixed; here the vote varies the terms which the statute has fixed. Nor is this like the case of *Louisville & N. R. Co. v. Davidson County*, 1 Sneed, 634, where it was held that the act of 1852 did not prohibit the county from making more than three instalments. A comparison of section 8 of the act of 1852, chapter 117, with section 20 of the act of 1869, chapter 59, and with section 18 of the act of 1870, chapter 55, shows that while under the act of 1852 there was no other restriction than that the time was not to be less than three years, under the two latter acts the time fixed is "not exceeding" six years. This is the necessary construction of the two acts of 1869 and 1870, taken together, even if it be admitted that the act of 1870, applying to "any city or incorporation," was intended to modify the special act of 1869, applying only to the town of Dyersburg. In this view the departure from these acts cannot be regarded as falling within the fourth resolution of the court in *Railroad Co. v. Davidson County*, *supra*. The principle of directory statutes cannot be applied here, and the authority conferred must be pursued in its material requirements. *Winston v. T. & P. R. R.*, 1 Baxter, 61.

Besides, these acts only allowed six per cent. interest, and the bonds here bear seven per cent. This cannot be a change within the discretion of the town to make — it is an additional burden, not a beneficial modification of the requirements of the statute. I am not unmindful of the conventional interest act of February 23, 1870, chapter 69, allowing an increase by contract to any rate not greater than ten per cent. It will be observed that the first of these Dyersburg acts fixed no rate of interest for the bonds, and the second, limiting the rate to six per cent., was passed only a few days before the conventional rate of interest act just referred to, the latter being a general public law, and the former a special private act. I do not think, under the general law, the town could enlarge the rate of interest. It was a municipal corporation acting under a special grant of power which could not be exceeded. The result is that these bonds, being for a longer time and greater rate of interest than allowed under these two acts, cannot be supported by them. *Bell v. Railroad Co.*, 4 Wall., 598; *New Albany v. Burke*, 11 Wall., 96 (§§ 1134–36, *infra*). The case does not come within the case of *Rock Creek v. Strong*, 96 U. S., 271 (§§ 1010–12, *infra*), and *Marion County v. Clark*, 94 U. S., 278 (§§ 1382–88, *infra*), where there was a substantial compliance with the legislative requirement. *Dillon on Municipal Corporations*, § 414. It may be that if the bonds had been issued according to the terms of the act, they would be valid *pro tanto* for six per

cent. interest, as ruled in *Quincy v. Warfield*, 25 Ill., 317; but in the exercise of these special powers to impose the burdens of taxation upon a community, corporations should be held to a strict exercise of them, particularly in view of the peril to which the community is subject by a fraudulent use of such powers. Any purchaser of these bonds, in looking to these statutes, would see at once that the bonds were not such as the statutes contemplated. *Marsh v. Fulton Co.*, *supra*.

§ 910. *Power is not conferred on municipal corporations to issue bonds in payment of stock subscriptions to railroads by Tennessee act of January 23, 1871.*

The remaining claim for express power to issue these bonds is based on the act of January 23, 1871, chapter 50, Code, § 491a. It is argued for the plaintiff that the last clause of the second subsection of section 1 of that act authorizes a town to subscribe for stock, and that the clause immediately preceding authorizes the board of mayor and aldermen to issue bonds in payment. It is manifest, however, that this construction is strained and wholly unauthorized by either the grammatical structure of the section or by any natural interpretation of it. The section follows identically the language of the constitution in its restrictive clauses, and it is evident that both intend to indicate two corporate methods of giving aid to other persons or corporations; one of these methods—that of becoming a stockholder in a company—had been, so far as relates to encouragement of railroad building by stock subscriptions, regulated by a general law since the act of January 22, 1852, chapter 117; often, however, modified by special acts in particular cases, section 1142 *et seq.*; the other method, that of giving or lending the credit of the city or town, had never been the subject of any general statute, and was always regulated by special acts in particular cases. The two methods are entirely distinct in their nature and essential ingredients. *L. & N. R. Co. v. State of Tennessee*, 8 Heisk., 663, and cases cited *arguendo*, p. 667. It happens that, as to railroad building, they both aid and encourage it; but the constitution and the act apply to all corporate contracts within the scope of “corporate purposes” and to none other. Neither confers any authority either to lend credit or subscribe stock. But if the authority exists elsewhere this act regulates its exercise according to the constitution, and designates the county court or the board of mayor and aldermen as the agents who shall issue the bonds when credit is lent or given. The validity of these railroad bonds and subscriptions all depend on the construction given by the supreme court to the old constitution, that the promotion of railroads is a legitimate “corporate purpose,” and not upon any legislative power to authorize corporations to engage in extraneous enterprises. *Nichol v. Nashville*, 9 Hump., 250; *L. & N. R. Co. v. Davidson County*, *supra*.

Interpreting the constitutional restrictions of 1870 and this act passed to enforce them by the previous legislative and judicial decisions, this giving or lending the credit of a county, city or town to some other person, company, association or corporation means supporting the credit of such other person, etc., by guaranties, indorsements or contracts of like character, and possibly donations or loans in aid of the enterprise, which must be a corporate purpose. *Dillon, Municipal Corp.*, § 393; *Nichol v. Nashville*, 9 Hump., 250, and cases cited in Cooper's edition; *L. & N. R. Co. v. Davidson County*, *supra*. The credit cannot be given or lent nor the subscription be made upon the authority of this act, for it confers none. It regulates in certain respects the general subject, and harmonizes all the statutes with the constitution. When the corpora-

tion subscribes for stock, it must follow the general law on that subject, or some special law provided for it. The only effect of this act, or the constitutional provision referred to in it, on the general law — and it so affects all special laws as well — is to abrogate all provisions allowing the subscription for stock to be made on less than a three-fourths vote of the qualified electors, voting at the election in favor of it. In all other respects the statutes authorizing subscriptions remain as they were before this act was passed. I am, therefore, of opinion that there is no express authority given by any statute to the town of Dyersburg to issue these bonds.

§ 911. *There is no implied power in a municipal corporation to issue negotiable bonds in payment of a debt which it was authorized to contract.*

It is insisted by the plaintiff that there is a power to pay the subscription in bonds to be implied from the authority to make the subscription, whether we look to the authority as contained in the railroad charter or to the general law authorizing such subscriptions. The authorities on this question are conflicting. Dillon on Mun. Corp., §§ 83, 106; Dillon on Municipal Bonds, § 62; Daniel on Negotiable Instruments, §§ 1530, 1532, 1533. I do not think there is any case decided by the supreme court of the United States which supports such an implied power under a general law containing the restrictions found in these Tennessee statutes. Code, §§ 1142–1165. And where the mode of payment is pointed out as is done here, I hold that any other mode is excluded, and that a bare power to subscribe for stock does not imply a power to pay for it in negotiable bonds issued to the railroad company on such terms as the parties may agree upon. The intimation in *Hitchcock v. Galveston*, 96 U. S., 341, if it does not militate against such an implied power is the latest indication in favor of it, but I find no decision of that court sustaining it. In *Seybert v. Pittsburg*, 1 Wall., 272, the implication was upon an act authorizing a subscription “as fully as any individual;” and in *Meyer v. Muscatine*, 1 Wall., 384 (§§ 921–925, *infra*), the implication was upon a power “to borrow money,” coupled with a general law authorizing railroads “receiving bonds of any city” to sell them at a discount. *Id.*, 221. In *Rogers v. Burlington*, 3 Wall., 654 (§§ 837–841, *supra*), and *Mitchell v. Burlington*, 4 Wall., 270 (§§ 1151–53, *infra*), the implication was upon a power “to borrow money for any public purpose;” and in *Smith v. County of Sac*, 11 Wall., 139–156 (§§ 1465–66, *infra*), the statement of the proposition appears in the dissenting opinion only, the case being decided on other grounds. In *Lynde v. The County*, 16 Wall., 6 (§§ 1051–55, *infra*), the implication was upon a statutory power to borrow money. In the Tennessee statutes, now under consideration, there is no power given to borrow money, nor to subscribe for stock as fully as an individual. On the contrary, the subscription for stock is regulated by a statute prescribing the mode of payment. The power to borrow money will not be implied. *Mayor v. Ray*, 19 Wall., 468, 475. It may be doubted if any case hereafter will extend this implication of power to issue bonds any further than it has already gone. 2 Daniel on Negotiable Instruments, §§ 1523, 1532; Dillon on Mun. Bonds, § 6.

The legislative construction in Tennessee is against any such implied power; and ever since the act of January 22, 1852, granting power to subscribe stock as therein specified, it has been the constant practice to confer express power to issue bonds to pay for stock subscriptions whenever thought advisable, as was done by the act of December 30, 1853, amending the general act of January 22, 1852, to allow Sumner county to pay her subscriptions. *L. & N. R. v.*

Davidson County, 1 Sneed, 661. Very many such acts have been passed, and, as we have seen, there is special legislation as to Dyersburg. This would seem to exclude any legislative sanction of the doctrine of an implied power based on the general authority given to make these subscriptions. It is said by the supreme court of Tennessee in *Moss v. Harpeth Academy*, 7 Heisk., 283, of a private corporation, that there is an implied power to borrow money to carry out the purposes of its organization, and it is shown by a note to that case that other courts have applied this doctrine to municipal corporations, notably the case of *The Bank v. Chillicothe*, 7 Ohio, 358, cited by counsel here. And see, also, *Dillon, Mun. Corp.*, §§ 106, 107 and notes, and § 407.

There seems to me to be a vast distinction between using private funds and implying this power to borrow money upon negotiable bonds against a body of people who have organized a municipal corporation with limited powers of taxation for special purposes. Yet the supreme court of Tennessee have said in the case of *Adams v. Memphis & L. R. Co.*, 2 Coldw., 645-650, that there is an implied power to borrow money for corporation purposes belonging to municipal corporations. And, relying upon the settled doctrine in Tennessee that railroad building is a corporate purpose, the learned counsel for plaintiff presses with great earnestness the doctrines of that case. We are asked, upon its authority, to imply a power to borrow money for this corporate purpose, and then again to imply from the power to borrow money the power to issue negotiable bonds. In *The Mayor v. Ray*, 19 Wall., 479, it is said that this declaration of the supreme court of Tennessee in *Adams v. M. & L. R. Co.*, *supra*, was not necessary to the decision of the case, as it clearly was not. The case of *Nichol v. Nashville*, *supra*, does not support the implied power to issue bonds where authority to subscribe stock is given under a statute appointing the mode of payment. In that case there was express power to issue the bonds, and even if it had been necessary to their support to rely on any implication of power, the charter of the railroad company in that case authorized corporations to subscribe stock, "with all the rights of any other stockholder." This is directly within the case of *Seybert v. Pittsburg*, *supra*, where the words were, "as fully as any individual." Here there are no such words, either in the railroad charter or in the act of 1852, under which this town acted. There are decided expressions in the case, pp. 262, 263, in favor of powers by construction, but confessedly they did not arise, and we have the authority of the same court for saying that "the reasoning, illustrations or references contained in the opinion of a court are not authority, not precedent, but only the points in judgment arising in the particular case before the court." *L. & N. R. Co. v. Davidson County*, *supra*.

The case of *Ross v. Anderson County*, *supra*, is much relied on by plaintiff. This is also a case in which there was express power to issue the bonds, and they were issued in exact conformity to the statute. There is a very strong expression in the opinion in this case in favor of the incidental right to issue bonds or other commercial evidence of debt, wherever the power to contract is given, but it is manifest that the case is not an adjudication on the point, and it could not have been, for there was no want of a positive grant of power to issue the bonds, and the decision is put upon that ground. I am unwilling to adjudicate, in the absence of a controlling authority, that a municipal corporation has power to issue coupon bonds in payment of any debt it is authorized to contract. No case that I have found decided, either by the United States supreme court or the supreme court of Tennessee, has gone that far as an adju-

dication. And after a most patient and deliberate examination of the subject, I am of the opinion that the defendant corporation had no power to issue these bonds to be implied from the authority to subscribe stock. This judgment is supported by the reasoning in the case of *Gause v. Clarksville*, 19 Alb. L. J., 253 (§§ 1264-68, *infra*), where the question is examined by Judges Dillon and Treat upon authority and principle. The opinion of one of the learned judges in that case, as shown in the second division of the opinion, would seem to be against the views here expressed, but I think there is here in Tennessee no universal practice to issue bonds without special authority, as in Missouri, in payment of stock subscriptions. And I have endeavored to show that the United States supreme court have not yet decided in favor of any such implication of power. Until it decides the point, I cannot yield my own strong convictions against the doctrine acquired by this investigation.

§ 912. *An express condition in the face of a bond that a railroad shall go to a named town is a condition precedent, and binds the holder of the bond and coupons.*

I have also considered the other question, raised by the pleadings, as to the effect of the condition mentioned in the face of the bond. These coupons not containing on their face the condition expressed in the bonds, unless the reference to the number of the bond is to be so taken, the first question argued is, whether they are affected by the recital in the bond? If this can be regarded as an open question since the case of *McClure v. Oxford*, 94 U. S., 429 (§§ 1398-1401, *infra*), it is not raised by the demurrer. *Harshman v. Bates County*, 92 U. S., 69 (§§ 899, 900, *supra*). The third, fourth and fifth pleas aver that the plaintiff had notice of the condition and its breach. He may have had such notice otherwise than by the expression of this condition on the face of the bond. The demurrer admits this averment of notice, and the only question is, whether the facts stated constitute a defense. It is not denied by the plaintiff that, if this be a condition precedent to the payment of the bonds, they are not negotiable, and are subject to all the defenses which could have been made against them in the hands of the original holder. Indeed, as the pleas charge notice of the failure to comply with the contract on the part of the railroad company, the case must be treated as if the railroad company itself were the plaintiff.

§ 913. *Rule of construction. The intention of the parties to a contract must prevail.*

So many decisions have been made upon the vexed question of what are and what are not dependent covenants, that, being irreconcilable with one another, they rather perplex than aid the judgment in determining a given case. That the intent of the parties is to control is a universal rule. *Officer v. Sims*, 2 Heisk., 501; *Grant v. Johnson*, 5 N. Y., 247, 255. The intention is to be ascertained from the contract; there is nothing technical in it. The parties have a right to make their agreements dependent or independent, and as they make them the courts are bound to enforce them. *Clermont County v. Robb*, 5 Ohio, 491. Where parties have made an express contract none can be implied, is an axiom in the law particularly applicable to this subject. *Cutter v. Powell*, 2 Smith's Lead. Cases, 1; *Hudson Canal Co. v. Penn. Coal Co.*, 8 Wall., 276. In the notes to *Pordage v. Cole*, 1 Wms. Saund., 319, 320a, Sergeant Williams has deduced from the cases certain rules for ascertaining the intention, which have all the force of judicial decision because they have been referred to and adopted by almost every court considering the subject from that

day to this. But in the application of these rules the courts have great difficulties, and there is no subject in our jurisprudence more beset with conflicting decisions. The difficulty is determining whether one promise be the consideration for another, or whether the performance and not the mere promise be the consideration. As, in this case, was the construction of the railroad to Dyersburg, or the undertaking of the company to construct it to that place, the consideration of these bonds? It is said that this is to be determined by the intention and meaning of the parties as shown in the face of the instrument, and by the application of common sense to each particular case. *Chitty on Contr.*, 11th ed., 1082; *Stavers v. Curling*, 3 Bing. N. C., 355; S. C., 32 E. C. L., 159; *Taylor v. Mason*, 9 Wheat., 327. The court will not confine itself to particular expressions, but will collect the intention from the whole instrument. *Chitty on Contr.*, 122. And every part must have its effect. *Ibid.*; *Herschel v. Mahler*, 3 Denio, 428, 431; *Haywood v. Perrin*, 10 Pick., 228. Where there are mutual covenants or acts, they are construed to be dependent, unless a contrary intention appears, and there is good sense as well as practical convenience in the rule. *McNeil v. Magee*, 5 Mason, 244, 255. The supreme court of the United States have said that although many nice distinctions are to be found in the books upon the question "whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident the inclination of courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration; nor the purchaser to part with his money without an equitable return." *Bank of Columbia v. Hagner*, 1 Pet., 455, 465. This is said in a case of vendor and vendee of an estate, but it applies as well to all contracts. It is undoubtedly true that in cases involving the forfeiture of estates, and perhaps in ordinary commercial contracts, where the language of an agreement can be resolved into a covenant, the judicial inclination is to so construe it. And where a party has another remedy for an injury inflicted by the non-performance of a condition, which may be compensated in pecuniary damages, he will be remitted to that remedy. *Paschall v. Passmore*, 40 Penn. St., 295, 307. The reason of this distinction is stated to be that the other consideration prevents the court from dealing out justice to the parties according to the equities of the case. *Railroad Co. v. Butler*, 50 Cal., 575. But this doctrine appertains rather to courts of equity than those of law, and can never be invoked to destroy the clear intention of the parties, and where the enforcement of the rule would operate to inflict injustice on the other side. In a case like this there can be no compensation in damages. How could this town be compensated in damages by a failure to build a railroad to it? Nothing less than money enough to build the entire road from Paducah to Memphis would answer as compensation, in case of total failure to build it. The object of this subscription was to secure the road to that town, and whatever they may have technically expressed by their contract, I have no doubt they intended to secure the construction of this road by making their contribution dependent upon the performance of the condition, and did not intend to rely upon any mere covenant on the part of the railroad company secured against a breach by an action for damages. Where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other. *Goldsborough v. Orr*, 8 Wheat., 217. This rule is not inflexible, but yields wholly or in part to the intention of the parties and the good sense and equity of the case. *Cunningham*

v. Morrell, 10 Johns., 203, and cases cited in note to *Wilks v. Smith*, 10 Mees. & W., 360, by Hare & Wallace. A more practical test for all cases is whether the defendant reasonably appears to have looked to the plaintiff's covenant, or to its performance, as the consideration and condition of his being bound. *Ibid.*

§ 914. *Rule as to time,—reasonable time.*

Here, however, no time is fixed for building this railroad to Dyersburg. The law implies that a reasonable time was intended to be given. *Chitty, Contr.*, 1062; *Davis v. Gray*, 16 Wall., 204, 231; *Cooke v. Taylor*, 2 Tenn., 49. The act of January 27, 1870, ch. 49, sec. 5, allowed seven years from the date of the act for the completion of the road. The bonds being issued subsequent to that amendment the parties are supposed to have contracted with reference to it, and this fixes the time within which this condition should have been performed, and it had expired when this suit was brought and about six years before this money was payable, so that the rule operates the other way, unless the fact that some of the coupons fell due prior to that time changes it. The town may have been willing to pay the coupons falling due prior to the date designated by statute as the time for the completion of the road; relying upon the security which the condition gave as to the remainder. They could make this contract if they chose, and we have seen that the rule yields to the actual intention.

There are some cases which hold that if part of the money be payable before the act is to be done by the other side, the respective promises are independent as to the instalments of interest; but these cases have, in their peculiar facts, furnished other evidences of such intention, such as delivery of possession of the thing sold. Generally, however, the cases have been those where the principal money was payable in instalments. *Wilks v. Smith*, 10 Mees. & W., 355; *Mattock v. Kinglake*, 10 Ad. & Ell., 50; 37 E. C. L., 37; *Dicker v. Jackson*, 60 E. C. L., 102; *Edgar v. Boies*, 11 Serg. & R., 445; *Chitty, Contr.*, 1082, and cases. It was held in *Loan Association v. Topeka*, 20 Wall., 656, that the mere payment of interest would not work an estoppel, and I think the application of this rule of part payments to instalments of interest, aside from other controlling circumstances, is a perversion of the rule itself, and often would operate to defeat the intention. It should only be applied where the mode of payment of the principal money indicates that the parties could have had no other intention than that the promises should be independent. *Gardiner v. Corson*, 15 Mass., 500, shows that annual payments of interest do not bring the case within the rule of payment by instalments. The plaintiff here also relies on the rule that where an essential part of the consideration has been paid the party receiving it will not be allowed to defeat a recovery against him because some remaining portion of the whole consideration remains unperformed, the argument being that the town has received the stock of the railroad company for which it subscribed, and because the whole consideration has not been received it cannot refuse payment. *Chitty, Contr.*, 1092. This question might become important if the railroad company were in a condition to tender performance of its undertaking, but the pleas aver that it has been foreclosed and its property and franchises sold under a mortgage. If a party has disabled itself from fulfilling the contract, there is already a breach, and the contract is at an end. *Chitty on Contr.*, 1079–1084. And the non-performance of one part of a contract is not excused by showing performance of another part. *Id.*, 1079. *Cutter v. Powell*, 2 Smith's Lead. Cases, and notes, is a case that discusses this

doctrine; and it will be found that the rule does not apply where the main and essential part of the consideration remains unperformed. Here the chief consideration was the railroad facilities to be acquired by the construction of the road to the town. It is well known that in these days stock in railroad companies as property is not of much value, and the shares are not, in this class of cases, any very essential part of the consideration.

The case of *Humboldt v. Long*, 92 U. S., 642 (§§ 1451-53, *infra*), is not like this case. The bond did not show any condition, and therefore the subsequent use of the words "upon the performance of this condition" had no force. If the bond had said "payable upon express conditions that the road be constructed through the township," it would have been this case, but it does not so say. In *Pendleton County v. Amy*, 13 Wall., 305, the condition was precedent to the issuance of the bonds, and its performance was presumed from the recitals in the bonds and the fact of their issuance. But here the condition is attached to the payment of the money. Usually, these bonds are issued in aid of the road without incumbrance as to conditions, and it would have been better for the railroad company had these bonds been so issued. But the parties could attach this condition to their contract, and the bonds were not valueless if the condition has been performed. It was simply a transfer of confidence in the railroad company from the town to the capitalist who takes the bonds. It is he who trusts the railroad company in this case, and not the defendant corporation. It was a wise contract on the part of the town, and it has taken the precaution to inform persons dealing in the bonds of the fact that it had attached the condition to the contract by this recital. The language of the proposition as voted, and the proceedings of the town authorities, do not indicate any other condition than that shown on the face of the bond. But if they did, the expression in the bond itself is not ambiguous. The case of *Miller v. Pittsburg R. Co.*, 40 Penn. St., 237, falls directly within the case of a contract for payment before the road was to be built, and to build it. The principal money—the subscription itself—was all due two years before the road suspended. Here it is deferred for ten years, and the charter of the company required the road to be completed six years before these bonds were due. The case of *Brooklyn v. Ætna Life Ins. Co.*, decided by the United States supreme court, October term, 1878 (not yet reported), 11 Ch. Leg. N., 319; 8 Cent. L. J., 422; 19 Alb. L. J., 361 (§§ 1402-1404, *infra*), is a clear recognition of this defense as a good one. And there can be no doubt that if the bonds in that case had on their face given notice, as in this case, the plaintiff would have failed. The case of *Town of Concord v. Portsmouth Savings Bank*, 92 U. S., 625, is directly in point in favor of this opinion. There the act of the legislature attached the condition to the subscription; here the contract of the parties attached it. There the bonds were void; here the condition, being broken, the bonds became valueless. The case of *N. & N. W. R. Co. v. Jones*, 2 Coldw., 574, is also an authority directly in favor of this conclusion.

The importance of this case demands, and has received, my most careful consideration, and the defenses set up have raised some of the most perplexing questions known to the law. This must be my apology for the delay in deciding it, and the fulness of the opinion. Demurrer overruled.

COUNTY OF RANDOLPH v. POST.

(8 Otto, 502-514. 1876.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—By consent of the parties, this case was tried by the circuit judge without the intervention of a jury. It resulted in a judgment for the plaintiff below, for the amount of the coupons upon certain bonds issued by the county of Randolph and held by the plaintiff, thus establishing the validity of an issue by said county of bonds in aid of the Chester & Tamaroa Coal and Railway Company. The county, dissatisfied with this result, brings its appeal to this court, and rests its objections upon two principal grounds:

1. The first allegation of error is, that the issue of these bonds was forbidden by the constitution of the state of Illinois. A separate article of the constitution of that state provided as follows: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make a donation, or loan its credit in aid of such corporation: *Provided*, however, that the adoption of this article shall not be construed as affecting the right of any municipality to make such subscriptions when the same have been authorized under existing laws by a vote of the people of such municipality prior to such adoption."

This provision took effect on the 2d of July, 1870. *Richards v. Donaghue*, 66 Ill., 73. If, then, the county of Randolph had been authorized, prior to July 2, 1870, to make the subscription in question, the bonds were valid, so far as this objection is concerned. If it was not so authorized, the subscription was prohibited by the constitution, and the bonds were void. It will be observed that the decision of this point depends not upon the question whether a subscription had in fact been made by a county prior to July 2, 1870, but whether the county had been authorized in the manner specified to make such subscription. The provision does not apply where such subscriptions "have been authorized under existing laws."

The act of the legislature of Illinois, respecting railroad companies, in force prior to the adoption of the constitutional provision, contained the following sections:

"77. Subscriptions and loans. Whenever the citizens of any city or county in this state are desirous that said city or county should subscribe for stock in any railroad company already organized or incorporated, or hereafter to be organized or incorporated, under any law of this state, such city or county may and are hereby authorized to purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding \$100,000, for each of such cities or counties; and the stock so subscribed for, or purchased, shall be under the control of the county court of the county, or common council of the city, making such subscription or purchase, in all respects as stock owned by individuals.

"78. For the payment of such stock, the judges of the county court of the county, or the common council of the city, making such subscription or purchase, are hereby authorized to borrow money, at a rate not exceeding ten per cent. per annum, and to pledge the faith of the county or city for the annual payment of the interest, and the ultimate redemption of the principal; or, if the said judges or common council should deem it most advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city

or county making such subscription, to be drawn for that purpose in sums not less than \$50, bearing interest not exceeding ten per cent. per annum, provided that no bond shall be paid out at a less rate than par value.

"79. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated, under the laws of this state, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company, at par, and in lieu of cash, and to issue their bonds, bearing interest not exceeding ten per cent. per annum, for any money by them borrowed for the construction of their railroad and fixtures, or for the purchase of engines and cars; and for such purpose may dispose of any bonds by them received as aforesaid."

The section following enacts that no such bonds shall be issued unless a majority of the voters of the municipality shall, at an election called for that purpose, sanction such issue. It is not necessary to give the details of this section, as no question exists as to the holding the election on the 6th day of June, 1870, and to the vote thereat, as set forth in the bonds.

§ 915. *A company authorized by its charter to "construct, complete and operate a railroad" is, to all intents and purposes, a railroad company.*

The point of the objection here made is that the Chester & Tamaroa Coal and Railway Company is not a railroad company within the meaning of the general act already cited. It is said that it is a mining and a manufacturing company, and not a railroad company. By an act of the legislature passed March 4, 1869, that company was created a corporation, and "vested with all power, privileges and immunities which are or may be necessary to engage in mining, and to construct, complete and operate a railroad, with single or double track, commencing at Chester, in Randolph county, Ill., thence running easterly on the most eligible route, *via* Pinckneyville, in Henry county, Ill., to Tamaroa, in said Perry county; and for this purpose said company are authorized to lay out their said railroad, not exceeding one hundred feet in width through the whole length, and for the purpose of cuttings, embankments, stone or gravel, may take as much more land as may be necessary for the proper construction and security of said railroad, and shall have power to extend the same to connect with or cross over any other railroad within the state of Illinois, and may make such lateral or branch road or roads to any coal lands belonging to said company as they may deem necessary for the successful prosecution of their business; and said company may enter upon and take possession of so much land as may be necessary for the construction and maintenance of said railroad and branches, depots, side-tracks, water-stations, engine-houses, machine-shops and other buildings and appendages necessary to the construction and working of said road; and in case said land be not donated to said company for such purpose, it shall be lawful for said company to proceed to condemn said land, as provided by the laws of the state concerning right of way.

"SEC. 2. The said corporation may take and transport upon said railroad any person or persons, merchandise or other property, and may fix, establish, take and receive such rates of toll, for any passenger and property transported upon the same, as the directors shall, from time to time, establish, subject to such limitations and restrictions as are or may be provided by general law.

"SEC. 3. The said corporation is hereby vested with power to purchase, hold and convey real and personal estate; to give and receive promissory notes; to enter into and carry on all kinds of mechanical and manufacturing business; to erect mills, furnaces, foundries, factories and machine shops for the manu-

facture of flour, lumber, iron, castings, machinery, farming utensils, and any other kind or description of article not forbidden by law; and may erect and build marine ways or dry docks, and use the same for the purposes of repairing and building boats, barges or any other description of water craft; may buy, build and own boats, barges or other vessels, and navigate the same for the transportation of their coal, manufactures, or for other purposes."

We are at a loss to conceive what words could be used to create a railroad company that are not here used. The persons named are "hereby created a corporation," and authority is given "to construct, complete and operate a railroad" from Chester, a point in Randolph county on the Illinois railroad, to Tamara, a point on the Mississippi river. They are authorized to extend their road, by lateral branches, to connect with other roads; and the power of eminent domain, to condemn such land as may be needed for building the railroad, is vested in the corporation. The corporation is authorized to take and transport upon said road all persons and property, and to fix and establish rates of toll for the transportation of such persons and property. It is not the less a railroad company within the statute authorizing municipal subscriptions, because it is also a coal, or a mining, or a furnace, or a manufacturing company. By the third section of its charter it is vested with large power to carry on various kinds of mechanical and mining business, and is authorized to build and use vessels and barges in the transportation of coal and for other purposes. If the legislature had placed great restrictions upon its capacity as a railroad corporation, it might plausibly be objected that the purpose of a municipal subscription to its stock would be so far thwarted. Such purpose is to promote the settlement and increase the business and enhance the value of the property of the municipality and of its citizens, by furnishing the means of passage to all wishing to come or to go, and providing a means of bringing in the produce of other regions and of furnishing a market for its own. The vast corn growing lands of the state of Illinois depend for their value upon their convenience to a market. A few years ago its rich production was almost valueless, for the want of railroads or canals to carry it to other regions, where it could have been sold to advantage. No court has authority to say that an operating railroad is less a railroad, is less valuable to a county through which it passes, because it proposes to mine and transport coal, to manufacture and transport flour, to carry on iron foundries, digging or buying the raw materials, employing men to manufacture them into different kinds of iron or articles of use or luxury, and transporting them as may be required, than if it confined itself to the business of a carrier. So far as the probable success or advantages of such undertakings are concerned, it is not for us to decide upon it. The people of Randolph knew what the powers of the corporation were, and if they thought well of the undertaking it was a matter for their judgment only. The question of power being settled, the matter of judgment, wisdom or expediency is not for reconsideration by the courts.

§ 916. *A municipal corporation has power to waive conditions, and by so doing estop itself.*

2. The objection is made, secondly, that the subscription of the county was a conditional one and that the condition was not complied with. The allegation is, that by the terms of the contract of subscription the road was agreed to be completed and in operation within eighteen months from the date of the subscription, which would be on the 27th day of December, 1871, and that it was not completed until the 19th day of January, 1872. We do not think the

fact upon which this objection is based appears from the record. It is certain that no attention was called to it in the court below, and no ruling there asked or had in relation to it. It is there stated that "the plaintiff proved that the road was built and completed within the time required by the county court of Randolph, according to contract; that it was upon its completion put into operation, and has been ever since and now is in full operation, with trains of cars carrying freight and passengers as a common carrier through said county of Randolph on the line prescribed by the contract. . . . Said bonds were not issued and delivered to said railroad company until said county officers . . . had first rode over said railroad in cars of said company through the county of Randolph, and expressed themselves satisfied with the construction of said railroad." This plain statement is supposed to be overthrown by the evidence of a petition presented to the county court by the company on the 6th day of October, 1871, in which it is stated that, for reasons there given, it will not be able to complete the road within the time stipulated, and asking an extension from December 27, 1871, until February 1, 1872, and of the order of the county court granting such extension. This is evidence, no doubt, that the company then believed that it would not be able to complete the road as it had undertaken, and that it desired to guard itself against default, as well as that the county was ready to grant the request. This was, however, ninety days before the expiration of the time stipulated, and it is by no means difficult to believe that the company overcame the existing obstacles. It could not obtain the bonds until the road was completed; and it had the strongest motive, therefore, not to accept the indulgence of the county, if it was possible to avoid it.

The evidence shows that the bonds had been delivered on the 19th day of January, thirteen days before the expiration of the extended time, and that the road was completed and in operation before such delivery. It appears, also, from the citation already made from the record, that the road was built through the county "according to contract." When it is stated in the bill of exceptions that the "plaintiff, to maintain the issue on his part, offered in evidence the contract made by the county court of Randolph county, also the order of the county court extending the time for the completion of the road," it is plain that the distinction between the contract and the order of extension was well understood, and that the statement that the road was found to be completed according to the contract, means within the time and in the manner prescribed by the original contract, and not by the extension. If the fact assumed is doubtful, we are not called upon to study out a defect for the purpose of overthrowing the judgment, which was not objected to, or in any manner alluded to on the trial. Should we, however, assume the fact to be as is insisted by the plaintiff in error, it does not follow that its conclusion is correct. The constitutional provision alluded to prohibited all loans to corporations of municipal credits after July 2, 1870. If, however, a subscription for that purpose had already been authorized by a vote of the people, the right to make such subscription was not affected by the prohibition. If not authorized before the date mentioned, the subscription was absolutely prohibited. If previously authorized, the constitution had nothing to do with it. It was as if no such ordinance existed. We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally made contract by waiving conditions found to be injurious to its interests, or that it could not estop itself, like other parties to a contract. Bigelow on Estoppel, 464; *Moran v. Comm'rs*, 2 Black, 722 (§§ 1439-42, *infra*); *Zabriskie*

v. Cleveland, 23 How., 400; *Pendleton County v. Amy*, 13 Wall., 297; 1 Dill Mun. Corp., secs. 375, 383, 385, 398.

§ 917. *A municipal corporation declaring itself satisfied with a road, and issuing its bonds, waives objections and estops itself.*

In the present case the county, by an order in writing made on the 6th day of October, 1871, expressly agreed, for reasons satisfactory to itself, to extend the time of completing the road from the 27th day of December, 1871, to the 1st day of February, 1872. Before that time,—to wit, on the 19th day of January, 1872,—it declared the road to be completed to its satisfaction, delivered its bonds to the company, and received its stock in return, which it still holds and owns. That this constitutes a waiver and an estoppel, which under ordinary circumstances would prevent the obligor from raising the objection that the contract had not been performed in time, the authorities leave no doubt. *Muller v. Ponder*, 55 N. Y., 325; *Barnard v. Campbell*, id., 457; *McMarler v. Bank*, id., 222; *Kelly v. Scott*, 49 id., 601; *Dezell v. O'Dell*, 3 Hill, 215; *Grand Chute v. Winegar*, 15 Wall., 372; *Mercer Co. v. Hackett*, 1 Wall., 83 (§§ 1409–12, *infra*); *Gelpoke v. Dubuque*, 1 Wall., 175 (§§ 1367–70, *infra*); id., 184; *County of Moultrie v. Savings Bank*, 92 U. S., 631 (§§ 872–875, *supra*); *Converse v. City of Fort Scott*, id., 503 (§§ 1039–40, *infra*). We are of the opinion that the case was well decided, and the judgment is accordingly affirmed.

JARROLT *v.* MOBERLY.

(18 Otto, 580–591. 1890.)

ERROR to U. S. Circuit Court, Western District of Missouri.

STATEMENT OF FACTS.—Plaintiff, a citizen of Illinois, sued the town of Moberly, a town of Missouri, upon a number of coupons detached from bonds issued by the town to purchase land to be donated to a railroad for machine shop purposes. The bonds were issued May 1, 1872, and recited on their face that they were authorized by an election held March 26, 1872, and that the result of the election was that two hundred and twenty-eight votes were cast in favor of the donation, and only one against it. The bonds further recited that they were issued in pursuance of an act of the legislature of Missouri, passed March 18, 1871. The defendant demurred to the petition on the ground that the aforesaid act of the legislature is in conflict with the constitution of the state, and that the petition does not set out a sufficient cause of action. On these two points the judges were divided in opinion, and certified that fact to this court. The bonds were issued under a law authorizing their issue on a majority vote; the constitution required the assent of two-thirds of the qualified voters.

Opinion by MR. JUSTICE FIELD.

The object of the inhibition in the state constitution was to prevent the creation of debts by counties, cities and towns on behalf of any company, association or corporation without the assent of two-thirds of their qualified voters. The loan of their credit, that is, the placing of their obligations for the payment of money for the use of companies, was the usual mode in which they incurred indebtedness. Aid in this way to companies, particularly such as were organized for the construction of railroads, was given so frequently by municipal bodies in Missouri, before the constitution of 1865 went into effect, as in many instances to greatly embarrass and subject them to burdensome and oppressive taxation to provide for the interest on their obligations and the ultimate pay-

ment of the principal. Numerous acts of the legislature had authorized officers of counties and cities to subscribe for stock in railway companies, and to issue bonds for their aid without limit as to amount and without the previous assent of those who were to be taxed for their payment. In many instances the road in aid of which the bonds were issued was never constructed, and as no benefit resulted to the counties and cities, their inhabitants naturally felt impatient under the burdens which their officers had improvidently imposed.

It was the purpose of the constitutional provision to check these abuses, by requiring the previous assent of two-thirds of the qualified voters of the municipal bodies before any more stock should be subscribed by them or any further indebtedness be thus incurred. The issue of obligations directly to the company, association or corporation, without such previous assent, is within the letter of the prohibition, and to purchase property to be given to such company, association or corporation by the issue of obligations to others, without such assent, is within its spirit. Both modes of using the bonds of the municipality are equally a use of its credit, the difference being that the one is a direct and the other an indirect way of employing the credit of the municipality for the benefit of the railway company. It would be a narrow and strict construction of the constitutional provision to hold that it prohibited the creation of indebtedness by a municipality by a direct use of its credit for the railway company, and yet permitted such creation by the indirect use of it for the same purpose. A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed. In accordance with this principle, this court held, in *Harshman v. Bates County* (§§ 899, 900, *supra*), that the inhibition in question extended to townships in Missouri, as well as to counties, cities and towns, although townships were not mentioned. To contend, said the court, that the mere subdivision of counties into townships enabled the legislature to evade the constitutional provision is to ignore the manifest intention and spirit of that instrument; that it could not be possible that it was intended to restrict the legislature as to counties and not to restrict it as to mere sectional portions of the counties. 92 U. S., 569.

§ 918. *The Missouri act of March 18, 1871, authorizing municipal bodies to issue bonds to aid in the construction of railroads without the assent of two-thirds of the lawful voters, is unconstitutional.*

Considering the provision in this spirit, and looking at the evil to be prevented, we are of opinion that the issue by the defendant of its bonds to purchase lands, to be donated to the railway here, was a loan of its credit which could not be made without the assent of two-thirds of the qualified voters of the city. It is true that a loan implies a return of the thing loaned at some future day. A loan of credit would, therefore, seem to require that the party receiving its benefit should provide for its cancellation by the payment of the bonds issued. This being so, it would be unreasonable to hold that, whilst the framers of the constitution intended to prohibit a temporary use of the credit of a municipality without the previous assent of two-thirds of its qualified voters, they were willing that the absolute grant of the credit should be made without such assent. We do not think that a construction leading to such a conclusion is permissible. The act of March 18, 1871, must, therefore, be held to be in conflict with the constitution of the state. It authorizes a majority of the voters of a municipality to do that which the constitution declares the legislature shall not authorize to be done except by the assent of two-thirds of such voters.

The supreme court of Missouri has given a similar construction to the constitutional provision. An act of the legislature had, among other things, provided for the establishment of a school of mines and metallurgy as a branch of the university of the state, which was to be located in such county having mines as should donate to the board of curators of the university for buildings and other purposes of the school, the greatest available amount of money and bonds. The act authorized the county court of a county desirous of making a donation, to issue bonds of the latter, to be delivered to the board of curators and to be by them sold, and the proceeds used in the purchase of the land and the erection of the necessary buildings. Under this act, the county court of Phelps county ordered the issue of bonds, at different times, amounting in all to \$75,000, to be used as mentioned, and their delivery to the curators. The order was made without the assent of two-thirds of the qualified voters of the county, and, upon the petition of the state, the sale of the bonds was enjoined, the court holding that their issue was a loan of credit within the constitutional inhibition, and that the act authorizing their issue, without the sanction of two-thirds of the voters of the county, was void. It stated that the object of the inhibition upon county courts and city and town municipalities was to prevent them from taxing the people without their assent. 57 Mo., 178.

The difference between that case and the one at bar is only in the mode of effecting the same result. There the bonds were given to the curators to be by them sold and the proceeds invested in the establishment of the school of mines. Here the bonds were to be sold by the municipality issuing them, and the proceeds used by it in the purchase of lands to be donated to the railroad company. The object of the loan in both cases, in authorizing the issue of the bonds, was the purchase of property and the donation of it to corporations. As remarked by counsel, it is difficult to see how the fundamental law of the state could be evaded by a change of the parties through whom the credit of the municipality is to be converted into money. In either case the debt created is to be paid by taxation. The subsequent case of the county court of St. Louis county against Griswold does not change this decision. The bonds there considered were issued to purchase lands in St. Louis for a public park for the benefit of its inhabitants. There was no loan of credit for the use of any other parties in the case. 58 id., 175.

The act of the legislature of February 16, 1872, upon which much reliance is placed by counsel for the plaintiff, is merely prohibitory in its character, forbidding the officers of counties, cities and towns to donate, take or subscribe stock in any railroad or other company, corporation or association, or the loan of their credit, without the previous assent of two-thirds of their qualified voters, and prescribing a punishment for a disregard of its provisions. It confers, of itself, no authority. The inhibition upon the officers of a county, city or town to loan its credit without the previous assent of others was not an authority to loan it when such assent was given. Authority to create an indebtedness against a municipality, except on certain conditions, was not conferred, because the attempt thus to create it was made punishable as a crime. Further legislation was needed. Such was the evident opinion of the legislature of the state, for, by an additional act, passed on the 29th of March, 1872, the authority was given in terms. We answer, therefore, the first question certified to us in the affirmative, and the second in the negative.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.

COUNTY OF KANKAKEE v. ÆTNA LIFE INSURANCE COMPANY.

(16 Otto, 668-672. 1882.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—The judgment sought to be reviewed by this writ of error was rendered upon coupons attached to municipal bonds purporting to be issued by the plaintiff in error. The cause was tried by the court without the intervention of a jury, and the facts appear in a bill of exceptions. Each bond of the issue bears date September 20, 1870, and contains a recital that it "is issued under and pursuant to orders of the board of supervisors of Kankakee county, Illinois, for subscription to the capital stock of the Kankakee & Illinois River Railroad Company, as authorized by virtue of the laws of the state of Illinois authorizing cities and counties to subscribe capital stock to aid and construct railroads; also in accordance with the provisions of an act of said state of Illinois, entitled 'An act to fund and provide for paying the railroad debt of counties, townships, cities and towns,' in force April 16, A. D. 1869."

The bonds were sealed with the county seal, signed by the chairman of the board of supervisors, and countersigned by the clerk of the county court, under the order of the board of supervisors of the county, September 20, 1870. The defendant in error is a *bona fide* holder for value, having purchased them before their maturity in the open market and without notice of any defense. The defense made, however, and overruled in the court below, is matter of law, and alleges that the bonds are void, in whosoever hands, first, because the county had no power under the law to issue them at all, and second, because they were issued by the board of supervisors of the county, who were not the representatives of the county empowered to bind it.

§ 919. *Charter of the Kankakee, etc., Railroad Company does not limit the operation of the general laws of Illinois.*

Section 16 of the charter of the Kankakee & Illinois River Railroad Company, in force April 15, 1869, provides that "to further aid in the construction of said railroad, townships, corporate towns and cities on or along the line of said railroad may subscribe to the capital stock of said company in sums not exceeding one hundred thousand dollars respectively," if such subscription shall have been authorized by a majority of the legal voters at an election called and held for that purpose. In that event, bonds of such township, corporate town or city shall be issued in payment thereof to the railroad company. Section 17 of the same act declares that "nothing herein contained shall prevent counties and cities from taking and voting for subscriptions in the stock of said company, under the general laws of this state." The general laws referred to include "An act supplemental to an act entitled 'An act to provide for a general system of railroad incorporations,'" which took effect November 6, 1849. Laws of 1849, 2d Sess., p. 33. That act authorizes every county to subscribe for stock in any railroad company already or thereafter to be organized or incorporated under any law of the state, to the extent of \$100,000, and, for the payment of the same, expressly empowers the judges of the county court to borrow money at a rate of interest not exceeding ten per cent. per annum, and to pledge the faith of the county for the annual payment of the interest and the ultimate redemption of the principal, or if they shall deem it most advisable, they are authorized to pay for such subscription in bonds of the county,

bearing interest not exceeding the rate aforesaid; and the railroad company is also authorized, by a separate section of the act, to receive such bonds in payment of such subscriptions.

The contention now is on the part of the plaintiff in error, that the language quoted from the seventeenth section of the charter of the Kankakee & Illinois River Railroad Company is a reservation merely of the power given by the general laws of the state to counties to subscribe for stock; and as the power to issue bonds in payment therefor is a distinct power, it is not included in the reservation, and therefore ceased to exist on the passage of the act, so far as the present transaction is concerned. But the obvious meaning of the clause relied on to accomplish that result is merely that the general laws of the state authorizing counties to subscribe for stock in that railroad company shall remain unaffected by the charter, which conferred similar power on townships, corporate towns and cities on the line of the road, and not in any manner to limit the operation and application of those general laws upon the subject. The very purpose of the proviso seems to us to have been to exclude the very conclusion now sought to be drawn from it. Indeed, if the argument be good for anything at all, it results that, under the operation of this reservation, the naked power to subscribe for stock remains in the counties, without any authority, and therefore without any obligation, to pay for it; for if the power to issue bonds is taken away, so also is the power to pledge the faith of the county for the annual payment of the interest and the ultimate redemption of the principal,—a pledge which means, of course, that payment shall be made out of the revenues of the county derived from taxation. As such a construction of law confesses its own absurdity, it is not necessary to make any formal refutation of it.

§ 920. Powers of supervisors of Kankakee county to issue bonds in aid of railroads.

It is further contended on the part of the plaintiff in error that if, at the date of these bonds, Kankakee county had corporate power to execute and issue them, it could only be done by the county court according to the terms of the statute conferring that power. Such, in fact, is the language of the general law of 1849, from which the power is derived. But the county of Kankakee, it is admitted, was organized under the act of April 1, 1851, to provide for township organization. Laws of 1851, p. 35. Under that mode of organization the corporate powers of counties, otherwise exercised by the judges of the county court, are devolved upon a board of supervisors, such as in the present instance executed and issued the bonds in question. Article 15, section 4, of that act declares that "the powers of a county as a body politic can only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted." And article 16, section 4, provides that "the board of supervisors of each county in this state shall have power, at their annual meetings, or at any other meeting, . . . to perform all other duties, not inconsistent with this act, which may be required of or enjoined on them by any law of this state to the county courts."

In *Green v. Wardwell*, 17 Ill., 278, it was said that the board of supervisors were the legal successors to the county commissioners court, as had been previously decided in *The People v. Thurber*, 13 Ill., 554. In *Prettyman v. Supervisors of Tazewell County*, 19 Ill., 406, the very point here raised was decided, and it was held that under the act of 1851 it was the duty of the board of supervisors to act instead of the county court in calling an election to vote on

the question, in making the subscription for the stock, and in issuing county bonds in payment therefor. The act of April 1, 1861, "to reduce the act to provide for township organization and the several acts amendatory thereof into one act, and to amend the same" (Session Laws of Illinois, 1861, pp. 216-237), removes all doubt on the subject. It confers (article 14, section 6, 8th clause) upon the board of supervisors authority "to perform all other duties, not inconsistent with this act, which may be required of or enjoined on them by any law of this state, or which are enjoined upon county courts when holding terms for the transaction of county business in those counties not adopting township organization." This act was in force when the bonds sued upon in this case were issued, and they are governed by it. The case of *Gaddis v. Richland County*, 92 Ill., 119, relied upon by counsel for plaintiff in error on this point, is not inconsistent with this result in the present case, because that decision is based on the words of the charter of the railroad company conferring the authority to subscribe to its capital stock, which, in the opinion of the court, expressly limited the exercise of the power to the county court. The same comment may be made upon the case of *Supervisors of Schuyler County v. People ex rel. Rock Island & Alton Railroad Co.*, 25 Ill., 181. We find no error in the record, and the judgment of the circuit court is accordingly affirmed.

MEYER v. CITY OF MUSCATINE.

(1 Wallace, 384-393. 1863.)

ERROR to U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE SWAYNE.

The demurrer brings under examination the objections taken by the defendant to the validity of the coupons upon which this suit is founded. These objections will be considered as we proceed.

§ 921. *Authority of municipal corporation to issue bonds.*

I. "That there is no authority in the charter of the city of Muscatine under which money may be borrowed to aid in the construction of railroads." The charter gives the city authority "to borrow money for any object in its discretion, if at a regularly notified meeting under a notice stating distinctly the nature and object of the loan, and the amount thereof, as nearly as practicable, the citizens determine in favor of the loan, by a majority of two-thirds of the votes given at the election." When the bonds and coupons were issued, the acts of the legislature of Iowa of the 25th of January, 1855 (chaps. 128 and 149) were in force. These acts, in connection with the provision of the charter, furnish, in our judgment, a conclusive answer to this objection. The effect of the acts was considered in the case of *Gelpoke v. City of Dubuque*, 1 Wall., 220, decided at this term, to which we refer.

§ 922. *Interest on municipal bonds may be made payable at any place.*

II. "Because the interest was made payable in New York city, instead of at the treasury of the city of Muscatine." It was according to the general usage to make such bonds and coupons payable in the city of New York. It added to the value of the bonds and was beneficial to all parties. No legal principle forbids it. The power of a municipal corporation to make any contract does not depend upon the place of performance, but upon its scope and object. A city authorized to establish gas works and water works, and to gravel its streets, may buy water, coal and gravel beyond its limits, and agree to pay where they are found or elsewhere. The principal power, when expressed,

draws to it, by necessary implication, the means of its execution. This is a settled rule in the construction of all grants of authority, whether to governments or individuals. If the subject admitted of doubt, we should hold that the city, having acted upon its own construction and drawn in others to take the securities and advance their money upon it, is now concluded from denying that construction to be the true one. *Van Hostrup v. City of Madison*, 1 Wall., 291 (§§ 1196-97, *infra*).

§ 923. *Interest at the highest legal rate may be made payable semi-annually.*

III. "Because in the stipulation to pay the interest semi-annually at the rate of ten per cent., the authority conferred by the vote which limited the rate of interest to 'not higher than ten per cent. per annum,' was transcended, and a usurious rate agreed to be paid." This objection has no foundation. When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year. *Mowry v. Bishop*, 5 Paige, 98.

IV. "Because the stock of the Mississippi & Missouri Railroad Company, for which said bonds and coupons were issued, was, without authority from the city, placed in the hands of a trustee, and entirely beyond its control." This objection, though urged in the argument, does not arise upon the record. All that appears touching the subject is, that the bond of \$1,000, as set out in the exhibit attached to the complaint, besides binding the city to pay, provides that the holder, upon surrendering it at any time before maturity "to A. C. Flagg, trustee," should be entitled to ten shares of the stock of the railroad company. To such an arrangement there is no legal objection. The city had a right to apply the stock for which the bonds were given, or its proceeds, at any time, in discharge of the bonds.

§ 924. *Under authority to borrow money, city may issue bonds.*

V. "Because, under the authority to borrow a sum of money, no money was ever borrowed by the city; but instead, these bonds were delivered to the officers of the Mississippi & Missouri Railroad Company, and by their agents and brokers sold to the plaintiffs at a price greatly below their par value." The amended answer avers, "That the said bonds were by the officers of said railroad company, and their agents and brokers, sold to the plaintiffs at a price greatly below their par value; that at the time said bonds and coupons were received by said plaintiffs, they had full knowledge of the fact that said bonds had been issued for the purpose of aiding in the construction of said Mississippi & Missouri Railroad." The city was authorized to issue the bonds in order to borrow money to pay for the stock. If the company chose to receive the bonds in payment for the stock, retaining a lien on the stock until the bonds were paid, there was no legal obstacle in the way of their doing so. The object of issuing the bonds was thus accomplished, and no injury was done to those who were to pay them. It is neither averred in the answer, nor claimed in the argument, that the railroad company took them at less than their face. It does not appear that any one objected then, and no one can object now. After the bonds passed into the hands of the railroad company, the company was at liberty to sell them on such terms as it might deem proper. The act of January 25, 1855 (chap. 128), by a clear implication, authorizes cities to give their bonds in payment of their subscriptions of railroad stock, and expressly authorizes the bonds to "be sold by the company at such discount as may be deemed expedient." What is implied has the same effect as what is expressed. *United States v. Babbit*, 1 Black, 55.

§ 925. *Where bonds purport to be issued in compliance with legal authority, irregularities cannot be urged in defense against a bona fide holder.*

VI. "The ordinance on which the vote for a loan was taken was void, because it submitted three distinct propositions in one, and in such a manner as to cut off an effective opposition from all voters who were against the whole of the propositions."

The record shows that all the votes cast except five were in favor of the loan. The city and citizens adopted and acted upon the ordinance as valid and sufficient. The citizens voted and the city authorities issued the bonds. No one interposed to prevent their issue. It is not questioned that all the parties acted in good faith, and the city cannot now be heard to object to the irregularity of its own proceedings. A party taking the bonds was bound to look to the legal authority under which the public agents acted. If that were sufficiently comprehensive, he had a right to presume that those empowered to act and acting under it had complied with its requirements. *Commissioners of Knox Co. v. Aspinwall*, 21 How., 539 (§§ 1413-18, *infra*).

VII. "It is insisted that the legislature had no constitutional power to authorize the issue of such bonds, and that hence they are void." This is sufficiently answered by the opinion of this court in *Gelpcke v. City of Dubuque*, decided at this term, 1 Wall., 175 (§§ 1367-70, *infra*). See, also, *Rowan v. Runnels*, 5 How., 134; *Pease v. Peck*, 18 id., 599; *State Bank of Ohio v. Knoop*, 16 id., 392; *Jefferson Branch Bank v. Skelly*, 1 Black, 436. The judgment below must be reversed, and the cause remanded for further proceedings in conformity to this opinion.

Judgment accordingly.

MR. JUSTICE MILLER dissented, holding that the power in the charter to borrow money did not confer power to issue the bonds in this case; the objects for which the city could borrow money were enumerated in the charter, and that the power could not be exercised for other purposes.

§ 926. *In general.*—To authorize a municipal corporation to subscribe for stock in a public improvement and pay for it by the issue of negotiable securities, there must be a legislative grant of power either in express terms or by necessary implication. *Lewis v. City of Shreveport*, * 3 Woods, 205; *Allen v. Louisiana*, 13 Otto, 80 (§§ 1014-16); *Kenicott v. The Supervisors*, 16 Wall., 452 (§§ 1458-64); *Chisholm v. City of Montgomery*, * 2 Woods, 585; *Bull v. Town of Southfield*, 14 Blatch., 216.

§ 927. Unless restrained by some positive provision of the organic law, a legislature may authorize a municipal corporation to take stock in a railroad or other work of internal improvement and to borrow money to pay for it, and to levy a tax to repay the loan; and bonds issued in aid of a plank road fall within the same principle as those issued in aid of a railway. *Larned v. Burlington*, 4 Wall., 276; *St. Joseph Township v. Rogers*, 16 Wall., 644 (§§ 1674-77).

§ 928. An act, passed by the legislature, authorizing the city council to issue new bonds in place of and in extension of bonds issued without legislative authority, provided the citizens should vote their consent thereto, does not cure the original want of power, the vote being adverse to such reissue. *Chisholm v. The City of Montgomery*, * 2 Woods, 585.

§ 929. Corporations are bound the same as individuals to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced. Powers and privileges do not pass to a corporation except by unambiguous words, and an act giving special privileges must be construed strictly; and in case a sentence is capable of having two meanings, it will be construed in favor of the public, but in such cases the subject matter contemplated by the legislature as a whole must be considered. *Moran v. Commissioners of Miami County*, 2 Black, 722 (§§ 1439-42).

§ 930. *Implied power to issue bonds.*—Power conferred upon a municipal corporation to subscribe to the capital stock of a railroad, and to borrow money to pay the amount of its

subscription, implies the power to issue bonds on which to negotiate the loan. *Milner v. The City of Pensacola*,* 2 Woods, 632. An implied power in a statute to issue bonds makes the bonds as valid as if the power was express. *Gelpcke v. City of Dubuque*,* 1 Wall., 220. See §§ 1867-70.

§ 981. Authority to a municipal corporation to contract debts and issue bonds therefor in aid of railways or other internal improvements must be given clearly and will not be implied. So an authority to the municipality simply to subscribe for stock in such corporations is insufficient to authorize it to borrow money for that purpose; nor is an act allowing corporations to pay such subscriptions in the stock of other companies held by them; nor providing that acts limiting the amount of corporate debts shall not apply to subscriptions to railways. *Oelrich v. Pittsburgh*,* 1 Pittsb. R., 528.

§ 982. The power conferred on a municipal corporation, by its charter, to erect wharves and improve streets, does not carry with it the power to raise funds for this purpose by the issue and sale of negotiable bonds. No recovery can be had on the bonds so issued. The clause in the charter that the city "may do all other acts as natural persons" cannot confer the needed power. *Gause v. Clarksville*,* 5 Dill., 165. See §§ 1264-68.

§ 983. In Missouri, under the general legislation of that state on the subject of municipal aid to railway and other companies, and the usual practice under such legislation, to issue bonds for debts of this kind, authority to a municipal corporation to subscribe to the stock of a gravel road company, implies the power to issue bonds in payment for such stock. *Ibid.*

§ 984. The power conferred on a municipal corporation to provide for the payment of the debts of the city, to provide special funds for special purposes, to construct sidewalks, etc., does not imply the power to issue bonds for the construction of sidewalks. Such a power must be conferred by the legislature. *Hitchcock v. Galveston*, 2 Woods, 272.

§ 985. A police jury of a parish in Louisiana, which is vested with the usual powers for the administration of the local affairs of the parish, including the power to raise money to defray its ordinary expenses, has no implied authority to issue negotiable bonds payable in the future for the purpose of raising money or funding a previous debt, which shall be unimpeachable in the hands of a *bona fide* holder. *Police Jury v. Britton*, 15 Wall., 570.

§ 986. The statutory power given to county authorities to borrow money for public buildings, roads and bridges, includes the incidental power to issue therefor the bonds of the county. *Carpenter v. Buena Vista Co.*,* 5 Dill., 556.

§ 987. Power conferred by statute on a county to borrow money to build a court-house does not imply the power to issue bonds for that purpose; and where such bonds were issued by the commissioners of a county, without the consent of the people, and were never used for the purpose of building a court-house, and contained no recitals of conformity to law, their holders cannot recover on them. *Lewis v. Board of Commissioners*,* 2 McC., 464.

§ 988. Where a statute authorizes any city to subscribe to the stock of a railroad company "as fully as any individual," a city may not only subscribe, but may issue negotiable bonds in payment of the stock. *Seybert v. City of Pittsburgh*,* 1 Wall., 272. *Contra*, *Oebicke v. City of Pittsburgh*,* 7 Am. L. Reg. (O. S.), 725.

§ 989. A law incorporating a board of public schools, which provides that it "may purchase and receive and hold property, real and personal, may lease, sell or dispose of the same, and do all other acts as natural persons;" another section providing for the election, attendance and expulsion of members, the control of the school property, and for the making of rules and ordinances for the management thereof, and giving to the board power "to do all lawful acts which may be proper and convenient to carry into effect the objects of the corporation," does not confer on the board power to issue bonds for the building of school houses. And especially since another section of the act requires the county court to levy taxes annually to pay the annual estimates made by the board of their expenses in building school houses, etc. *Erwin v. St. Joseph Board of Public Schools*, 2 McC., 606.

§ 940. Authority in the charter of a railroad company to counties through which the road shall pass to subscribe to the capital stock of the company, and to make payments on such terms and in such manner as may be agreed upon by said company and the proper county, followed by a proviso that, whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold at less than par value, and no bonds shall be for a less amount than \$100, and shall not be subject to taxation until a certain time, etc., confers authority on the counties referred to to issue bonds in payment for stock subscribed. *Adams v. Lawrence County*,* 2 Pittsb. R., 60.

§ 941. Effect of a change in the law.—The power given to a county court to subscribe to the stock of a railroad is a "privilege" which cannot be impaired or taken away by a subsequent constitutional amendment. (Following state decisions.) *Thomas v. County of Scotland*,* 3 Dill., 7.

§ 942. Where the charter of a railroad company authorized subscriptions without a vote

of the people, bonds issued pursuant to the provisions of said charter, but after a constitutional provision requiring a vote had gone into effect, were held valid. *County of Ralls v. Douglass*,* 15 Otto, 728; *Nicolay v. St. Clair Co.*,* 3 Dill., 168; *County of Schuyler v. Thomas*,* 8 Otto, 169; *County of Cass v. Gillett*,* 10 Otto, 585; *County of Scotland v. Thomas*, 4 Otto, 682 (§§ 1210-14); *County of Macon v. Shores*, 7 Otto, 272 (§§ 1389-94); *Foster v. Callaway Co.*,* 3 Dill., 200; *County of Cass v. Jordan*,* 5 Otto, 373.

§ 943. An act of March 7, 1867, of the state of Illinois, authorized certain towns to make an appropriation or donation to a certain railroad company, after the completion of the road through the town, at any time prior to July 2, 1870. At the latter date a new constitution was adopted, annulling all power of donations for the future. The vote of appropriation was made by one town, prior to the adoption of this constitution, but the road was not completed to that town until after that date. It was held that the mere vote did not constitute a contract irrevocable by the new constitution, although the road had already given notice of its acceptance of the donation, and the bonds issued as such donation were void. *Concord v. Savings Bank*,* 2 Otto, 625.

§ 944. The act of January 14, 1860, of the state of Missouri, which requires the assent of tax-payers to the issue of county bonds for railroad stock, is in amendment of the general railroad law of 1853, and, like that law, does not apply to companies having special charters. *County of Cass v. Gillett*,* 10 Otto, 585.

§ 945. A municipal corporation has no power to issue bonds except it be given by the legislature. And hence where a town has authority to issue its bonds for the purpose of repairing its streets, and such power is dependent upon the power to determine upon the necessity, amount and manner of expenditure, and a subsequent statute takes away from such town all jurisdiction of its roads and streets, bonds afterwards issued to repair such roads and streets are void for want of legislative authority. *Bull v. Town of Southfield*, 14 Blatch., 216.

§ 946. In the midst of proceedings by a town to issue its bonds for subscription to stock in a railroad company, an act is passed by the legislature, introducing important changes in the legislation, regulating the proceedings for bonding municipal corporations, by amending, but not repealing, various sections of the existing act. The rest of the proceedings are had in accordance with the new act, leaving those already had unchanged. It is held that the bonds issued in accordance with these proceedings are valid, since the legislature did not intend to repeal, but to amend, the provisions of the former act, and the provisions of this act remained law until changed. *Munson v. Town of Lyons*,* 12 Blatch., 539.

§ 947. Under an act incorporating a railroad company, and authorizing counties along its route to subscribe stock and issue bonds, and reserving a right to amend its charter, the bonds of a county, through which the route was relocated by an amendment of the charter, are valid. *County of Schuyler v. Thomas*,* 8 Otto, 169.

§ 948. Where the charter of a bank, authorizing it to build water works to supply a city with water, required it to sell them to the city after a certain time and take the city's bonds in payment if the city desired to purchase, it was held, the sale having been consummated according to the requirement, that the bonds are not invalid because not issued in accordance with statutes passed since the charter of the bank, since the provisions in the charter, in accordance with which the bonds were to be issued, form a contract, not to be impaired by subsequent legislation. *Sala v. New Orleans*,* 2 Woods, 188.

§ 949. A statute authorized the issue of bonds to aid a railroad by towns in certain counties extending from east to west. A subsequent act authorized the issue of bonds in aid of railroads by towns in a tier of counties lying north and south, the aid in each case to be extended to roads running into or through the counties. The later act contained a different provision in relation to the necessary vote from the provision contained in the first act. The county of M. was in both groups of counties. The town of Red Rock, in the county of M., issued bonds under the first act. *Held*, that the first act was not repealed by the last act. *Red Rock v. Henry*,* 16 Otto, 596.

§ 950. An amendatory act, passed after bonds have been issued in compliance with law, can have no effect on the validity of such bonds. *Ibid*.

§ 951. City subsequently incorporated.—Authority given to "any incorporated town or city" to subscribe to the stock of a certain railroad company and issue bonds in payment for such subscription, includes a town or city thereafter incorporated. *Lewis v. City of Clarendon*,* 5 Dill., 329.

§ 952. Chapter 98 of the laws of Wisconsin for 1867, providing that it shall be lawful for any county, town, or incorporated village, through which a certain railroad shall run, to subscribe to its stock and pay in bonds, is held to include a village thereafter incorporated, although the acts incorporating the village did not give it power to issue bonds. This construction is not affected by the provision, in the act incorporating villages, that "no general law of this state contravening the provisions of this act shall be considered as repealing,

amending or modifying the same, unless such purpose be expressly set forth in such law, as this provision referred to future laws. Nor does the provision, in the charter of the village, forbidding it from borrowing money, repeal the power given by the act of 1867, to issue bonds in exchange for stock in the railroad company. *Long v. New London*, 9 Biss., 539 (§§ 1240-42).

§ 953. **Township aid.**—The constitution of Missouri, which prohibits the legislature from authorizing any "county, city or town" to subscribe to the stock of any railroad company, unless authorized by two-thirds of the qualified voters therein, does not prohibit the legislature from authorizing township aid to railways, if two-thirds of the voters of the township shall sanction the proposition. *Jordan v. Cass County*,* 8 Dill., 185.

§ 954. The act of March 18, 1871, of the state of Missouri, entitled "An act attaching certain territory to the town of Westport and to enable said town to take stock in a railroad," the object of which was to erect a certain district and enable this district to take stock in a horse railroad, entirely within the district, the stock to be paid for by a tax levied on the district, is constitutional. And the provision in this act, that said district, in subscribing to the stock of said company and in voting taxes for the same, shall be governed by the law regulating the subscription to railroad companies of municipal townships, is sufficient authority to the county in which this district is situated, to issue bonds in payment of such subscription; since the law referred to in this provision gives a county authority to issue bonds in payment for the subscription to the stock of railroad companies by its townships. *Henderson v. Jackson County*,* 12 Fed. R., 676.

§ 955. **Aid in constructing depots.**—Authority to a township to issue bonds to "aid in the construction of railroads" includes the authority to issue them for the purpose of aiding in the construction of the depots and side-tracks of a road within its limits. No argument against this authority can be drawn from the fact that it is the duty of the company to construct suitable depots and side-tracks. *Township of Rock Creek v. Strong*, 6 Otto, 271 (§§ 1010-12).

§ 956. **Road organized under the laws of another state.**—Authority to subscribe to the capital stock of a railroad organized under the laws of the state does not confer authority to subscribe to the capital stock of a road organized under the laws of another state and extending into the former, even though by the laws of the former state such railroad is entitled to all the rights and privileges of railroads organized under its laws. *Allen v. Louisiana*, 18 Otto, 80 (§§ 1014-16).

§ 957. **Held valid after issue.**—After bonds are issued and negotiated courts will hold them valid if the statute can be made to bear the construction, although grounds existed which would have warranted the courts in enjoining their issue. *Woodhull v. Beaver County*,* 3 Wall. Jr., 274.

§ 958. **Bonds donated.**—It does not render municipal bonds invalid that they were donated to a railroad company and not issued in payment of a subscription to stock, there being no special restriction in the constitution upon the power of the legislature to authorize municipal aid to such enterprises. *New Buffalo v. Iron Co.*,* 15 Otto, 78.

§ 959. Where a city had power to make a loan or donation to a railroad company "with or without conditions," it had power to donate bonds subject to any conditions, not contrary to public policy, which might be deemed for the benefit of the people. *Taylor v. Ypsilanti*,* 15 Otto, 60.

§ 960. The legislature may authorize a county to issue its bonds as a donation to aid in the construction of a railroad, and to levy taxes to pay these bonds. Such a tax is not a tax laid for private use, since the railroad may be controlled and regulated by the state, its charter amended or repealed, its tolls regulated or limited. *Olcott v. The Supervisors*, 16 Wall., 678.

§ 961. **Obligation of contracts.**—A law authorizing the commissioners of a county to borrow money to build a railroad, to be paid by a tax on the citizens, does not "impair the obligation of the contract" between the state and the citizens of the county holding land under patent from the state. Nor is such a law in violation of the "fundamental principles of republican government." *McCoy v. Washington County*,* 3 Wall. Jr., 381.

§ 962. **Corporate purpose; vote.**—The act of the legislature of Illinois of March 5, 1867, establishing a state reform school for the education, employment, discipline and reform of juvenile offenders and vagrants, and providing that any county, town or city might make subscriptions in aid of the school, in money or bonds, for the purpose of securing its location within its limits, is not repugnant to the section of the constitution of that state which declares that the corporate authorities of counties, townships, etc., may be vested with power to assess and collect taxes for corporate purposes. Bonds issued under authority of the act are valid, the object of the act being held to be a corporate purpose by the state supreme court at the time of their negotiation. It is immaterial that the vote of the people was not taken, when it has been decided by the state supreme court that the corporate authorities

may make such subscription without a vote of the people. *County of Livingston v. Darlington*, 11 Otto, 411.

§ 968. Bonds issued without authority.—Where a city issues bonds in aid of a railroad without authority of law, and receives from the company bonds and other securities as collateral, it is entitled to hold such securities for its own indemnity as against a judgment creditor of the company until it is released or its liabilities determined in a judicial proceeding. *Smith v. Milwaukee, etc., R. Co.*, * 9 Am. L. Reg. (O. S.), 655.

§ 964. Whether a county is included in the grant of power.—The charter of a railroad company which recites that it shall be lawful for the county court, in any county in which any part of the route of said railroad may be, to subscribe to the stock of the company and issue bonds of the county in payment therefor, and which also provides that the company shall have power to locate its road from a certain point in the direction of a second point in another state, and may select such route as may be most advantageous, authorizes a county, through which its route is laid out, to subscribe stock and issue bonds therefor, although this county is not situated on the straight line between the two points, but is in the general direction indicated from the starting point. *County of Schuyler v. Thomas*, * 8 Otto, 169.

§ 965. Miscellaneous.—A statute in Arkansas provides that "any county in this state may subscribe to the stock of any railroad in this state," and "may issue bonds for the amount of such stock so subscribed; provided, that the amount of such subscription shall not exceed \$100,000." A county, by a single vote, subscribes \$100,000 to each of two companies. The bonds are held valid. *County of Chicot v. Lewis*, * 13 Otto, 165.

§ 966. The legislature of Alabama passed an act appointing a harbor board, authorizing them to improve the river, harbor and bay at Mobile, and pay for the contracts of improvement with the bonds of Mobile county. It also declared that the officers of Mobile county should issue its bonds and deliver them to the board. It was held that, this act having been declared constitutional by the supreme court of Alabama, the decision was binding on the circuit court. That the legislature had the power to compel Mobile county to issue its bonds to improve the river and harbor, within the county. That, the board having been dissolved, contractors who had done work and had not been paid, could compel the county, by suit in equity, to issue to them bonds in payment for their work, since they had no remedy at law against the board with whom they had contracted for the bonds. *Kimball v. Mobile*, * 3 Woods, 555.

§ 967. The legislature of Dakota territory passed an act authorizing counties to issue their bonds in aid of a certain railroad enterprise. Congress subsequently, by a special enactment, annulled the act of the territorial legislature, excepting the authority of the company to construct the road between certain points, and the power of the counties to issue bonds in pursuance of any vote already taken. It was held that in a suit on bonds issued by one of these counties, no objection could be taken to the validity of the territorial act, because the act of congress was sufficient authority for the making of the bonds. *National Bank v. County of Yankton*, 11 Otto, 129.

§ 968. Bonds a debt of the city.—A corporate power was created, known as water commissioners, for the purpose of erecting and maintaining a system of water-works for the city. The commissioners had power to borrow money and issue bonds, with the consent of the city council, the bonds to be under the seal of the city and signed by the mayor and clerk. Held, that the bonds when issued became a debt of the city, for which the city was liable. *Portsmouth Savings Bank v. City of Springfield*, * 4 Fed. R., 276.

§ 969. City may issue bonds, though it has power to levy a tax.—Where a city has power to build school-houses and construct sewers, it may borrow money and issue bonds for such purposes, notwithstanding it has power to levy taxes for such purposes. *Ibid.*

II. SUBSCRIBING AND ISSUING BONDS.

SUMMARY—*Authority to issue bonds; signing*, § 970; *not necessary that road should be constructed*, §§ 971, 983, 991, 992.—*Bonds to be sold at par*, § 972.—*Requiring a majority of tax-payers*, § 973.—*Irregularities in holding election*, §§ 974, 979, 984.—*Time of maturity; rate of interest*, § 975.—*Conclusiveness of acts of officers*, §§ 976, 994.—*Ordinance in conflict with constitution*, § 977.—*Act held constitutional*, § 978.—*Subscription a contract which cannot be impaired*, § 980.—*Election held before approval of act authorizing it*, § 981.—*Certificate as to compliance with conditions*, § 982.—*Agreement by a county to assign its stock to the company*, § 985.—*Whether a subscription to a particular road was authorized*, § 986.—*Act conferring general authority*, § 987.—*Sufficient description of*

road, § 968.— Assent of residents as appearing by assessment roll, § 969.— Exchange of bonds for stock, § 990.— Vote giving implied power to issue bonds, § 993.— Executed and sold out of the state, § 995.

§ 970. A state law provided that counties through which a certain railway might pass should be authorized to subscribe to the capital stock of the company, "and to make payment on such terms and in such a manner as may be agreed upon" by the company and the county, provided that the amount should be fixed by a grand jury and should not exceed ten per cent. of the assessed valuation, and that upon the filing of the report of the grand jury "the county commissioners may carry the same into effect by making, in the name of the county, the subscription directed by the grand jury; provided, that whenever the bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by the railroad company at less than par value," and shall not be of less than \$100 each, and shall not be taxed until the profits of the company exceed six per cent., and all subscriptions made in the name of a county should be valid if made by a majority of the commissioners of the respective counties. *Held*, that under this law the county commissioners of the counties in question had power to issue bonds to pay such subscription and to make them payable to bearer with interest-bearing coupons attached; and that if the bonds were signed by two only of the three commissioners they were valid. *Curtis v. County of Butler*, §§ 996, 997; *Woods v. Lawrence County*, §§ 998-1002.

§ 971. Under this law it was not essential to the validity of the bonds that the railroad company should have been organized, or its road constructed or located within the county, before the subscription to its stock was made. *Woods v. Lawrence County*, §§ 998-1002. See § 1065.

§ 972. The clause in the above act, forbidding the sale of the bonds by the company at less than par, was intended for the benefit of the county, that its bonds should be received by the railroad at par and exchanged at par for its stock, so that it should receive the full amount of its subscription; and the clause does not avoid the bonds in the hands of persons purchasing them from the company at a discount. *Ibid*.

§ 973. Bonds were issued by the city of Hannibal to pay its subscription to the stock of a railroad company, under authority in its charter, which required the ratification of a majority of the tax-payers. In an action on these bonds, the plaintiff offered in evidence the poll books of an election, which showed that many more than a majority of the voters voting were for the issue. On objection that the charter required a majority of the tax-payers, the court held that it must be presumed that this vote included a majority of the tax-payers, in view of another provision in the charter of the city which required, as a qualification to voting for city officers, the having paid a city tax or license, this vote having taken place at the same time with a vote for city officers. *Hannibal v. Fauntleroy*, §§ 1003-1005.

§ 974. Where an election for the issue of bonds is regular in every particular, except that the application for the election was signed by twelve tax-payers instead of twenty, and ten days' notice of the election was given instead of twenty, the bonds are valid in the hands of *bona fide* holders. *Roberts v. Bolles*, §§ 1006-1009.

§ 975. Where the act conferring power to issue township bonds provides that they shall be payable in not less than five nor more than thirty years from the date thereof, with interest not to exceed ten per cent. per annum, bonds made payable thirty years and thirty-five days from date, but only drawing interest for the last thirty years of the time, are valid. *Township of Rock Creek v. Strong*, §§ 1010-1012.

§ 976. Where the law casts the duty on the board of commissioners of a county to canvass the vote of a township had for the issue of township bonds, the action of the board as found in its records is conclusive of the sufficiency of the vote as between the township and a holder of the bonds in good faith. The auditor's certificate of registration indorsed on the bonds is also conclusive of that fact, where the rights of a *bona fide* holder are concerned. *Ibid*.

§ 977. A state constitution provided that no municipality should be authorized by the state legislature to loan its credit to a corporation, unless on an affirmative vote of two-thirds of the qualified electors of such municipality. A city charter provided that it should have the power to subscribe to the capital stock of a railroad on an affirmative vote of a majority of the resident tax-payers of the city. A city ordinance provided for the submission of the question of subscribing to the stock of a certain company to the voters, and that if two-thirds of the qualified electors voted therefor, the subscription should be made. An election was held, and bonds were issued which recited that they were issued pursuant to the charter and the ordinance. *Held*, that, as the charter could not authorize a subscription on a vote of two-thirds of the tax-payers, on account of the constitutional prohibition above mentioned, there was no authority in the clause of the charter above mentioned for the subscription, and that

the bonds were invalid. If any effect can be given to that clause of the charter, it means that, in addition to the vote required by the constitution, the city in question must have also a vote of two-thirds of the tax-payers as an additional protection, and that the permission given to subscribe when such two-thirds vote of the tax-payers is obtained is conditioned upon a previous authority to make a subscription, conferred by the legislature. *Allen v. Louisiana*, §§ 1014-1016.

§ 978. A state constitution provided that all county officers should be elected by the electors of the respective counties. With this provision in force, and with a regularly elected county board in office, the legislature authorized a certain county to aid in the construction of a railroad, and appointed five commissioners to aid in the project. The act provided that a vote should be taken to decide whether a subscription should be made pursuant to the act, and authorized these commissioners to borrow money and issue county bonds therefor, signed by the president and secretary of the board and countersigned by the county clerk. The act declared that, when thus prepared and issued, they should, "in the hands of any *bona fide* holders, be of full and complete evidence to establish the indebtedness of the county, according to their tenor and effect." *Held*, that the act was constitutional; that the commissioners were simply agents to carry out the subscription voted by the people, and that bonds issued according to the provisions of the law could not be repudiated by the county after its vote in favor of the subscription. *Sheboygan County v. Parker*, §§ 1017, 1018.

§ 979. An act under which county bonds were issued provided that if issued by the proper authorities, and in the hands of a *bona fide* holder, and regular upon their face, they should be taken in all courts as *prima facie* evidence of the regularity of everything required by the acts in relation to the bonds or by any other act to be done preliminary to their issue and negotiation. *Held*, that without any proofs of irregularity this provision of the law is conclusive against the existence of any. *County of Clay v. Society for Savings*, §§ 1019-1023.

§ 980. Pursuant to laws then in existence a county voted to issue its bonds to a railway company, upon certain conditions to be performed on the part of the company. The board of supervisors of the county ordered the subscription, and, on the performance of a specified portion of the conditions, made a subscription on the books of the company. The remainder of the conditions being performed the bonds were issued. *Held*, that the subscription on the company's books was a contract, though the conditions had not all been performed, the obligation of which could not be impaired by a clause in a new constitution subsequently adopted, which prohibited any municipality from loaning its credit to any railway, and that the bonds, though issued on such subscription after this clause went into effect, were valid. *Ibid*.

§ 981. It is no objection that a county election to vote subscription to the stock of a railroad company, to be paid in county bonds, was had before the approval of the act authorizing such subscription and issue, where the act expressly authorized the commissioners of the county to issue bonds and subscribe stock, where the vote had been taken prior to the act. *County of Leavenworth v. Barnes*, §§ 1024-1026.

§ 982. Municipal bonds contain the condition that they may be put upon the market as commercial paper, "when it is duly certified thereon that the conditions upon which they were voted, issued and deposited by said town had been performed." The president of the bank in which the bonds were deposited was required to make this certificate when he had received the certificates of the president of the road in aid of which the bonds were voted, and the chairman of the board of supervisors of the town, that the iron had been placed upon the track and cars run over the same between certain points. The bank president simply certified that he had received the certificates of the president of the road and the chairman of the board, setting them out. It is held that the certificate of the bank president is sufficient authority for the negotiation of the bonds. And in an action on these bonds by *bona fide* holders the non-performance of the conditions cannot be relied on as a defense. *Menasha v. Hazard*, §§ 1027-1029.

§ 983. Where a statute authorizes a subscription by any county into, through, from or near which any railroad is or may be located, it is not necessary that the road should be located at the time the vote is taken; nor that the proposition submitted to the popular vote should describe the road to which the subscription is to be made. *Commissioners of Johnson County v. Thayer*, §§ 1030-1036. See § 1085.

§ 984. Defects, irregularities and informalities which do not affect the result of the vote—do not go to the question of jurisdiction—do not impair the validity of the bonds. *Ibid*.

§ 985. An agreement by a county to assign and transfer to the railroad company the stock held by the county, and to issue the bonds remaining unissued, on condition that the road be completed within a given time, does not invalidate the bonds. *Ibid*.

§ 986. Under an act of Kansas authorizing the commissioners of any county, to, into, from, or near which, whether in that state or any other, any railroad is or may be located, to subscribe to the stock of said road, issue bonds, etc., the required submission to the voters

in case of a certain county was whether they would subscribe to the stock of any railroad company that should construct a road commencing at a point on the Tebo & Neosho Railroad running westward, *via* Fort Scott (in that county). The Tebo & Neosho Company was a Missouri corporation, and the proposition contemplated a road built partly in Kansas and partly in Missouri. A Missouri corporation by its own direct action could only build the part in Missouri, and a Kansas corporation the part in Kansas. The Tebo & Neosho Company did in fact cause the entire line to be constructed, by transferring a part of its franchises to a Kansas corporation. *Held*, that a subscription to the stock of the Tebo & Neosho Company, and the issue of bonds accordingly, was authorized by the submission. *Block v. Commissioners*, §§ 1037, 1038.

§ 987. An act which grants power to a city to take all needful steps to protect the interest of the city, present and prospective, in any railroad leading from or towards the same, but not to take stock in any railroad without a vote of a majority of the legal voters, and to take private property for public use or for the purpose of giving a right of way or other privilege to any railroad company, and which also grants power to the city to borrow money, without imposing any limit, and to issue bonds to fund any or all indebtedness due or to become due, authorizes the city to issue bonds for the purpose of procuring the right of way for a railroad company through the city, and also procuring grounds for depots, engine-houses, etc., and donating the same to the company. It is no objection to the validity of these bonds that the city agreed to make the above donations upon conditions fulfilled by the company, or that the city gave these bonds to the company in lieu of the right of way and the grounds. *Converse v. City of Fort Scott*, §§ 1039, 1040.

§ 988. The authority to a town to aid any such railroad company running between designated points (now organized, or such company as may be organized under the general railroad law, as may be expressed by the written assent of two-thirds of the resident tax-payers of said town) is sufficiently complied with by a description, in the assent, of the company as a company organized under the general railroad law for the purpose of constructing a road between the points designated, there being no other company to which the description would apply. *Scipio v. Wright*, §§ 1041-1043.

§ 989. A law which requires, as a prerequisite to any action by commissioners in bonding a town, that the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll made next previous to the time such money may be borrowed, shall be obtained, verified and filed in the clerk's office, does not invalidate bonds sold, after a new assessment roll has been completed, to obtain money to pay a subscription to the stock of the railroad intended to be aided, made prior to the new assessment roll. *Ibid*.

§ 990. A statute in New York authorizing county commissioners to borrow a certain amount of money and pay it to the officers of a certain railroad company, in exchange for stock, to aid in building the road, and to issue bonds for the money so borrowed, does not authorize a direct exchange of bonds for stock, as the company might dispose of the bonds below par to the detriment of the county as a stockholder and the public as interested in the enterprise. Such has been the settled construction of the statute by the courts of New York. Neither a purchaser of the bonds from the company, with notice of the exchange, or his assignee, who took after maturity, can recover on such bonds. (*CLIFFORD and SWAYNE, JJ., dissented.*) *Ibid*.

§ 991. A statute provided that before any application could be made for a subscription to the stock of a railroad company, the entire line "shall be surveyed by a competent engineer, and substantially located by designating the termini and approximating the general direction of the road, and an estimate of the grading, embankment and masonry made by the engineer under oath, and filed with the application." *Held*, that this did not require a final and definite survey and location of the road before the election, but that a survey of the line, designating the general direction and fixing the termini, was sufficient; that an estimate of the amount of masonry, grading, etc., was not required, but only the cost. *County of Wilson v. National Bank*, §§ 1044-1048. See § 1085.

§ 992. An act in New York authorized the New York & Oswego Midland Railroad Company to extend their road from the city of Auburn, or from any point on said road easterly or southerly from said city, upon such route and location and through such counties as the board of directors should deem most feasible and favorable, to any point on Lake Erie at the Niagara river. And authorized the bonding, in aid of such construction, of any town in any county through or near which said railroad or its branches might be located. *Held*, (1) that the words "through or near which" referred to counties and not towns; (2) that the location of the road is a condition precedent to the issue of bonds, that location is something to follow a determination of the board of directors to construct the branch, and that where such location is established the prior determination may be inferred; (3) that evidence of surveying, grading, constructing and operating a road through a town along a route authorized by the act,

without proof that such road was constructed and owned by the company authorized, is not sufficient evidence of location. *Mellon v. Town of Lansing*, §§ 1049, 1050.

§ 993. Under the code of Iowa the county judge is the agent of the county to provide for the erection of the necessary county buildings, and may submit to the people of the county, at any regular or specially-called election, the question whether money should be borrowed by the county for the erection of such buildings. The code also provides that "When the question so submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes. No vote adopting the question proposed will be of effect unless it adopt the tax also." Under these laws the county judge of a certain county submitted to the voters of the county, at a specially-called election, the question of levying a tax of seven mills on the dollar for the purpose of building a court-house, the said tax to be levied annually, not exceeding ten years, until a sufficient amount was raised for that purpose, and a vote of twenty-four to five was obtained in favor of the proposition. Negotiable bonds to the amount of the estimated cost of the court-house were thereupon issued by the county judge. *Held*, that under those laws the affirmative vote on the proposition submitted gave the county judge authority, by necessary implication, to borrow money, and for this purpose to issue the bonds in question. *Lynde v. The County*, §§ 1051-1055.

§ 994. Where a law confers upon an officer the duty of determining whether the voters of a county have given the requisite sanction to an issue of county bonds, and he issues bonds after a vote of the county, his decision, in the absence of fraud or collusion, is conclusive upon all parties. *Ibid*.

§ 995. The validity of county bonds is not affected by the fact that they were sold and are payable beyond the limits of the state, or that they were actually executed by the proper agent of the county without the limits of the state, and sealed with a seal procured at the place where they were executed. *Ibid*.

[NOTES.— See §§ 1056-1121.]

CURTIS v. COUNTY OF BUTLER.

(24 Howard, 435-450. 1860.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Western District of Pennsylvania.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This case has been sent to us upon a certificate of division upon two points, which occurred between the judges upon the trial of it in the court below: 1. Had the commissioners of Butler county legal authority to issue the bonds given in evidence? 2. If they had, was such power or authority well exercised by two out of the three commissioners of the said county, or were the bonds signed by two of them binding?

The act under which the bonds were issued was passed 9th February, 1853. The first section enumerates the persons by name who were to become commissioners to open books, receive subscriptions of stock, and to organize a company by the name, style and title of the Northwestern Railroad Company, with all the powers, and subject to all the duties, restrictions and regulations, prescribed by an act regulating railroad companies, approved the 19th of February, 1849, "so far as the same are not allowed and supplied by the provisions of this act." By the second section of the act, the capital stock of the company was to be divided into twenty thousand shares, of \$50 each, with the privilege to be increased, if the exigencies of the company shall require it, to any sum not exceeding \$2,000,000, as the president and directors of said company may deem expedient. By the third section, the company have the right to build and construct a railroad from some point on the Pennsylvania or Allegheny railroad, at or west of Johnstown, by the way of Butler, to the Pennsylvania and Ohio state line, at some point on the western boundary line of Lawrence county, etc., etc., to connect with any railroad now or which might be thereafter constructed at either

end or at any intermediate point on the line or route thereof. For doing this the company was authorized to borrow money to an amount not exceeding the capital stock of the company, upon bonds to be issued by it, whenever the president and directors might deem it expedient to do so. The rate of interest upon the bonds was not to exceed seven per cent., and they were to be convertible into the stock of the company whenever the holders of it and the company might agree to have that done. The sixth section of the act we need not speak of, as it relates to matters unconnected with the questions certified, or from which there is not any impeachment of the correct action of the company.

By the seventh section, the counties through parts of which the railroad may pass were authorized to subscribe to the capital stock of the company, "*and to make payments on such terms and in such manner as may be agreed upon by the company and proper county.*" But the amount of the subscription of any county was not allowed to exceed ten per centum of the assessed valuation thereof (for taxes), and before any subscription could be made for any county, the amount of each was to be determined and approved by a grand jury of the county. Upon the report of a grand jury being filed, the county commissioners were to carry it into effect, accordingly. Then, whenever bonds of the respective counties were given in payment of subscriptions, the commissioners were prohibited from selling them at less than at par; and such bonds the state exempted from taxation until the clear profit on the business of the railroad amounted to six per cent. on the cost thereof; and it was declared that the subscription of the counties was to be held to be valid when made by a *majority* of its commissioners. With this analysis of the act under which the bonds sued upon were issued, we proceed to consider the points submitted to us. In the first place, after a careful examination of the act to which this act was made subordinate, we do not find that anything was done by the commissioners inconsistent with it, or bearing upon the points certified.

§ 996. *Power was given by the act of February 9, 1853, of Pennsylvania, to the commissioners of Butler county to bind the county by its bonds.*

We think that the county commissioners had authority from the legislature to execute the bonds, and to pledge the faith, credit and property of the county to pay them. Authority was given by the seventh section of the charter. It declares that the county shall have power to subscribe to the capital stock of the railroad company, and to make payment in such manner and upon such terms as may be agreed upon between the county and the company. It cannot be denied that this was an authority to the county to make a contract of subscription, and that it contemplates a payment for it prospectively "by bonds which, when made in the name of any county, were to be held valid, if made by a majority of the commissioners of the respective counties." The power to subscribe, the manner of payment, the limitation upon the amount of subscription, the mode of carrying that out through the intervention of a grand jury's approval and report, the allowance of bonds to be given in payment, the restriction of the same upon the railroad company to which they were to be transferred, not to sell the bonds at less than par, the hindrance upon the issue of bonds of less than \$100, the exemption of them from taxation upon a contingency until the clear profits of the railroad shall amount to six per cent. upon the cost of it, are significant of what was intended. All of those particulars in this section of the statute are to be considered together in the construction of it. No one questions that the legislature then had the power to incorporate such companies, and to allow the counties of the state to become

interested in them upon the faith of county securities, for the transportation of persons and things in all of the vehicles used for commerce and the carrying trade, either by water, or by land upon ordinary artificial roads. And that associations of persons might be incorporated for the construction of the latter, either by money already subscribed, or by money to be raised or borrowed by certificates of indebtedness, with certificates of interest attached, separable from the former, for the payment of interest, payable at particular times.

The objection now, as we understand it, is not that the legislature had not such a power. But it is said, in the exercise of it, that the railroad company and the counties through which the road might be constructed had mistaken the terms upon which the counties might subscribe to the capital of the railroad company, as to the manner for the payment of the subscription; in other words, that the counties in issuing bonds with coupons had mistaken the special authority given to them by the seventh section of the act, and had made a different contract, which could not be judicially enforced. That section is as follows: "That the counties through parts of which said railroad may pass shall be authorized to subscribe to the capital stock of the railroad company, and to make payment on such terms and in such manner as may be agreed upon by said company and the proper county: provided, that the amount of subscription by said county shall not exceed ten per cent. of the assessed valuation thereof, and that, before any such subscription shall be made, the amount thereof shall be fixed and determined by one grand jury of the proper county, and approved by the same; and that upon the report of such grand jury being filed, the county commissioners may carry the same into effect *by making in the name of the county* the subscription directed by the grand jury: provided, that whenever the bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by the railroad company at less than par value, and no bonds shall be in less amount than \$100, and that such bonds shall not be subject to taxation until the clear profits of said railroad company shall amount to six per cent. upon the cost thereof; and that all subscriptions made or to be made in the name of any county shall be held and deemed valid if made by a *majority* of the commissioners of the respective counties."

Now, we freely subscribe to the rule that neither privileges, powers nor authorities can pass by an act of incorporation unless they be given in unambiguous words, and that an act giving special privileges must be construed strictly. That in such a case, where a sentence is capable of having two distinct meanings, a construction must be given to it most favorable to the public. But in applying these principles to this case, it must be done with reference to the subject matter contemplated by the legislature as a whole, and not allow its manifested intention and design to be defeated by denying to the counties the only means of paying their subscription, by which the main object could be accomplished. Why was it that the legislature in drawing the section directed that the subscriptions of the counties should be made upon terms and in manner as the railroad and the counties might agree upon; that it limited the amount of subscription upon an assessed valuation of the property of the county; that it contemplated a taxation contingently upon the bonds of the counties, respectively, that they were to be given in payment of subscriptions, unless it had been its clear intention that the subscriptions were to be paid for by county bonds, when both company and county should make such a contract?

This, in our view, is not a case of ambiguity in the power given, but one of

as clear designation as could have been expressed. Nor was it a case in which the legislature imposed a public burden. It was no more than giving to the people of the county a right to tax themselves for an anticipated advantage to arise from an expenditure of their own money in the construction of a railroad. It was the concern of the county; the same as it would have been if the county had been legislatively empowered to tax themselves to clear out a river for a better navigation, or for the cutting of a canal. Whether the allowance for the issue of bonds for either of those purposes will be judicious depends upon the subject and the regulations which the legislature may impose for their execution. In our best judgment, applied as it has been to the seventh section of the act to incorporate the Northwestern Railroad Company, in connection with a full consideration of the rules for the construction of the powers of corporations, we have been unable to find anything in the seventh section equivocal or doubtful as to the power given to the counties to make and to pay for their subscriptions to the railroad company, and nothing wrong as to that company having received them according to its charter. We therefore answer to the first point certified to this court, "that power was given in the act of the 9th February, 1853, and by the agreement of subscription and terms of payment, to the commissioners of Butler county, to make the instruments upon which the suit is brought, and to bind the county to pay them."

§ 997. — *two out of three commissioners could execute the power intrusted to them.*

We will now proceed to the second point certified to this court: and if any power was given to issue bonds payable to bearer, with coupons attached, it could not be exercised by two out of the three commissioners of the said county; and that these bonds, having been signed by but two of the said commissioners, are not binding on the county. We have examined the acts relating to who are designated to exercise the corporate powers of the county. By the act of the 15th April, 1834, the commissioners are to do so; and it is now claimed, as there are three, that all of them should have signed the bonds to make them binding upon the county. But by the nineteenth section of the act, it is declared that two of the commissioners shall form a board for the transaction of business, and when convened in pursuance of notice or according to adjournment shall be competent to perform all and singular the duties appertaining to the office of county commissioners. Purdon's Digest, 176. Before the act of 1834 was passed, it was held in the case of the Commissioners of Allegheny County *v. Lecky*, 6 Serg. & R., 166, that all powers conferred upon the commissioners might be legally executed by two, without the concurrence of the third. The same ruling will be found in *Cooper v. Lampeter Township*, 8 Watts, 128; 5 Binn., 481. But why cite authorities when the act in terms makes the bonds valid if made by a *majority of the commissioners* of the respective counties. We therefore answer the second point certified, that the bonds upon which suit is brought, being signed by two out of the three commissioners, are binding upon the county of Butler.

WOODS, *v.* LAWRENCE COUNTY.

(1 Black, 886-414. 1861.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This is an action of debt brought upon coupons for interest attached to bonds, which had been passed by the county of Lawrence

to the Northwestern Railroad Company, in payment of its subscription for \$200,000 to the capital stock of that company. It is here upon a certificate of a division of opinion between the judges of the circuit court.

The company was incorporated as the Northwestern Railroad Company on the 9th February, 1853, with the power to build a railroad from some point upon the Pennsylvania or the Alleghany Portage Railroad, at or west of Johnstown, by the way of Butler, to the Pennsylvania and Ohio state line, at some point on the western boundary line of *Lawrence county*. It was to be done on the most eligible route, etc., etc., and to be connected with any railroad then constructed, or which might thereafter be built, at either end or at any intermediate point on the line thereof. The capital stock was to be twenty thousand shares, of \$50 each, with power to increase it to \$2,000,000, if the directors of the company should think its exigencies required that to be done. The company was authorized, in either event, in respect to the amount of capital, to build the road *by borrowing money on its bonds, bearing interest at seven per centum*, not exceeding the amount of its capital, and with the further limitation, that no bond should be issued for less than \$100. The seventh and last section of the act is, that the counties, through parts of which the railroad may pass, are severally authorized to subscribe to the capital stock of the company, and to pay its subscription in such manner as might be agreed upon between the county and the company. But no county could subscribe more than ten per cent. upon its assessed valuation; and before any subscription could be made, its amount was to be determined by a grand jury of the county, and approved by it. And when that had been done and filed, the county commissioners were authorized to make the subscription as the grand jury had directed. Then follows a proviso, that when the bonds of the county were passed to the railroad company, they should not be sold by it at less than their par value. The meaning of that proviso will be given hereafter, when we shall consider the fourth question upon which the judges were divided in opinion.

Upon the trial of the case, the plaintiff gave in evidence the recommendation and direction of the grand jury for the subscription. It was executed by the commissioners to the amount of \$200,000, for the payment of which the county was to issue bonds, with such conditions as might best promote the interests of the railroad company and of the county of Lawrence. The plaintiff also gave in evidence one of the coupons upon which he had sued, attached to the county bonds. We give a copy of it, that the obligation of the county to pay those coupons and their bonds, when the latter shall become payable, may be better understood:

“COUNTY OF LAWRENCE.

“Warrant No. 37 for \$30. Being for six months’ interest on bond No. —, payable on the 1st day of January, A. D. 1873, at the office of the Pennsylvania Railroad Company in Philadelphia.

“\$30.

—, Clerk.”

Here the plaintiff rested his case. The defendant gave in evidence the agreement for the subscription, as made by the commissioners. We have examined it in connection with the presentment of the grand jury, and found both properly in conformity with the section of the act giving to the counties, severally, the right to subscribe. It is recommended and determined that the subscription of the county of Lawrence shall be \$200,000, or four thousand shares of the capital stock of the railroad company, it being understood that, whenever the amount of it should be required by the company from the county, it should

be paid in bonds of sums not less than \$1,000, payable in twenty years after date, or at such other times after the date of the bonds as might be agreed upon between the commissioners of the county and the railroad company, the interest upon the bonds to be paid semi-annually by the *railroad company*, until the time when the road shall have been completed. The defendant then gave other evidence to prove that when the grand jury made its presentment the railroad company had not been organized; also, that when the subscription was made the company had not fixed upon its line, or that any part of it should be run within the limits of Lawrence county, and then that no part of it had ever been built within that county. It was also proved by the defendant that the company in using the bonds of the county to get money upon them for the construction of the road, had sold them at a discount of twenty-five per cent., but not with having credited the county with less than their par amount.

Thus the case stood when it was submitted to the jury, and the defendant asked the court to give the following instructions: 1. That there was no authority vested in the county of Lawrence to make the subscription to the Northwestern Railroad Company, and that the subscription and the bonds which had been issued for its payment were void. 2. That the recommendation and report of the grand jury were materially deficient, in not setting forth or prescribing the terms and manner of payment, and that the subscription was void on that account. 3. That the county of Lawrence was not authorized to issue the instruments or bonds in question. 4. That the county bonds which had been given in payment of the subscription, having been sold below their par value, was contrary to the provision of the act incorporating the railroad company, and were therefore avoided in the hands of purchasers.

§ 998. *The Pennsylvania act of 1853, authorizing counties to take stock in the Northwestern Railroad Company, is constitutional; and subscriptions for stock by such counties may be paid in county bonds with interest coupons attached.*

We observe, in respect to the first, second and third questions, that they are not now open questions in this court. They were in effect comprehended in the case of *Curtis v. County of Butler*, which this court passed upon at the last term, as well in respect to the constitutionality of the act of the 9th of February, 1853, as to what was the proper construction of it. This court then decided, after mature deliberation upon all the sections of the act, assisted by the arguments of Mr. Stanton and Mr. Black, which were in every particular fully up to the occasion, that by the seventh section of the act of the 9th February, 1853, the counties through parts of which the Northwestern Railroad may pass were authorized to subscribe to the capital stock of the company and to make payments on such terms as might be agreed upon between the company and the county, and that the subscription was valid and binding upon it when made by a majority of its commissioners. It was also then decided that the power given to the county to subscribe included its right to issue bonds, with coupons for interest attached, for the payment of its subscription. The constitutionality of the act was admitted in the argument then as it has been in this case.

§ 999. *By the omission in the act of the names of the counties, the legislature did not mean that it had no power to authorize subscriptions by counties through which the road did not run.*

But it is now urged, in addition to what was then said, that as the county of Lawrence had not been empowered *by name* to subscribe, such omissions must suggest a purpose of the legislature when passing the act to accommodate itself to what is asserted to have been at that time the constitutional law of

Pennsylvania, as it had been expounded by the supreme court of that state, in respect to the right of the legislature to empower a county to subscribe and tax the people of it to pay for railroads and other improvements of a like kind which were not positively to be constructed within its territory. One of the cases cited is that of *The Commonwealth ex relatione Dysart v. McWilliams and Issett*. It was a *quo warranto*, in which it was alleged that they had usurped the office of supervisors and assessors of Franklin township, under and by virtue of the act of the 13th April, 1846, and of assessing, levying and collecting taxes for the use and benefit of the Spruce Creek & Water Street Turnpike Company. And it was decided that the defendants, as supervisors, had the power to levy and collect a tax to enable them to subscribe for shares of the stock of the turnpike company, at the cost of the inhabitants of the township, in virtue of the authority vested in the supervisors of townships by the act of the 15th of April, 1834, and because the sixteenth section of the act of 1846, incorporating the turnpike company, had provided that the supervisors of the public highways, in the townships through which the road may pass, "were authorized to subscribe in the name and behalf and for the use of its inhabitants any number of shares, not exceeding three thousand six hundred, in the capital stock of the turnpike road." The decision is not put upon the locality of the route of the road, though, in fact, it was located and passed through the township of Franklin; but upon the constitutional power of the legislature to pass both acts just mentioned, and that in doing so it did not differ in principle from the power given to tax for the purpose of repairing roads and bridges and for such other purposes as may be authorized by law. Before leaving this case we recommend it as a whole, and particularly the decision of Mr. Justice Bell, to the perusal of such of the profession who may be engaged in a case of *quo warranto* in the state of Pennsylvania.

The other case cited, of *McDermond v. Kennedy*, Brightley's R., 332, which was taken to the supreme court and affirmed, is that a municipal corporation, under a power to make such by-laws as shall be necessary to "promote the peace, good order, benefit and advantage of the borough," and to assess such taxes as may be necessary for carrying the same into effect, *is not authorized to levy a tax* for the payment of a part of the expense to be incurred by a railroad company in bringing the line of their road nearer to the town than it had been originally located. Judge Reed places his conclusion exclusively upon the disability of a borough corporation to exercise rights on private property except for corporate purposes; and he says it can no more raise a tax and grant the avails of it to a railroad because it is believed to be advantageous to the borough, than they could do anything else, for there is no relation or connection between the railroad and the borough. Neither of the cases cited have any application to sustain the position taken, that the legislature meant, by omitting the names of the counties in the act of the 9th February, 1853, that it had not the power to authorize them to subscribe to the capital stock of a railroad which was not to be run within its territory.

§ 1000. — *the power of the counties to subscribe and issue bonds under said act was not in abeyance until the railroad passed through them.*

Nor do these cases countenance the idea that the power given to the county to subscribe was not exercisable *in presenti*, but was in abeyance until the passing of the railroad through it. It is true, when a charter is given for franchises or property to a corporation which is to be brought into existence by some future acts of the corporators, that such franchises or property are in abeyance

until such acts shall have been done, and then they instantaneously attach. But not to distinguish the acts enjoined or permitted to give to the corporation its intended purpose and object is to confound the franchises with such acts, and would nullify the means by which the franchises are to be produced.

§ 1001. *Franchise; how conferred and brought into existence.*

A franchise is a privilege conferred in the United States by the immediate or antecedent legislation of an act of incorporation, with conditions expressed or necessarily inferential from its language as to the manner of its exercise and for its enjoyment. To ascertain how it is to be brought into existence, the whole charter must be consulted and compared. If that depends upon co-operating subscriptions of money to be borrowed upon securities of indebtedness bearing interest payable yearly or at times within the year, until the security is finally payable, it must be intended that all the parties to whom has been given a right to subscribe may use it to aid the beginning and the completion of the object; in other words, when there is no express limitation as to the time of making the subscription, that it was optional with those who could do so to make it when most convenient or advantageous to themselves. In this instance we find that certain persons were named in the first section of the act as commissioners to receive subscriptions and to organize the company, and that the counties through parts of which the railroad may pass were permitted to make their subscriptions with those commissioners, and that they could receive them. Then it was intended that the subscription should precede the organization, and no one who reads the whole act will doubt that the latter depended upon the subscription of the larger, if not the whole number, of the twenty thousand shares, of which the capital stock was to consist. The road was to be built with money to be borrowed on the bonds of the company and upon the bonds of such of the counties meant in the act which might choose to subscribe. Until the subscription received had indicated the responsibility of the parties to be equivalent to the contemplated cost of the road, or that it would become so, there was neither an inducement to organize the company nor security for capitalists to lend upon. We conclude that there is no weight in the suggestion of its having been meant by the legislature that the road was to be carried within a county before it could subscribe. The subscription depended upon the presentment of the grand jury, and the agreement of the commissioners to take for the county four thousand shares of the company's capital stock. And it was agreed that the subscription was to be paid for in bonds of the county of not less than a thousand dollars, payable in twenty years after date, or at such other time as the company and the county might agree upon. The company having agreed to pay the interest until such time as the Northwestern Railroad should be completed, the county bonds were made and paid to the company accordingly, and we have no doubt of the obligation of the county to pay them.

§ 1002. *The provision that the bonds should not be sold by the company below par did not vitiate them in the hands of the purchasers if sold below par by it, if the counties were allowed par for them.*

But it is now said that such of the county bonds as were sold by the president and directors of the railroad at a discount are "avoidable" in the hands of the purchasers of them, because the act for making and paying them to the company declares that the company shall not sell them "at less than their par value." Such are the words of the statute; and it was proved and conceded by the plaintiff that they were sold at a discount of twenty-five per cent. The words of the seventh section are, that whenever bonds of the respective counties

are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value. Those words have a meaning, but not such as it was assumed to be when the court was asked to instruct the jury upon the fourth prayer. A comparison of the seventh section, in which they are, with the fifth and sixth sections of the act, will show that they were meant to secure to the counties the par value of their instalments, as those were to be paid in bonds, from any reduction by the sale of them at a discount, to the loss of the county, after the railroad company had received them in payment. The words are, whenever bonds of the respective counties are given in payment, the same shall not be sold by the railroad company at less than par value, etc.; and such bonds shall not be subject to taxation until the clear profits of the railroad shall amount to six per cent. upon the cost of it. Such was the understanding of the commissioners and the railroad company when they entered into their agreement for the subscription. The agreement itself, the stipulation that the subscription was to be paid by bonds, the undertaking of the company that it would relieve the county from the payment of interest of its bonds, and that the interest should be on their par value until the entire railroad was completed,—and every section of the act shows it to have been the intention of the legislature to have the railroad constructed by money to be borrowed upon bonds, payable at a distant date,—indicate the correctness of our interpretation of the limitation upon the sale of the county bonds at less than par. And the conclusion is strengthened by consulting the sixth section of the act, giving to the company the right to pay an interest of six per cent. per annum to the stockholders, on instalments for subscription paid by them until the railroad should be finished; and requiring, when that happened, that all interest which had been paid in the meantime should be credited to the cost of the construction of the road—in that, placing all of the stockholders upon an equality as to the cost of the road, and securing to them the number of shares for which they had subscribed, and for which they had paid by instalments. Without such an arrangement, that equality could not have been produced, and this result in respect to the subscription of the counties paid by bonds would have followed. If the railroad could have sold the bonds at less than par, after they had been received in payment, and charged the discount to the counties, in that case the latter could not have received the number of shares for which they had subscribed, by permitting a part of the sum, for which they were authorized to tax the counties, for the ultimate payment of the bonds, to be diverted to a purpose neither contemplated nor allowed by the act; and, in respect to the county of Lawrence, its subscription would have been reduced to \$50,000 less than the amount of the bonds which it had issued and paid to the railroad, supposing the whole to have been sold at twenty-five per cent. less than their par value, in that way reducing its dividend—\$3,000 per annum—when the clear income of the company, after it had been finished, should become six per cent. per annum upon the cost of the road.

We are confirmed in the opinion that the limitation upon the company that it should not sell the bonds of the counties at less than par, after it had taken them in payment of the subscription, had no other meaning than this, that they should not so sell them at the expense of the counties—causing any loss to them less than their par value, as they were payable to the company at par in twenty years, with an annual interest of six per cent.

It has also been insisted that the county of Lawrence could not subscribe

before the Northwestern Railroad Company had been organized, or before its line had been indicated by a survey on the ground and a part of it had been fixed for construction within the county; and it is said that no part of it had been built in it. Having already shown that the right to subscribe was given to enable the company to organize, and that organization was essential before the route of the road could be determined, and that there was no direction in the act when that was to be done, and that a wide discretion had been given as to the point of its beginning, and how it should be continued in the counties, and where it should terminate on the Pennsylvania and Ohio state line, we must declare that the objection has neither pertinency nor force against the subscription made by the county of Lawrence. Another objection is, that the right to subscribe depended upon a part of the road having been built within the county. We deem it only necessary to repeat what has just been said, that the act indicates no point at which the line of the road should be begun. That, taken in connection with the fourth section of the act, it could not have been the intention to require a part of the railroad to be built in each county before it should subscribe; its language being, that its franchises should be used and enjoyed when five miles of the railroad had been finished, as fully as if the whole road had been completed.

We therefore answer that there was authority in the county of Lawrence constitutionally, and by the proper construction of the act of the 9th February, 1853, to subscribe to the stock of the Northwestern Railroad Company as the subscription was made; and that the bonds issued by the county, and given in payment of its subscription to the railroad company, are valid, and binding on the county to pay and redeem them according to their tenor.

We answer to the second prayer, that there was no deficiency in the action of the grand jury in making its presentment, or in setting forth the terms in which the subscription should be made.

We answer to the third prayer, that the county of Lawrence was authorized to issue such bonds as they did issue, and pass to the railroad company in payment of its subscription to the Northwestern Railroad Company.

To the fourth prayer, we answer that the sale of the county bonds by the railroad company, at less than par, does not avoid them in the hands of the purchaser.

HANNIBAL v. FAUNTLEROY.

(15 Otto, 408-418. 1881.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—This was an action brought by Fauntleroy, the defendant in error, a citizen of Virginia, against the city of Hannibal, a municipal corporation of Missouri, to recover the amount of principal and interest alleged to be due on certain bonds and coupons. The bonds are dated April 1, 1858, for \$1,000 each, and are payable twenty years after date to A. O. Nash, auditor of said city, or bearer, at the American Exchange Bank, New York, for value received, without defalcation, with interest at the rate of ten per cent. per annum, payable semi-annually, on the 1st day of October and April in each year, upon presentation of the annexed coupons severally, until the payment of the principal sum. They purport on their face to have been issued by the city to pay calls on subscription for stock in the Pike County Railroad, Illinois. They contain no other recitals. They were issued, it is

claimed, under the authority of an act of the legislature of Missouri, passed February 27, 1857, to amend the charter of the city, the third section of which reads as follows: "SEC. 3. Said city council shall have power to subscribe for and take stock in any railroad terminating at the city of Hannibal, or upon the bank of the Mississippi river, opposite to said city, in the state of Illinois. But before such subscription shall be valid, it shall be ratified by a majority of the tax-payers at a poll to be opened for that purpose."

The second section of the same act provides that "said council shall also have power to borrow on the credit of the city and to pledge the revenues and public property for the payment thereof; but a greater rate of interest than ten per cent. shall not be paid on any sum borrowed, unless two-thirds of the qualified voters of said city, at polls to be opened for that purpose, shall instruct the payment of a greater rate." It is, therefore, not denied that the bonds are binding obligations upon the municipal corporation, provided the subscription to the stock of the Pike County Railroad, in payment of which they were issued, was lawfully made; and no question is made as to the validity of this subscription, except that it was not ratified, as is claimed, by a majority of the tax-payers, in accordance with the provisions of the third section of the amended charter.

It appears that, at a called meeting of the city council of the city of Hannibal, held on October 22, 1857, an ordinance was duly passed authorizing and directing the subscription of \$100,000 stock in the Pike County Railroad, as follows:

"Be it ordained by the city council of the city of Hannibal as follows:

"SEC. 1. That the mayor of the city of Hannibal be, and is hereby, authorized and directed to subscribe for and take for the city of Hannibal \$100,000 stock in the Pike County Railroad, having its western terminus on the bank of the Mississippi river, at a point in the state of Illinois opposite the city of Hannibal, within a one-half mile of the western terminus of Suy Carty plank road; said stock to be paid for in the bonds of the city of Hannibal at their par value, which bonds are to be made payable not exceeding twenty years from the date of their issue, and are to bear ten per cent. interest per annum, payable semi-annually.

"SEC. 2. That the mayor be, and is hereby, directed to cause a poll to be opened in said city of Hannibal for the purpose of obtaining the ratification of the foregoing said subscription of \$100,000 stock in said Pike County Railroad by the tax-payers of said city of Hannibal, in accordance with the provisions contained in the third section of an act passed by the general assembly of the state of Missouri, entitled 'An act to amend the charter of the city of Hannibal,' approved February 27, 1857.

"SEC. 3. This ordinance to take effect from and after its passage."

On the trial of the cause in the circuit court, the plaintiff, recognizing his obligation to prove affirmatively that the bonds in question had been issued under the authority of the law, introduced in evidence the poll-books of an election held at voting places in the three wards of the city, on the first Monday (the second day) of November, 1857, for the purpose of electing a mayor, marshal, recorder and attorney for said city, three councilmen for each ward, and for the ratification of the subscription of \$100,000 of stock in the Pike County Railroad. These poll-books contain the name of every voter, with a record of his vote, whether for or against ratification, and are authenticated by the certificate of the judges and clerks of the election, stating the result

and specifying in their return, under the head "for ratifying the subscription of \$100,000 stock in Pike County Railroad," the number of votes cast in favor of and against the ratification. The result as shown by these poll-books, in the aggregate, was that three hundred and sixteen votes were cast in favor of and thirty-two against the ratification. At a called meeting of the city council of the city on November 4, 1857, it is recorded that the clerk read to the city council the certificate of the mayor and one judge of the election from each ward in the city, whereby it was shown to the satisfaction of the council that at the municipal election held in the several wards on Monday, November 2, 1857, certain persons named therein had been duly elected to the several offices therein specified, and thereupon it was resolved that certificates be made out and delivered to the officers elect, and at the conclusion of the entry upon the record there is the statement,— "for ratification, three hundred and sixteen votes; against, thirty-two votes." At a regular meeting of the city council on December 7, 1857, it is recorded that, "on motion of Mr. Dowling, resolved, that the mayor be, and he is hereby, authorized and instructed to issue the bonds of the city to the Pike County Railroad, in accordance with calls on the capital stock made by order of the board of directors, and in pursuance of an ordinance approved October 22, 1857." The stock subscribed for was duly issued to the city, and is still held by it; and the corporation has continuously exercised the privileges of a stockholder, though it is admitted that the stock has no pecuniary value.

§ 1003. *The poll-books and the proceedings of the city council which ordered the bonds to be issued are sufficient to prove ratification of subscription to stock.*

It was also proven that, in various ways, prior to the institution of this suit, the city had admitted her liability upon these bonds by making arrangements for the payment of coupons as they fell due, receiving them in payment of taxes, permitting judgment to be rendered on account of unpaid coupons, once by consent and once by default; but the city objected to the whole evidence on the ground that it was insufficient to establish such liability, because it failed to show a ratification of the subscription by a vote of a majority of tax-payers at an election called and held for that purpose. The answer to this objection, however, is found in the provisions of article 1, section 10, of the charter of 1851 of the city (Laws of Missouri, 1851, p. 327), admitted to have been in force at the time, which defined the qualification of voters as follows:

"SEC. 10. All free white male citizens, who have arrived at the full age of twenty-one years, and who shall be entitled to vote for state officers, and who shall have resided within the city limits at least six months next preceding any election, and, moreover, who shall have paid a city tax or any city license according to ordinance, shall be eligible and entitled to vote at any ward or city election for officers of the city."

It thus appears that no person could lawfully vote at the election held November 2, 1857, for city officers, except tax-payers; and assuming that the list of names contained in the poll-books as having voted for or against the ratification of the subscription to the stock in the Pike County Railroad are those of the same persons who voted for city officers, it follows that they must all have been tax-payers, on the presumption, which certainly must be applied, that they were all legally entitled to vote.

§ 1004. *"Tax-payers" and "qualified voters," when synonymous.*

It is argued that the legislature used the word "tax-payers," in the third section of the act of 1857, in a sense designedly differing from that of "qualified

voters," in the second section, who are to decide upon the question of the rate of interest on money borrowed in excess of the ten per cent. per annum. We see no evidence, however, of such an intention. On the contrary, that supposition would necessitate the conclusion that by the word "tax-payers" the legislature meant to include persons not otherwise qualified to vote; for example, not free white male citizens, minors, women, married and unmarried, and non-residents. The reasonable interpretation is that the question of ratifying the subscription should be submitted to the vote of the tax-payers of the city having the qualification otherwise of lawful voters; and this included, as we have seen, all the qualified voters of the city.

§ 1005. *Purchaser of bonds not required to show authority to issue bonds, when.*

To allow the present objection to prevail would require the plaintiff not only to show that the persons voting to ratify the stock subscription were all tax-payers, but also that they had all the other requisite qualifications of persons entitled by law to vote. In our opinion, the law imposes no such unreasonable burden upon the owner of such bonds. He is bound to show, in the absence of recitals that prevent its denial, that the corporation issued them, in the exercise of a power conferred by law; and where that can arise only in consequence of the performance of a condition precedent, such as the result of an election by a public vote, he has the burden of proof to show the fact. That fact, as in the present case, is fully proven by an exhibition of the record, which shows on its face the result claimed. He is not bound to sustain the truth of the record, as if it were the case of a contested election, and prove that the majority, on the existence of which his rights rest, consisted of persons, all of whom possessed the qualification of voters. Whether each voter was lawfully such, was a question in the first place, in the present case, for the judges of the election, who were appointed under the law, for the express purpose of receiving and deciding upon their votes; and, in the second place, for the city council, to whom the official return of the election and of its result was made, as required, and who were authorized to act upon that result as certified to and verified by themselves, in the very matter of consummating the subscription, which was the subject of the vote. It would be impracticable for any purchaser of the bond, put on inquiry, as to the authority of the city council to make the issue of the bonds in question, to make inquisition into the facts of the election, beyond these returns and records; and it is but reasonable to permit him safely to rest his rights upon them as they appear. They show the fact that the subscription to the railroad stock was ratified by a majority of the voters presumed to be qualified to vote, because permitted by the authorities controlling the election to do so, at an election held for the purpose, among other things, of deciding that question; and that fact constitutes the condition on which the authority to issue the bonds, by law, depends, and is the guaranty of their validity.

Judgment affirmed.

ROBERTS v. BOLLES.

(11 Otto, 119-129. 1879.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—This case involves the validity of certain township bonds, bearing date April 7, 1871, issued in the name of the town of Roberts,

in the county of Marshall, Ill., and made payable to the Hamilton, Lacon & Eastern Railroad Company, *or bearer*, on the 7th of April, 1874, with interest from date, payable annually, on the presentation and surrender of the interest coupons as they matured. Each bond, signed by the supervisor of the town, attested by its clerk, and certified upon its face to have been duly recorded in the township registry of bonds, as directed by law, recites that it "is one of a series, amounting in the aggregate to \$30,000, and consisting of thirty bonds, numbered from 1 to 30 inclusive, each of which is for \$1,000, and all of which are of even date herewith, and are issued in accordance with the laws of the state of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon & Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special election had for such purpose in said town on the 25th day of March, 1869, in pursuance of the provisions of the laws of the state of Illinois, and of the several acts of the general assembly of the state of Illinois incorporating said company." It is found as a fact in the case that, in January, 1872, defendants in error purchased, in good faith, the bonds in the market, without notice of any defense thereto, and paying therefor at the rate of ninety-three and a half cents on the dollar.

§ 1006. *In Illinois municipal bonds payable to a person named "or bearer" pass by delivery and the holder can sue in his own name.*

The first plea alleges that the payee named in the bonds, the railroad company, had never indorsed them, or any of them, in writing, and that by the law of Illinois in force when they were made, as well as when they were sold by the company, without such indorsement, they were not transferable so as to vest the title thereto, and the right to sue thereon in the name of the holder. A demurrer to that plea was sustained, and, as we think, properly so. It is true that the supreme court of Illinois, in *Hilborne v. Actus*, 4 Ill., 344, held that under a statute of that state, then in force, notes payable to a person or bearer could not be transferred or assigned by delivery only, so as to authorize the holder by delivery to sue in his own name. "There is one way," the court said, "by which he can do so, and that is by virtue of the assignment indorsed on the note itself. The indorsement gives the right to sue in the name of the assignee." That construction of the Illinois statute was followed in *Roosa v. Crist*, 17 id., 450. But *New Hope Delaware Bridge Co. v. Perry*, 11 id., 467, decides that bank notes payable to bearer, or to a particular person or bearer, are not embraced by the provisions of the statute, or by the reasons which caused its passage; and that the holder, by delivery merely, can maintain an action thereon, unless it appears that he obtained them *mala fide*. The statute, it was said, applies "only to instruments that were not negotiable by the common law or the custom of merchants."

In *Johnson v. County of Stark*, 24 id., 75, the court put municipal bonds and coupons on the footing, in this respect, of bank bills, and thus brought that class of commercial securities within the rule announced in *New Hope Delaware Bridge Co. v. Perry*. Its language was: "It seems to be the well-settled doctrine that state, county, city and other bonds and public securities of this character are negotiable by delivery only, without indorsement, in the same manner as bank bills, especially when they are payable to bearer." Subsequently, in *Supervisors of Mercer County v. Hubbard*, 45 id., 139, which was an action on coupons attached to bonds issued by a county in payment of a

railroad subscription, the court said: "More recent decisions place these coupons in the condition of bank bills payable to bearer, and no one will deny such bills can be given in evidence in a suit by the bearer against the bank issuing them under the common counts. We see no difference between coupons payable to bearer for a sum certain, and a bank bill. They alike pass by delivery only." Finally, in *Town of Eagle v. Kohn*, 84 id., 292, it was said: "It is the well-settled doctrine that bonds of this character are to be treated as commercial paper; and this court has held coupons attached to them to be negotiable by delivery only, without indorsement." It is thus seen that by repeated adjudications of that court, prior to the statute of 1874, municipal bonds payable to bearer were excepted from the rule announced in *Hilborne v. Actus* and *Roosa v. Crist*.

But all doubt upon the subject is removed by the eighth section of the act approved March 18, 1874, revising the laws of Illinois in relation to promissory notes, bonds, due-bills and other instruments of writing, which was in force when this action was commenced. It provides "that any note, bond, bill or other instrument in writing, made payable to bearer, may be transferred by delivery thereof, and an action may be maintained thereon in the name of the holder thereof." R. S. Ill., 719, sec. 8. This act, though not in force when defendants in error acquired the bonds in suit, applies, we think, to actions commenced after it took effect. We are satisfied that this plea, tested alone by the law of Illinois, and without reference to the decisions of this court upon the subject of commercial securities, is insufficient.

The third plea, to which a demurrer was also sustained, proceeds upon the ground that the election of March 25, 1869, was called without competent authority, and conferred no power upon the supervisor and town clerk, or either of them, to subscribe to the stock or issue the bonds in question, and that the latter were, consequently, void. Of the facts set out in the plea it is alleged that the defendants in error had "constructive notice," prior to their purchase of the bonds; to wit, on the day they bear date. The questions of law presented under this plea arise out of certain facts which it is necessary to state somewhat in detail. By an act of the legislature of Illinois, approved March 5, 1869, it is provided that any incorporated town or township of any county through or near which the Hamilton, Lacon & Eastern Railroad Company may be located, or is about to be located, might, by a vote of the people thereof, subscribe to the corporate stock of the company any sum not to exceed \$100,000 each,—such vote to be ascertained by an election held in the manner prescribed by and in conformity with the provisions of an act, approved March 6, 1867, authorizing certain designated counties, and townships, cities, incorporated towns and corporations in said counties, to subscribe to the capital stock of any railroad then or which might thereafter be incorporated in the state of Illinois. The act of March 5, 1869, made it the duty of the clerk of each township, subscribing stock under its authority, to keep, in duplicate, a complete register of the bonds issued, showing their numbers, amount, date and rate of interest, and deliver one copy of the same to the county clerk of his county.

Under the act of March 6, 1867, to which reference is made by the act of March 5, 1869, elections to take the sense of the people upon subscriptions to the capital stock of a railroad company could be called and held, upon the application of twenty legal voters and tax-payers of the county, township, city or incorporated town in whose behalf it was proposed to make the subscription,

such application specifying the amount and the conditions of the proposed subscription. The notice of such election was required to be posted, in the case of a township, by the clerk thereof, in three of the most public places of such township. If a majority of such voters voting at said township election favored the subscription, then it was made the duty of the supervisors thereof to make the subscription; and when the subscription was accepted or received, to cause the bonds to be issued in compliance with the popular vote. Pri. Laws Ill., 1867, vol. i, p. 866. The fifth section of the act of March 6, 1867, declares that "no mistake in the giving of the notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the said bonds so issued: *Provided*, that there is a majority of the voters at such election in favor of such subscription."

A few weeks after the election of March 25, 1869, to wit, on 17th April, 1869, the legislature of Illinois passed an act which, in its second section, declares that subscriptions of stock made by certain townships, including that made by the town of Roberts of \$30,000 to the capital stock of the Hamilton, Lacon & Eastern Railroad Company (quoting from the act), "be each legalized, and are hereby made valid and binding, according to the terms thereof; and the several supervisors of said townships shall issue, in due form, the bonds of their respective townships for the amount of stock subscribed for, according to the terms and conditions of said subscription, and shall deliver said bonds to said railroad company." Pri. Laws Ill., 1869, vol. iii, p. 302. With these facts before us, we come to the examination of several propositions which have been pressed with much force upon our attention.

§ 1007. *Independently of curative acts, a variation of detail in the notice given of a popular election, etc., does not vitiate municipal bonds, provided the popular vote ratified their issue.*

It is contended that the election mentioned in the bonds declared on was a nullity, because called upon an application signed by only twelve, instead of twenty, legal voters and tax-payers, and because only ten days' notice thereof was given, when the law required twenty; that the law is imperative in these respects, and that the failure to comply with its requirements rendered the bonds void, even in the hands of innocent holders for value; that such was the settled law of Illinois, as declared by the supreme court of that state prior both to the election of March 25, 1869, and to the issuing of the bonds; and, finally, that such prior judicial declarations are to be regarded as part of the local statutes, binding upon this court, according to its own decisions. Undoubtedly there are several decisions by the supreme court of Illinois of the character indicated by counsel; but unless we are greatly in fault in our examination, no one of them relates to a municipal subscription, or to an issue of bonds, under a statute containing a provision similar to section 5 of the act of March 6, 1867, under which the election in question was held. That act rests the validity of the bonds issued under its authority upon the essential fact that the majority of voters at the election voted, as in this case, in favor of the subscription. In that event, it expressly declares that the bonds shall not *in any way* become invalidated by reason of *mistake in the giving of the notice, or in the canvass or return of votes, or the issuing of the bonds*. These words are without effect if the municipality issuing the bonds can avoid their payment because its agents or constituted authorities committed mistakes such as are specified in the statute. If the town clerk gave a notice of ten instead of twenty days, based upon an application of twelve instead of twenty legal voters and tax-payers,

was not this a mistake "in the giving of the notice" and "in the issuing of the bonds?" The purchaser of the bonds, if chargeable with notice of these facts, was, in terms, assured by the statute that no such mistakes as those facts indicated would invalidate the bonds, if the majority of the voters at the election had approved the subscription. He had the right to rely upon these legislative assurances, unless the fifth section of the act of March 6, 1867, was in violation of the constitution of the state. We do not, however, feel justified in declaring that provision of the act to be in conflict with that instrument. We are referred to no decision of the state court which so decides. On the contrary, that court, in *Burr v. City of Carbondale*, 76 Ill., 455, which was a case of municipal bonds, said: "These bonds having been issued in the exercise of a power constitutionally conferred, must be binding on the municipality, although some irregularities in the form of notice of the election, want of the precise words on the ballots, and others of like character, may have occurred" (page 469). It is true that, according to the settled construction of the constitution of Illinois in force in 1869, the legislature could not require or compel the corporate authorities of a county, city or town, against or without its consent, to subscribe to the stock of a railroad company. But it could *authorize* such corporate authorities to make subscriptions with or without referring the question to the people immediately interested.

§ 1008. — *authorities reviewed.*

In *President and Trustees of Town of Keithsburg v. Frick*, 34 Ill., 405, the supreme court of Illinois, speaking by the late Chief Justice Breese, held that it was by no means a necessary element in municipal subscriptions to the stock of railroad corporations that there should be a vote of the inhabitants of the town or city authorizing them; "that it was competent for the legislature to bestow the power directly on the corporation without any other intermediary." The authority of that case, upon some points therein determined, has perhaps been shaken by later decisions in the same court. But in *Marshall v. Silliman*, 61 id., 218, the court, while holding that the legislature could not clothe the supervisor and town clerk, without the consent of the people, with discretionary power of taxation or of creating a debt,—they not being the corporate authorities of the township in the sense of the constitution,—yet approved that case so far as it ruled that those who were the corporate authorities of a town, within the meaning of a state constitution, might be empowered by the legislature to subscribe to the stock of a railroad corporation, and issue bonds therefor, without taking a vote of the people. *Q. M. & P. R. R. Co. v. Morris*, 84 id., 410. Certainly the legislature could prescribe the mode of ascertaining the sense of the voters, who alone, it is claimed, were the corporate authorities of the town, within the meaning of the state constitution. And as it might, in the act of March 6, 1867, have allowed the election to be called upon the application of a less number of voters and tax-payers than twenty, and to be held after a notice of ten days, rather than twenty, we do not see any ground to question its right, consistently with the state constitution, to declare in advance that, if the majority of voters at the election favor the subscription, the bonds issued in payment thereof should not be invalidated by mistakes of the kind specified in the fifth section of that act. The mistakes here complained of were not such as necessarily affected the substance or essence of the election, and consequently it cannot be said that the subscription was made or the bonds issued without the consent of the corporate authorities or the legal voters of the township. The application for the special election and the notice therefor

were not so radically defective as to justify us in saying, as matter of law, that a debt for a railroad subscription was thrust upon the legal voters and taxpayers of the township without their having a reasonable opportunity to vote upon the question of subscription. It is not a case where bonds have been issued by the supervisor and town clerk without any previous election whatever to authorize them so to do. It is a case of bonds issued in pursuance of a popular election, defectively called and held, and as to which the legislature declared that the bonds should not be invalidated by mistakes in giving the notice and in issuing them, if there was "a majority of votes at such election in favor of such subscription." In this respect the case in hand is different from *Township of Elmwood v. Marcy*, 92 U. S., 289. In the latter case, when the notice for the election was given, there was no provision in the charter of the town, or in any statute of the state, which authorized the subscription. The power of the town to subscribe had previously been exhausted; and the notice was not under or with special reference to the subsequent act allowing an additional subscription. Nothing here determined conflicts with that decision. Independently, therefore, of the curative act of April 17, 1869, we are of opinion that the bonds sued on are not invalid by reason of the departure from the provisions of the act of March 6, 1867, in the matter of the application for, and notice of, the election of March 25, 1869.

§ 1009. *This court is not bound by the decision of Williams v. Roberts, 88 Ill., 1.*

But a further contention of the plaintiff in error is that the supreme court of Illinois, in *Williams v. Town of Roberts*, 88 Ill., 1, decided in June, 1878, nearly four years after the commencement of this action, and three years after the entry of the judgment in this case, held not only that the curative act of April 17, 1869, was in violation of the constitution of the state, but that the election of March 25, 1869, was a nullity, conferring no power upon the supervisor of the town to make the subscription and issue the bonds.

In reference to the alleged conflict of the last named act with the constitution of Illinois we give no opinion. The views we have expressed as to the validity of the bonds, under the act of March 6, 1867, particularly its fifth section, render it unnecessary to consider or determine the constitutional validity of the curative act of 1869. It is, however, claimed that we are obliged to accept the decision in *Williams v. Town of Roberts* as conclusive against the validity of these particular bonds. We cannot give our assent to this proposition, for the reason, if there were no other, that that decision does not touch the precise point upon which we sustain their validity, despite the defective application and notice for the election of March 25, 1869. No reference is made in that case to the fifth section of the act of March 6, 1867, upon which we have commented. The supreme court of Illinois, in the case alluded to, undoubtedly held that the defects in the application and notice rendered that election a nullity, and that, because of such defects, the subscription was made and the bonds issued without authority of law. But we are not informed as to the effect which, in the opinion of that court, is to be given to the fifth section of the act of March 6, 1867. If the court had gone further and decided that section to be unconstitutional, or that the defective application and notice for the election were not mere mistakes within the meaning of that section, or that the bonds declared on were null and void, notwithstanding the legislative declaration that they should not be invalidated because of any mistake in giving the notice, in issuing the bonds, or in the canvass or return of votes,—

then its decision would have been an authority in point, covering the precise question before us. If we are mistaken in this, it does not follow that we should accept that decision as conclusive of this case. That would depend upon our approval or disapproval of the decision upon its merits. In *Pease v. Peck*, 18 How., 599, we said that this court would not feel bound, "in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision, contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent, declarative of the settled law of the state." *Morgan v. Curtenius*, 20 How., 1. For these reasons, we are of opinion that the demurrer to the third plea was properly sustained.

The facts set out in the fourth plea clearly do not constitute a defense to the action. We could not hold otherwise without overturning the settled doctrines of this court in reference to municipal bonds issued in payment of subscriptions to the capital stock of railroad corporations. Our remarks in *Brooklyn v. Insurance Co.* (99 U. S., 362; §§ 1402-1404, *infra*) are applicable to this case, and support the action of the court in sustaining a demurrer to the fourth plea. Other considerations might be suggested in support of the judgment, but what we have said is sufficient to dispose of the case.

Judgment affirmed.

TOWNSHIP OF ROCK CREEK v. STRONG.

(6 Otto, 271-278. 1877.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The act of the Kansas legislature, approved March 2, 1872, expressly authorized the issue of township bonds "to aid in the construction of railroads or water-power, by donation thereto, or the taking of stock therein, or for other works of internal improvement." Like all expressions of legislative will, this provision of the act must receive a reasonable construction, and we cannot doubt that in the grant of power to aid in the construction of railroads or other works of internal improvement is included authority to assist in the construction of depots and side tracks of a railroad. Such constructions are constituents,—essential parts of every railroad, without which it would be incomplete and incapable of serving the uses for which it is intended. The cost of building them is always, and properly, charged to construction account, and not to repairs or expenses of operation; and a mortgage of a railroad, without further description than such as is necessary to identify it, covers its side tracks and depots.

§ 1010. *The proceeds of bonds issued in aid of a railroad company may be properly expended in part in constructing side tracks and depots.*

We do not see any force in the argument pressed upon us by the plaintiff in error, that, because it was the duty of the railroad company to furnish suitable side tracks and depots, the act of 1872 cannot be construed as authorizing the issue of township bonds to aid in building such structures. It was equally the duty of the company to build the main line, and it is not questioned that the township was empowered to aid in doing that work. Nor is there anything in the proviso to the act that tends in the least degree to the conclusion that the legislature did not mean to authorize aid to the building of depots. The first question certified to us was, therefore, correctly answered by the circuit court in the affirmative, and the first assignment of error is overruled.

§ 1011. *Construction of an act authorizing the issuance of county bonds.*

The second question certified is, "Are the bonds mentioned in the plaintiff's petition void for the reason that they are made payable thirty years and thirty-five days from their date of execution therein written, but only drawing interest for the last thirty years of said time?" The second section of the act authorizing their issue enacted that the bonds should be payable in not less than five nor more than thirty years from the date thereof, with interest not to exceed ten per cent. per annum, all in the discretion of the officers issuing the same. These provisions were obviously directory and not of the essence of the power. The bonds issued were dated September 10, 1872, made payable thirty years from the 15th day of October, 1872, with interest thereon from that time at the rate of seven per cent. When they were delivered to the railroad company does not appear, though they were not registered by the auditor of the state until October 17, 1872. They were thus practically thirty-year bonds, bearing a less rate of interest than the rate authorized. Their legal effect is precisely what it would have been had the date inserted been October 15, instead of September 10, 1872. Substantially, therefore, the legislative direction was followed. The doctrine of *Commissioners of Marion County v. Clark*, 94 U. S., 278 (§§ 1382-88, *infra*), is applicable to the present case.

§ 1012. *Where the proper officers decide that bonds are duly authorized to be issued, a bona fide purchaser need not look behind that authority.*

The third assignment of error is that the court erred in not holding the township was not estopped by the recitals in the bonds from introducing the testimony offered. The bonds were executed by the township trustee and attested by the township clerk. These were the officers designated by the statute to execute such bonds. The recitals were that the bonds were made and issued in pursuance of the provisions of the act of the legislature of March 2, 1872. But whether the recitals were an estoppel against showing what the defendant proposed to show, or whether they were not, is quite immaterial in this case. The proof offered was, that in the records of the county commissioners of the county of which Rock Creek township is a part, it appeared the board had canvassed the vote at the election held to determine whether the township should issue the bonds, and had determined the result to be, for the issue, fifty-two votes, against the issue, fifty-one votes, making one hundred and three votes in all cast; but that in fact no canvass was made, and that only one hundred and two votes were cast, fifty-one of which only were in favor of issuing the bonds, and that one person who voted in favor was not a qualified elector. Now, if the town clerk and treasurer were not the persons authorized by law to determine the result of the election, the board of county commissioners were, and their action according to all our rulings was conclusive. A *bona fide* purchaser of the bonds was under no obligation to look beyond it. It was not his duty to canvass the vote, much less to ascertain whether those who had voted were qualified electors. The law cast the duty upon the board, and in such a case the action of the board must be found in their records. If it be admitted that the purchaser of the bonds was under obligation to inquire whether an election had been held, and what its result was, the only place to which he could resort for the information sought was the records of the board; and, had he sought there, he would have found that the township clerk and treasurer could rightfully issue the bonds. It follows that the evidence offered by the defendant was quite immaterial, or, if not, that it was destructive to his defense.

§ 1013. *It is not admissible to contradict an auditor's certificate of registration upon bonds.*

The defendant further offered to show that no registration of the bonds exists, or ever has been in the office of the auditor of the state, though the auditor's certificate of registration does appear upon the bonds. We cannot think this evidence, if admitted, could in any degree avail the defendant. The certificate of that officer indorsed on the bonds was all that was required for the holder of them. If the state auditor failed to make in his office an entry of his action, we do not perceive how his failure in this respect can invalidate bonds upon which he has certified a registration.

Judgment affirmed.

ALLEN v. LOUISIANA.

(18 Otto, 80-86. 1890.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—Article 10, section 14, of the constitution of Missouri, adopted in 1865, is as follows: "The general assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

The charter of the city of Louisiana, approved March 12, 1870, contained the following sections as sections 8 and 9 of article 3, and section 14 of article 7:

"SEC. 8. The bonded or funded debt of the city for all purposes, including \$100,000 subscribed (or to be lawfully subscribed) to railroads terminating at or passing through the city of Louisiana, shall not exceed the sum of \$200,000: *Provided, however,* that said debt may be increased to a sum not exceeding \$250,000 in all, by ordinance or ordinances properly passed and submitted to an election under the authority of the city council of all resident tax-payers of the city, that is to say, of all adult persons who shall have been assessed and actually paid a tax on real or personal property for the year or the year previous to the year in which such election shall be held, and at such election the judges holding the same shall require proof of the payment of such tax before recording the vote of any person offering to vote at such election, and a majority of all the legal votes cast at said election shall determine the question for or against such ordinance.

"SEC. 9. The city shall have power to subscribe for stock in any incorporated railroad company connecting with the city of Louisiana, or give a bonus to any institution of learning by submitting an ordinance making the appropriation or authorizing the issue of bonds for any such purpose to a vote of the qualified voters (as provided by section 8) of the city, at any general election held in the city, or any special election expressly ordered, at which election a majority of the votes cast shall be for such ordinance."

"SEC. 14. The city shall not at any time become a subscriber for any stock in any corporation, except as authorized by this or some other act of the general assembly, but said city may by ordinance appropriate money to aid in opening any road leading to the city, or in other improvements within the city, or in building any bridge within two miles of the city, and which may be

deemed of general public benefit to the inhabitants of the city: *Provided, however*, that no appropriation shall be made for any improvement beyond the limits of the city, unless a vote be taken on such appropriation at some general election or special election ordered for that purpose, and a majority of all votes polled be cast in favor of that appropriation."

Under the authority of these provisions of the charter the city council on the 10th of August, 1871, passed an ordinance, section 1 of which is as follows: "There shall be an election held at the several places in each ward for the holding general election in the city of Louisiana on the 5th day of September, 1871, on the proposition to take stock in the Clarksville & Western Railroad Company, or in the Quincy, Alton & St. Louis Railroad Company: *Provided*, the said Quincy, Alton & St. Louis Railroad Company shall cross the Mississippi river and make its southern terminus within the corporate limits of the said city of Louisiana, at such place as may be agreed upon by the officers of said Quincy, Alton & St. Louis Company and the city council of Louisiana, to an amount not to exceed fifty thousand dollars (\$50,000); said election to be conducted by the same judges and at the same places as the general election held on the Tuesday after the first Monday in March, 1871, and the returns to be made and certified to the city council in the same manner as that of any general election."

Other sections provided for the payment of the subscription in bonds, and for the form of the ballots. Section 4 provided that if on counting the votes it appeared that two-thirds of the legal votes cast at the election were in favor of the proposition a subscription might be made, and section 5 made provision for a registration of the voters prior to the day of the election. The Quincy, Alton & St. Louis Railroad Company was an Illinois corporation, one terminus of whose road was on the bank of the Mississippi river, in the state of Illinois, opposite the city of Louisiana. Before the day of election a full registration of the voters of the city was made, from which it appeared that there were three hundred and fifty-six qualified voters then in the city. On the day appointed an election was held, at which there were three hundred and thirty-six votes cast in favor of the subscription and ten against it. Afterwards the stock was subscribed to the Quincy, Alton & St. Louis Company, and the company having complied with the terms and conditions of the subscription, the bonds were delivered by the city, amounting in the aggregate to \$50,000, in the following form:

"Know all men by these presents, that the city of Louisiana, in the state of Missouri, is indebted to ———, or bearer, in the sum of \$1,000, lawful money of the United States of America, which the said city of Louisiana promises to pay on the 2d day of October, 1891, at the treasurer's office in the city of Louisiana, Mo., with interest thereon at the rate of eight per cent. per annum, payable annually on the 1st day of January in each year, upon presentation and surrender of the annexed coupons, as they severally become due and payable. This bond is issued by the city of Louisiana, under authority of the general assembly of the state of Missouri, entitled 'An act to amend and reduce into one the several acts incorporating the city of Louisiana,' approved March 25, 1870; also an ordinance of the city council of the city of Louisiana, No. 628, passed September 28, 1870.

"In witness whereof, the city of Louisiana has caused its seal to be hereto affixed, and the same to be signed by the mayor, and countersigned by the

clerk of the city council, at the city of Louisiana, Mo., the 4th day of November, in the year of our Lord 1871.

[SEAL.]

Countersigned,

“WM. PARKER,
“Mayor of City of Louisiana.
“N. H. GRIFFITH,
“Clerk City Council.”

The city paid without objection the first instalment of interest as it fell due, but since that time has been in default. This suit was brought on seventy-nine coupons, past due, of which the plaintiff's intestate was a purchaser for value before maturity without notice. Upon this state of facts the circuit court gave judgment for the defendant, and to reverse that judgment this writ of error has been brought.

§ 1014. *The rule of construction of a statute of which part is constitutional and part unconstitutional.*

The question which lies at the foundation of this case is whether the legislature of Missouri has, by a valid law, authorized the city of Louisiana to subscribe to the capital stock of the Quincy, Alton & St. Louis Railroad Company, an Illinois corporation. It is conceded that if there was no such law, the judgment below was right. It is also conceded that such a subscription could not be made on the vote of a majority of the tax-payers of the city, because the general assembly is prohibited by the constitution from granting authority for that purpose, except upon the assent of two-thirds of the qualified voters. Neither is it contended that the qualified voters, whose vote is to be taken under section 9 of the charter, are not the resident tax-payers specified in section 8; but the claim is that, if this unconstitutional provision is disregarded, enough can be found in the other parts of the sections to authorize the subscription. It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. “But,” as was said by Chief Justice Shaw in *Warren v. Mayor and Aldermen of Charlestown*, 2 Gray (Mass.), 84, “if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.” The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.

§ 1015. *Construction of the charter of Louisiana, Missouri, with reference to the constitution of Missouri.*

It is contended that, with a proper application of these principles, sufficient authority for this subscription can be found either in sections 8 or 9, article 3, or section 14, article 7. As to section 8. This section provides, in substance, that the bonded or funded debt of the city, including \$100,000 subscribed or lawfully to be subscribed to railroads terminating at or passing through the city, shall not exceed \$200,000 without the assent of a majority of the resident tax-payers, but that with the assent of the tax-payers, given in the way pointed

out, the debt may be increased to \$250,000. It authorizes no subscription to railroad corporations, but recognizes the fact that under certain circumstances such a subscription may be lawfully made, and limits the permanent debt to be incurred for that and other purposes to \$200,000 without the consent of the tax-payers, and to \$250,000 with their consent. In other words, it is a charter provision against incurring a bonded debt beyond the prescribed amounts. That is the whole scope and effect of this section.

As to section 9. This, when taken in connection with the requirements of the constitution, cannot be construed as being of itself a grant of authority to subscribe, because it makes a subscription dependent on a majority vote of the resident tax-payers, while the constitution requires the assent of two-thirds of the qualified voters. In the construction of a statute, every word is, if possible, to be given some effect. Nothing is to be stricken out if it can be avoided. It is not to be presumed that the legislature intended any part to be without meaning. In the light of these maxims of interpretation, the substantial object of this section evidently was to limit to a greater extent than had been done by the constitution the power to subscribe to the stock of railroad companies connecting with the city. Under the constitution, a two-thirds vote of the qualified voters, taken under the authority of law, would be enough; but under the charter, the two-thirds vote of the qualified voters required by the constitution, and a majority vote of the tax-payers, were both necessary. The charter limitation could be repealed. It was in the nature of a legislative regulation, which could be dispensed with whenever, in authorizing a particular subscription or otherwise, the legislature should so declare. As it stands, it operates as a charter protection to the tax-payers against the imposition of burdens of this kind by the qualified voters alone, but of itself it authorizes no subscription.

Had there been no constitutional restriction put on the legislature in matters of this kind, the language employed might have been susceptible of a different meaning; but with the constitution as it is, the entire provision as to the majority vote of the tax-payers, to which the legislature evidently attached special importance, must be stricken out, and that of the constitution as to the two-thirds vote of the qualified voters inserted by implication, before it can be said that what now appears to be a limitation was, in fact, a positive grant of power. We are clearly of the opinion that this cannot be done consistently with the evident purpose of the law, and, as a consequence, that no authority for the subscription can be found in this section of the charter.

As to section 14, article 7. This clearly gives no affirmative power to subscribe. It is, in effect, nothing more than a provision that no subscription shall be made unless expressly authorized by law, which is but an enactment of what had before become a well-established rule of decision. It authorized appropriations of money for the purposes specified, on a majority vote of the qualified voters at a general or special election, and it recognized the fact, which is no longer disputed, that the legislature might authorize the city, in a proper way, to become a subscriber to stock in some corporations. This is the full extent of the operation of that section.

These, so far as we can discover from the record, were the only provisions of law relied on in the court below to sustain the subscription for the payment of which the bonds now in question were issued. In this court, however, it is contended that power to make the subscription may be found in section 17, chapter 63, of the General Statutes of Missouri of 1865, taken in connection with an amendment to that chapter, adopted as additional section 52, March 24,

1870. Session Acts, pp. 89, 90. Upon this point it is sufficient to say that the Quincy, Alton & St. Louis Company was an Illinois corporation, and under section 17 authority was only given to subscribe to the stock of companies organized under the laws of Missouri. By the amendment of 1870 (section 52), under certain circumstances, railroad companies of other states might extend their roads into Missouri, "and for that purpose . . . possess and exercise all the rights, powers and privileges conferred by the general laws of this state [Missouri] upon railroad corporations organized thereunder," but this did not make them corporations "organized under the laws of Missouri." If, as is argued, the foreign corporation got, as one of the privileges conferred on it by this law, the right to receive municipal subscriptions, it was of no practical value as a privilege until the power to subscribe was in some form given to the municipalities.

§ 1016. *A vote of the people gives no authority to subscribe for stock, unless such vote has been ordered by previous legislation.*

It is of no importance that two-thirds of the qualified voters of the city gave their assent to the subscription at the election which was called. It has been uniformly held that until the legislature authorizes an election, a vote of the people cannot be taken which will bind the municipality or confer upon the municipal authorities the power to make such a subscription. The legislative authority to obtain the popular assent is as essential to the validity of the election as it is to the subscription.

Judgment affirmed.

SHEBOYGAN COUNTY v. PARKER.

(8 Wallace, 93-96. 1865.)

ERROR to U. S. Circuit Court for Wisconsin.

STATEMENT OF FACTS.—Bonds were issued by Sheboygan county, Wisconsin, after a vote of the people taken in the usual manner. A board of commissioners, appointed by the act authorizing the issue of the bonds, acted in the matter instead of the ordinary county officers, and a number of the warrants being unpaid, suit was brought upon them against the county, which denied the constitutionality of the act appointing the commissioners. The constitution of the state provided that county officers should be elected by the electors of the respective counties.

Opinion by MR. JUSTICE GRIER.

It is admitted that the bonds in question were issued in conformity with the statute of the Wisconsin legislature. By this statute, the bonds issued in pursuance of it are made "full and complete evidence, both in law and equity, to establish the indebtedness of the county according to their tenor and effect." The objection is, that the act is unconstitutional and void. Is the objection well founded?

§ 1017. *A legislature may authorize persons of its own appointment to issue bonds of a county after their issuance has been approved by a popular vote.*

The commissioners or board of supervisors of a county, in the exercise of their general powers as such, have no authority to subscribe stock to railroads and bind the people of the county to pay bonds issued for that purpose without special authority conferred upon them by the legislature. But when special authority is given to the people of a county to do these acts, and bind themselves by the issue of such bonds, the legislature may properly direct the mode

in which it shall be effected. The persons specially appointed to act as agents for the people have a ministerial duty to perform in issuing the bonds, after the people, at an election held for the purpose, have assented that they shall be bound.

§ 1018. *Commissioners to issue bonds are not county officers.*

Such persons, in performance of their special duty, are in no proper sense "county officers." They do not exercise any of the political functions of county officers, such as levying taxes, etc. They do not exercise "continuously and as a part of the regular and permanent administration of the government, any important public powers, trusts or duties." *State v. Kennon*, 7 Ohio, 562. An officer of the county is one by whom the county performs its usual political functions; its functions of government. Any other persons, appointed by the legislature and the people of the county, would be as competent to execute the bonds of the corporation as the supervisors. They are the lawful agents of the people for this special purpose, and, though nominated by the legislature, they cannot act without the consent of the citizens of the county, ascertained in the manner directed by law; and, having so acted, the county cannot now repudiate their acts.

Judgment affirmed, with costs.

COUNTY OF CLAY v. SOCIETY FOR SAVINGS.

(14 Otto, 579-591. 1881.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—In November, 1849, the legislature of Illinois passed an act authorizing cities and counties upon certain conditions to subscribe for railroad stock and to issue bonds to pay for the same. Among the conditions was one that the subscription should be authorized by a popular vote of a majority of the voters of the city or county. In 1867 the Illinois Southeastern Railroad Company was incorporated, and the counties through which the road should pass were authorized to donate to the company sums of money (in bonds) not exceeding \$100,000. In 1869 a law was passed requiring municipal bonds to be registered. On August 8, 1870, the new constitution of Illinois went into operation. It forbade counties and cities, etc., making donations or loaning their credit to railroads. This suit was brought on certain bonds issued by Clay County, dated November 1, 1869, and other bonds dated January 4, 1871, the latter being issued to pay for a donation made to the Illinois Southeastern Railroad Company. There was a judgment for the plaintiff.

Opinion by MR. JUSTICE WOODS.

Two classes of bonds are sued on, namely, the subscription bonds and the donation bonds. The defenses set up against each class will be separately considered. The findings of the court and the sections of the act of 1849, recited in the preceding statement of facts, furnish ample ground for the judgment in favor of the defendant in error upon the subscription bonds held by it.

The plaintiff in error, however, insists that there is no evidence or finding that the thirty days' notice of the election required by the statute had been given, or that a majority of the legal voters, taking as a standard the number of votes thrown at the last general election for county officers, voted in favor of the proposition to subscribe stock and issue the bonds of the county to pay for it. There are three conclusive answers to this contention.

§ 1019. *The recital of bonds, issued under the Illinois act of 1849 by a county, are conclusive against such county in favor of a bona fide holder.*

First, the bonds recite that they were issued under and pursuant to the orders of the board of supervisors of Clay county, as authorized by virtue of the laws of the state of Illinois. The act of November 6, 1849, authorized the judges of the county court to issue the bonds only in case a majority of the voters of the county, taking as a standard the number of votes thrown at the next preceding general election, should vote in favor of the proposition to subscribe to the stock of some designated railroad company, and pay for it by the issue of county bonds. The ultimate decision of the question whether such a vote had been cast was, therefore, left with the judges of the county court. The recital of the bonds, that they were issued pursuant to the orders of the board, the successor of the county court, as authorized by virtue of the laws of the state of Illinois, is equivalent to a declaration by the board, upon the face of the bond, that the election had been held and had resulted so as to authorize the lawful issuing of the bonds. When the bonds are in the hands of a *bona fide* holder, this recital is conclusive and binding upon the municipality. *Town of Coloma v. Eaves*, 92 U. S., 484 (§§ 1419-20, *infra*); *Marcy v. Township of Oswego*, id., 637.

§ 1020. *In a suit between a county and the bona fide holder of its bonds, any irregularity in their issuance is matter of defense and must be shown by the county.*

The second answer is, that if the county had, under the law, authority to issue bonds, and did issue them, and they went into circulation and came to the hands of a *bona fide* holder, he was not, in a suit upon them, required to aver or prove the performance of any of the requisites necessary to give them validity. The want of such performance is a matter of defense, and the burden of proof is upon the county to establish it. *Lincoln v. Iron Co.*, 103 U. S., 412. In this case the county offered no evidence in any degree tending to show that the conditions precedent upon the performance of which the issue was authorized had not been complied with. It cannot, therefore, assume that the conditions were not performed, and insist on non-performance as a defense.

§ 1021. *Under section 12 of the Illinois act of February 24, 1869, bonds regular upon their face are, in the hands of bona fide holders, prima facie evidence of the regularity of everything requisite for the proper issuance of such bonds.*

The third answer is, that section 12 of the act of February 24, 1869, amendatory of the act to incorporate the Illinois Southeastern Railway Company, which was indorsed on the bonds, expressly provided that when payment to the capital stock of the company should be made in the bonds of counties or townships, under any act authorizing such subscription, all such bonds issued by the proper authorities and appearing regular on their face should, in the hands of a *bona fide* holder, be deemed and taken in all courts, and elsewhere, as *prima facie* evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds, or by any other act to be done preliminary to their issue and negotiation. As no proof has been submitted of any irregularity in the issuing of the bonds, this section of the law is conclusive against the existence of any.

It is next insisted by plaintiff in error that the general statute of November 6, 1849, so far as it concerned the Illinois Southeastern Railway Company, was repealed by section 7 of the act to incorporate that company. That section authorized the county court of any county, or the board of supervisors (when the

county had adopted township organization), to donate to said company, as a bonus or inducement towards the building of said railroad or its branches, any sum not exceeding \$100,000, and to issue to the company its bonds in satisfaction of said donation; provided, that no donation of a greater sum than \$50,000 should be made until the question of such larger donation should have been submitted to the vote of the legal voters of the county, and a majority thereof should have voted in favor of such donation. The contention is that it was not the purpose of the legislature in these enactments to permit a county to purchase or subscribe to the capital stock of a railroad company and also make a donation to the same company. There is not a word in the charter of the Illinois Southeastern Railway Company which expressly excludes it from the benefits of the general railroad subscription law of November 6, 1849. Nor is there the slightest repugnancy between the provisions of the two acts. The latter, being a general law, authorized any city or county in the state to purchase or subscribe to the capital stock of any railroad company anywhere in the state; the former, being an act to incorporate a private corporation, authorized any county through which the railroad of the company or any of its branches might pass, to make a donation to the company as a bonus or inducement towards the building of the railroad or its branches. There is no ground whatever for the contention that the general law was repealed or modified, in any respect, by the act incorporating the Illinois Southeastern Railway Company. There is no repugnancy or inconsistency between them. A statute can be repealed only by an express provision of a subsequent law or by necessary implication. To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled. *McCool v. Smith*, 1 Black, 459; *Wood v. United States*, 16 Pet., 342. We are of opinion, therefore, that the act incorporating the Illinois Southeastern Railway Company does not repeal or modify the general law of November 6, 1849.

The plaintiff in error further insists that section 10 of an act approved February 24, 1869, amendatory of the charter of the Illinois Southeastern Railway Company, had the effect to repeal, not only section 7 of the charter of the company, but also the general law of November 6, 1849, so far as it concerned the company. This section provides "that any village, city, county or township along or near the route of said railway or its branches, or that are in anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company, or make donations to said company to aid in constructing and equipping said railway," provided the same shall be voted for at an election called by the clerk of the village, city, county or township, upon the written request of twenty legal voters thereof, and upon thirty days' notice. Conceding that this section is a substitute for section 7 of the original charter, it cannot be held to repeal the general law, for the reasons already stated in reference to section 7 of the original charter, namely, that there is no direct repeal, and there is no repugnancy between the two acts which would make a repeal by implication. The subscription bonds sued on were, according to the findings of the court, issued in substantial conformity, not only with the general act of November 6, 1849, but also with the amendatory act of 1869, so that, conceding that the latter act is applicable to the issuing of the bonds in question, they are valid in the hands of a *bona fide* holder. When these bonds were issued there was ample authority for their issue under the laws of the state of Illinois. The recital that they were issued in conformity with the laws of the state, as

already shown, is binding on the county when the suit is brought on the bonds by a *bona fide* holder, and concludes the county from setting up any irregularities in their issue, if any existed. We are of opinion, therefore, that the suit upon the subscription bonds was well maintained.

The objections to the bonds known and designated as donation bonds have nothing substantial in them. The bonds refer on their face to the laws which authorized their issue, and recite that they were issued in pursuance of authority granted thereby. They carry an indorsement made by the clerk of the county court, by its order and under its seal, that all the conditions upon which they were to become a binding obligation of the county have been complied with, and printed on every one of them is a copy of section 12 of the act of February 24, 1869, amendatory of the charter of the company, which makes the fact of the negotiation of them in payment of a donation to it *prima facie* evidence of the regularity of their issue when in the hands of a *bona fide* holder. There is no proof or offer of proof that they were not issued in conformity with the requirements of law. The plaintiff in error argues, however, as conclusive against their validity, that they were not issued until after August 8, 1870, the date upon which the present constitution of Illinois went into effect, which by the second additional section declared that no municipal corporation should ever make donation to any railroad or private corporation.

§ 1022. *Where a donation had been voted before August 8, 1870, bonds issued after that date to carry such donation into effect are not invalidated by the new constitution of Illinois which took effect on that day.*

The findings of the court show that the people of Clay county, on April 22, 1868, voted in favor of a proposition to donate \$50,000 to the Illinois South-eastern Railway Company, provided the railroad of said company should be located on a certain line specifically described, and provided the bonds issued in payment of such donation should not be payable until the railway had been completed the whole length of the line, from Shawneetown, on the Ohio river, to the Chicago branch of the Illinois Central Railroad, and the cars running thereon; that on the first Monday of November, 1868, the board of supervisors of the county, by resolution duly passed, directed its president to make the donation aforesaid upon the books of the railway company, in accordance with the condition of said vote, and that before the 1st day of November, 1869, the railway company had located its line of road, as required by the conditions upon which the donation was to be made, and had "graded, bridged and tied ten miles thereof." We think it may be fairly deduced from the findings of the court below that, on November 1, 1869, the president of the board of supervisors subscribed upon the books of the railway company as directed by the board of supervisors the donation of \$50,000, which the county had voted, and the brief of counsel for plaintiff in error distinctly admits that such is the proper construction of the findings.

These transactions made a contract between the county and the railway company to the effect that in consideration that the railway company should construct its road upon the line designated, and complete it and have the cars running thereon between the points mentioned, the county would deliver its bonds to the railway company in satisfaction of its donation. This contract had been partly performed by the railway company before the constitution of 1870 went into effect. The adoption of the constitution could not annul or impair it. The county was bound notwithstanding the provision of the constitution of 1870. *Town of Concord v. Portsmouth Savings Bank*, 92 U. S., 625.

And when, as appears by the findings of the court, the railway company had, on January 1, 1871, fully completed its road according to the terms upon which the donation was to be made, it was entitled in law under its contract to the bonds of the county in satisfaction of the donation. There was, therefore, authority to issue these bonds upon the conditions prescribed. The court found that the defendant in error was a *bona fide* holder, and that the railroad company had complied with all the conditions upon which the bonds were to be issued to it. Upon this state of facts the attempt of the plaintiff in error to avoid its liability upon these bonds seems a hopeless undertaking.

Other defenses are set up against a recovery in this case. Plaintiff in error alleges that the authority to donate \$50,000 to the railway company was expressly conferred upon the board of supervisors without any vote or precedent condition whatever, and the authority being conferred upon the board could not be by it "delegated to the people to be voted upon at a popular election." It further alleges that the bonds are not negotiable, and it insists that the authority of the board of supervisors, under the original charter of the railway company, to make the donation, was repealed by the amendatory act of February 24, 1869. These defenses do not in our judgment merit reply.

§ 1023. *Payment of interest on county bonds for a number of years cures mere informalities in their issue.*

The plaintiff in error has received in consideration for the issue of each series of bonds everything for which it bargained. They were regularly issued, and have been registered under the statute of Illinois with the auditor of public accounts, upon the strength of a certificate under oath made by a supervisor of the county pursuant to law, to the effect that all the preliminary conditions to the issue of the bonds required by law had been complied with. The record shows that taxes had been levied to pay interest, and that interest had been paid on the subscription bonds for eleven years, and on the donation bonds for nine years. This fact would of itself cure mere irregularities in the issuing of the bonds when they were sued on by a *bona fide* holder for value. *Supervisors v. Schenck*, 5 Wall., 772 (§§ 1683-86, *infra*). Under these circumstances, when a suit is brought on them by such a holder, as found to be the case here, some substantial defense must be set up by the county before it can escape its liability. Such defenses as are relied on in this case will not avail.

Judgment affirmed.

COUNTY OF LEAVENWORTH v. BARNES.

(4 Otto, 70-78. 1876.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—This action is brought upon certain bonds and coupons issued by the county of Leavenworth, Kansas. It is found by the judge, who tried the cause without a jury, that the bonds were issued by the county, and that the plaintiff below was the owner and holder, and purchased them without actual notice of the defenses set up, and for value paid. The defenses to the recovery upon the bonds resolve themselves into the following:

First. The bonds recite that they are issued under the provisions of the act of the state of Kansas, approved February 10, 1865, entitled "An act to authorize counties and cities to issue bonds to railroad companies."

They bear date of July 1, 1865, and are payable on the 1st day of July, 1875. This act authorized the counties to make subscription to the capital stock of a railroad company, and to issue its bonds in payment therefor, payable within thirty years, at a rate of interest not exceeding seven per cent. A previous assent of the qualified electors of the county, at an election, of which twenty days' notice should be given, was required.

§ 1024. *The decision of the Kansas supreme court followed; and an act authorizing counties and cities to issue bonds held to have been legally passed.*

It is contended that without this act there was no authority in the county to issue the bonds in suit, and that the act was never legally passed. The objection is that the yeas and nays were not called and entered on the journal, on the final passage of the bill; and, again, that the enrolled bill was not signed by the presiding officer of the senate. The recent decision upon this identical statute by the supreme court of Kansas, in a suit against this county, relieves us from all embarrassment upon this question. It gives effect and construction to one of its own statutes, and, according to well-settled rules, will be followed by this court. The question is discussed at much length, many local authorities in support of their conclusion are cited, and the act is held to have been legally passed, and to be a binding act. We must hold in accordance with this decision.

§ 1025. — *and said act authorized the issue of bonds, where they were sanctioned by vote had prior to the passage of the act.*

Second. It appears by the record that on the 2d day of January, 1865, the board of county commissioners called an election for the 21st day of that month, for the submission to the electors of the question of subscribing to the stock of the Leavenworth & Missouri Pacific Railroad Company; that an election was held on that day, at which seven hundred and eighty-four votes were cast in favor of the subscription, and one hundred and eleven against it; that on the 18th day of April the chairman of the board was directed by the board to make the subscription; and that on the 1st day of July the bonds were issued in payment thereof. It is now objected that the bonds are invalid, for the reason that the only vote taken by the electors of the county was before the passage of the act authorizing it. The law in question appears, from the printed volume of the statutes of Kansas, to have been approved on the 10th day of February, 1865, and to have been published on the 14th day of the same month. The act we are considering authorizes the counties into, from, or near which any railroad is or may be located, to subscribe to the capital stock thereof, and to issue its bonds in payment of such subscription. It proceeds to say: "But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county at some general election, or some special election, to be called by the board of county commissioners by first giving twenty days' notice in some newspaper published and having general circulation in the county. . . . If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners of the county shall issue the same." The road in question was located and built in and through the county of Leavenworth.

The fourth section of the act contained this provision: "In case the board of commissioners of any such county . . . have heretofore submitted to the electors of such county the question of issuing bonds to any railroad company, and at such election such electors voted to issue such bonds, such board are hereby authorized to issue such bonds and subscribe for stocks not exceeding

the amount as provided in the first and third sections of this act." Stat. Kan., 1865, p. 42.

In the present case, a majority of the electors voting declared themselves in favor of the subscription and issue of the bonds. This is all that is required either by the first or the fourth section. The same rule is intended to be applied in each case. This is an explicit authority from the legislature to the county board to adopt any previous expression of the electors of their willingness to make such subscription. It is conclusive upon the point under consideration.

§ 1026. *County bonds are not avoided by the consolidation of the company to which they were issued with another company, with the acquiescence of the county.*

Third. It is objected, again, that the bonds were issued to the Leavenworth & Missouri Pacific Railroad Company, whereas it is alleged that no such company was in existence on the 21st day of January, 1865, when the election was held, or on the 1st day of July, when the bonds were issued. This company was organized in 1860, under the name of the Missouri River Railroad Company, and on the 18th of April, 1865, it consolidated with another company, increased its capital, and changed its name to that of the Leavenworth & Missouri Pacific Railroad Company. We suppose this to have been authorized by the statutes of Kansas. Laws 1862, p. 768. We are certainly of opinion that when the parties interested in the two companies are content; when the newly-named company has been in operation for ten years; when the county has received and held its stock until 1869; when the same was sold by the county by authority of the legislature,—it is not competent for such a contracting party to say that there was an irregularity in the organization of the company. *Bigelow on Estoppel*, 464; *Moran v. Commissioners*, 2 Black, 722 (§§ 1439-42, *infra*); *Zabriskie v. Cleveland*, etc., R. Co., 23 How., 400; *Pendleton County v. Amy*, 13 Wall., 297. There are some other objections made, but none of them are serious in their character.

Judgment affirmed.

MENASHA v. HAZARD.

(12 Otto, 81-95. 1880.)

ERROR to U. S. Circuit Court, Eastern District of Wisconsin.

STATEMENT OF FACTS.—Hazard sued the town of Menasha, in Wisconsin, upon coupons of bonds issued by that town in payment of its subscription of stock in a railroad. In the court below the judges were divided in opinion on these points: (1) Whether the coupons created a liability of the town to the plaintiff, based upon the bonds and the certificates upon said bonds. (2) Whether securing the right to cross a lake on the bridge of another company was a sufficient compliance with the proposition of the railroad company to construct a railroad between two points of which route the crossing of the lake was a component part. (3) Whether, after consolidation of the company to which the subscription was made with other companies, delivery of the stock was a compliance with the proposition; and (4) Whether the town could issue its bonds to the consolidated company. There was judgment for the plaintiff. Further facts appear in the opinion of the court.

Opinion by WAITE, C. J.

The first question certified in this case is answered in the affirmative.

§ 1027. *Where certificates on bonds authorized by law recite in effect that the requisite preliminary conditions have been performed, such bonds are "duly" certified.*

We think that the certificate on the back of the bonds is a substantial compliance with the condition on their face, and the proposition of the railroad company accepted by the town. The condition as expressed in the bonds is in the exact language of the second article of the proposition, and implies that they shall be considered as fully executed, and that they may be put on the market as valid commercial paper, "when it is thereon duly certified that the conditions upon which they were voted, issued and deposited by said town have been performed." To ascertain what "duly" means in this connection it is necessary to look to the other parts of the proposition, and there we find in article 3 that the bonds, when issued by the proper officers of the town, were to be deposited with the National Bank of Commerce in New York, "in trust for said town, until such time as there shall be filed in said bank a properly authenticated certificate, signed by the chief officer of this company and the chairman of the board of supervisors of said town, or the secretary of state of this state, that the iron has been laid upon the track of road and cars run over the same, through from the depot on Doty's Island, or in said town, to Wolf River, when the said bonds shall become the absolute property of and be held by said bank, subject to the order of this company, or its assigns, and which certificate shall authorize and require the president of said bank to certify upon the back of each of said bonds that the conditions upon which the said bonds were voted, issued and deposited by said town have been performed." Taken as a whole, the proposition and the condition on the face of the bond mean that the bonds should become the valid and subsisting obligations of the town when the president of the National Bank of Commerce had certified thereon that the president of the railroad company and the chairman of the board of supervisors of the town had certified to him that the iron had been laid on the track of the road and the cars run over the same from the depot on Doty's Island, or in said town, to Wolf River. This certificate was on the bonds when they were bought by the defendant in error on the market. In legal effect it was the same as if it contained the words, "that the conditions upon which they [the bonds] were voted, issued and deposited by said town had been performed;" because by the very terms of the proposition the certificate of the proper officers was to be conclusive evidence to the president of the bank of that fact, and not only authorize, but require, him to make the indorsement contemplated. When, therefore, he certified that he had received and put on file in his bank certificates from the proper parties, such as were required as the basis of his action, he did certify to the facts which the proposition said they should conclusively prove. His statement of what they proved was unimportant. The proposition settled that. The fact that the certificate furnished the bank is signed in the name of the railroad company by the president is not a valid objection. It was signed by the president, and that is all the proposition required.

§ 1028. *Where, before the subscription and bonds are voted, the railroad company in question is consolidated with another company, the issue of bonds to the conjoint company is valid.*

The third and fourth questions are also answered in the affirmative. Before the subscription and bonds were voted, the Portage, Winnebago & Superior Company was authorized to consolidate with other companies "which by law may be authorized to construct connecting lines of road, or make such consoli-

ation." Act approved March 10, and published April 6, 1870. The Portage, Stevens Point & Superior Railroad was incorporated March 16, 1870, with express authority to consolidate with the Portage, Winnebago & Superior Company. The Wisconsin Central Railroad Company is, in fact, the name of the Portage, Winnebago & Superior Company, as changed by statute, February 4, 1871. The organization of the company was the same after as before this change. The Manitowoc & Minnesota Railroad Company was authorized to enter into consolidation agreements by the act of March 24, 1871, being chapter 476 of Private and Local Laws, Wis., 1871, and the consolidation with the company was actually effected July 1, 1871. The vote for the bonds was taken June 4, 1870, and the bonds were issued and delivered to the bank October 25, 1871. Upon this state of facts we think this case is brought directly within the principles settled in *County of Scotland v. Thomas*, 94 U. S., 682 (§§ 1210-14, *infra*), and *Wilson v. Salamanca*, 99 id., 499. The authority of the Wisconsin Central Company was to consolidate with any other company that might at any time have the power to enter into such an arrangement. It was not confined to such companies as then had the power.

§ 1029. *Condition in bonds; negotiability.*

These answers dispose of the case, and make it unnecessary to consider the second question certified. When the bonds were "duly certified" and delivered to the railroad company by the bank, they became, under the agreement of the parties, valid instruments, completely executed in form, and in a condition to be put on the market as commercial paper. Having on them the necessary certificate, the purchaser need not inquire whether the facts were as certified. *Anthony v. County of Jasper*, 101 U. S., 693 (§§ 1250-54, *infra*). With the certificate indorsed the bonds were in legal effect the same as if they had been issued by the proper officers under full authority without the condition which appeared on their face. Under these circumstances the condition did not destroy their negotiability.

Judgment affirmed.

COMMISSIONERS OF JOHNSON COUNTY v. THAYER.

(4 Otto, 681-645. 1876.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The recovery by Thayer and others of the amount of the coupons sued upon is challenged upon various grounds.

1. It is contended that no authority to subscribe for the bonds was conferred by the vote of November 7, 1865, for the reason that no particular railroad was referred to in the vote on that occasion. The question was submitted to the voters of Johnson county, in the form of an inquiry, whether the commissioners should be authorized to subscribe capital stock to the amount of \$100,000, to aid in the construction of a railroad commencing at or near the Union depot, on the south side of and near the mouth of the Kansas river, and near Kansas City; thence to Olathe, Johnson county; thence, in a southerly direction, through said county, to the southern boundary of the state of Kansas. Assuming that the road to which the subscription was made met the terms required, it is insisted that the question of subscribing to the particular railroad company by name should have been submitted to the electors, and that there must have been an actual location of the road before the election was held.

§ 1080. *A previous location of a railroad is not a condition precedent to the issuing of bonds or subscription of stock to the railroad by a municipal corporation, under a Kansas statute.*

We had occasion to consider a question similar to the latter branch of this objection in *County of Callaway v. Foster*, 93 U. S., 567 (§§ 876-878, *supra*), and held that the objection was not a valid one. In that case the statute authorized a subscription by any county "in which any part of the route of said railroad may be." The road was not built, located nor organized. The court there intimated that where this language was used in reference to a road which was yet to be built, it could be applied to any county in which the road might by law be located. The road to which subscription was in this case made was, in fact, located in the county of Johnson, and the work upon it commenced before any of the bonds were executed or delivered,—was actually built through the county, and is now there operated. We think a previous location of the road was not required by the terms of the statute. Was it necessary that the particular road to which a subscription was intended to be made should be described in the proposition submitted to the popular vote, or was the general language used in this case a compliance with the law?

The following is the section of the act of February 10, 1865, controlling the question:

"SEC. 1. That the board of county commissioners of any county to, into, through, from or near which, whether in this or in any other state, any railroad is or may be located, may subscribe to the capital stocks of any such railroad corporation, in the name and for the benefit of such county, not exceeding in amount the sum of \$300,000 in any one corporation, and may issue the bonds of such county, in such amounts as they may deem best, in payment for said stocks: *Provided*, that such bonds shall be issued only in payment of assessments made upon all the stocks of such railroad company, which bonds shall bear interest at a rate not exceeding seven per cent. per annum, and shall be payable within thirty years. And the said board of commissioners shall elect one of their number, who shall not be a stockholder, to cast the vote of the county at any election for directors, or at any meeting of the stockholders of such company; and said board of commissioners shall annually levy and collect, at the time and in the same manner that general taxes are levied and collected, a tax sufficient to pay the annual interest on such bonds, and to create a sinking fund for their redemption. But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county at some general election, or at some special election to be called by the board of county commissioners, by first giving twenty days' notice in some newspaper published and having general circulation in the county; or, in case there be no paper in the county, then by written or printed notices posted up in each election precinct; and, in submitting said question, said board of commissioners shall direct in what manner the ballots shall be cast. If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners of the county shall issue the same."

This language, in relation to the road to which the subscription may be made, is as general as words can make it. The board of commissioners may subscribe to the capital stock of "any railroad" which is or may be located in or near the county they represent, and may issue the bonds of the county in payment for said stocks. "But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county." In neither

of these clauses is there a qualification that the particular road shall be named in the submission, or that any detail shall be set forth. The burden of bonds shall not be imposed upon the county except by the previous assent of a majority of the electors. When the burden is assumed by the electors, it is quite reasonable that it should be left to the county board to select the particular corporation in which the stock shall be taken. That trust can be there executed as wisely and judiciously as at a mass meeting of the voters. The electors here voted to take stock in a corporation to aid in the construction of a road "commencing at or near the Union depot, on the south side of and near the mouth of the Kansas river, and near Kansas City; thence to Olathe, Johnson county; thence in a southerly direction, through said county, to the south boundary of the state of Kansas." We think this was a sufficiently specific statement to be submitted to the voters for their approval or disapproval.

§ 1031. *Defects, irregularities or informalities, which do not affect the result of the vote, do not affect its validity or the validity of bonds issued under it.*

We cannot, however, think that this is a vital point, even if there was a defect in this respect. The question of subscribing for the stock and issuing the bonds for a road from the mouth of Kansas river to the south boundary of the state was submitted to the electors of Johnson county. Notice was given for the time required by the statute, and a full and fair vote was taken, so far as we are informed. The approval of the electors by their vote, at a meeting called for that purpose, is the object of the statute. Defects, irregularities or informalities, which do not affect the result of the vote, do not affect its validity. The defect we are considering, if it is a defect, does not go to the question of jurisdiction, and does not impair the validity of the bonds. The case of *Lewis v. Commissioners of Bourbon County*, 12 Kan., 186, is cited on this point. In that case four questions were passed upon by the supreme court of Kansas: *First*. Was the presentation of a petition, signed by one-fourth of the qualified voters, a condition precedent to the valid action of the commissioners? *Second*. Did the failure to name the corporation in the propositions submitted to the electors avoid the whole proceedings? *Third*. A majority of the votes of the electors having been cast against the proposition to issue bonds, was the county board authorized to issue them? *Fourth*. Did the subsequent submission, and the proceedings thereon, confer the authority to issue the bonds? The court held that the first objection was cured by the act of 1868. The second and the third objections were held to be fatal, and that the case was not relieved by the proceedings referred to in the fourth objection. The court did, in its language, hold that the objection raised in the present case, to wit, that the name of the corporation was not inserted in the proposition for the popular vote, was fatal. Had this been the only or an indispensable part of the decision, we should have been called upon to inquire whether the decision was one of that class of state decisions upon its own statute that was binding upon us. The other question, however, existing and decided in that case, was, in its nature, so exclusive and so controlling that anything said or professed to be decided beyond it does not require much consideration. The court held that, in the exercise of its general jurisdiction, it had the power to inquire into the number of votes actually cast for and against the proposed issue of bonds; and, upon making such inquiry, it found and determined that, in fact, a majority of the votes cast were cast against the proposition. Upon this point all the decisions of this court, and, so far as we know, of all other courts, concur. If a majority of the electors cast their votes against the proposition to issue bonds, the

entire foundation of the proceedings is gone. There is an absolute want of jurisdiction to proceed further in the matter, and an attempt to do so is void, as are all proceedings or issues based upon it. With this elemental failure existing in that case, other and further decisions tending to the same result are not to be regarded as authority.

Gulf Railroad v. Commissioners of Miami County, 12 id., 234, is based upon the case above referred to, and follows it, without examination or discussion. It does not refer to the curative act of February 25, 1868, which was held, in the *Bourbon County* case, not to be applicable to an election where a majority of votes was cast against the proposition, but which act, it was held, did relieve against the defect of the absence of the preliminary petition required by the statute. The court said that act was intended to sustain, and not to defeat, the will of the people. This principle would have justified its application in relief of the defect before it, if there was such defect; and its consideration might well have altered the result.

§ 1032. *The supreme court will not follow the decisions of a state court holding bonds invalid, where the decision is made after the bonds have been issued.*

Both of these decisions were made after the bonds in this suit had been issued, and the interest upon them regularly paid for a considerable time. The road had been built as promised; the county of Johnson and its people enjoyed the anticipated benefits, and we are of the opinion that we are not bound to follow a decision which releases them from all the corresponding obligations. To this effect are the decisions of this court, made in the years 1865, 1871 and 1872. *Gelpcke v. City of Dubuque*, 1 Wall., 175 (§§ 1367-70, *infra*); *Butz v. Muscatine*, 8 id., 575; *Olcott v. Supervisors*, 16 id., 678.

§ 1033. *Curative act of Kansas, concerning bonds voted in aid of railroads, covers bonds issued before and after its passage.*

The curative act of February, 1868, was intended by the legislature of Kansas to reach cases like the present, and to cover both the bonds issued before, as well as those issued after, its passage. It is as follows:

"SEC. 1. Whenever a majority of the persons voting at any election called by the board of county commissioners of any county have heretofore voted in favor of subscribing stock and issuing bonds to any railroad company or companies, the board of county commissioners of such county may subscribe to the capital stock of such railroad company or companies to the amount and on the conditions specified in the order of such boards of county commissioners in such cases, and pay such subscription, by issuing to each company bonds of such county at par, payable at a time therein to be fixed, not exceeding thirty years from the date thereof, bearing interest at the rate of seven per cent. per annum, with interest coupons attached, whether such orders and elections, or either of them, have been in compliance with the statutes in such cases made and provided or not, or whether the proposition submitted at the election had was for the subscription of stock and the issuance of bonds to one or more railroad companies."

"SEC. 4. The provisions of this act shall be applicable in all cases where the election was held upon the subscription of stock and the issuance of bonds prior to the 21st day of January, A. D. 1868."

In the language before quoted, this act was intended to aid, and not to destroy, the proceedings in subscribing for stock and issuing bonds. In this case, the election was held prior to the 21st day of January, 1868; and, although a portion of the bonds had been issued prior to the passage of the act, we are of

the opinion that they are within its protection. It was intended to reach cases where the majority of the electors had voted in favor of issuing the bonds, "whether such orders and elections, or either of them, have been in compliance with the statutes in such cases made and provided or not."

§ 1034. *A subsequent agreement by a municipal corporation to cancel its stock in the railroad to which its bonds have been issued does not affect the validity of such bonds.*

It is contended again, that, by an agreement made on the 19th of June, 1868, the stock of the county in the company was canceled, and that, therefore, there was no consideration for the sale of the bonds. By the agreement referred to, the county undertook to deliver to the road the \$50,000 bonds, yet unissued, to sell and deliver its interest in the capital stock of the company, and in the meantime to cause its stock to be voted upon, as the company should direct, provided that the road should be built and completed to the southern boundary of Johnson county within eight months, and to the town of Olathe within five months, from date, the bonds to be issued and placed in the hands of a depository, to be delivered upon the performance of the agreement. A completion of the road at an earlier period than was required (no time being specified in the original proposition), and at a probable increase of expense, seems to afford a good consideration for any lawful agreement on the part of the county. We fail to discern the force of this objection, or of the point connected with it, that the stock became thereby canceled. The commissioners had authority to sell the stock (Compiled Laws of Kansas, 1862, 409); and, unless prohibited by law, an incorporation may become the holder of a portion of its own shares. *City Bank v. Bruce*, 17 N. Y., 507.

§ 1035. *A practical compliance with the terms of subscription to stock is sufficient.*

We do not regard the circumstance that the road was located and built a fraction of a mile distant from the town of Olathe as of any importance. It was a practical compliance with the requisition in that respect, and was accepted and received by the county as a satisfactory performance of the contract. The bonds were issued after the location, and the interest was paid from time to time without objection or complaint in that respect. It is too late now to set up an objection which is an evident afterthought.

§ 1036. *Notice to a trustee in the deed of trust does not affect the bona fide holding of the bondholders.*

It is contended, further, that there is no *bona fide* holding of these bonds, and that all defenses may have their full effect in this case. "The court below finds that the plaintiff, Thayer, had notice of all the facts and circumstances connected with the issue of these bonds by Johnson county, and of the agreement of June 19, 1868, and of the facts with regard to the assessment of the stock by the railroad company and of its non-payment, and of the issue of stock as a bonus to the purchasers of the bonds of the railroad company, and of the facts with regard to the completion of the road to the town of Olathe; but his co-trustees had no such notice, nor did the purchasers of the first mortgage bonds have such notice, except so far as they are charged with constructive notice by reason of the knowledge of Thayer, one of the trustees."

It is a part of the case, that, on the 1st day of January, 1869, the railroad company executed to Nathaniel Thayer, F. W. Palfrey and George W. Weld, the plaintiffs in this suit, a deed of trust conveying a large quantity of lands, and transferring, among other things, its subscriptions from towns and coun-

ties, including that now in suit, to secure the payment of \$5,000,000 of its negotiable bonds to be issued by the said company, as therein particularly described; that, before the coupons now sued upon had become payable, the railroad company had issued those bonds, which are now outstanding and unpaid to the full amount thereof. The question then arises, whether notice to one of the trustees in this deed of trust is notice to the holders of the mortgage bonds in such manner that, in a suit by the trustees to enforce payment of the county bonds, the character of a *bona fide* holder without notice is lost. In *Curtis v. Leavitt*, 15 N. Y., 9, the court say: "If Graham, one of the trustees, was chargeable, as director of the company, with knowledge that there had been no previous resolution, notice to him was not notice to his *cestuis que trust*. He did not stand to them in the relation of an agent. He was selected and appointed as a trustee by the company, not by the *cestuis que trust*. His powers and duties were prescribed by the company, not by the bondholders. There were, at the time of the execution of the trust deeds, no bondholders, no *cestuis que trust*. It is a necessary attribute of an agency that it should be created by the principal. . . . In this case, as the relation of principal and agent did not exist between the bondholders and Graham, notice to him, or knowledge by him, that there was no previous resolution, was not constructive notice to the bondholders."

And, again, on the page following, it is said: "The trustees are not to be regarded as the agents of the purchasers of the bonds and mortgages assigned to them. No consideration proceeds from them. They were mere assignees of those securities, coupled with no interest, in trust to hold them as security for the payment of all the mortgage bonds that should thereafter be sold or negotiated by the company. . . . Whoever purchased the mortgage bonds became purchasers of the bonds and mortgages so assigned as security for their payment, or of an equitable right to hold them as such security." We think this is sound doctrine, and that it establishes the proposition that notice to Thayer did not operate to destroy the *bona fide* holding of the bondholders under the deed of trust in which he was named as one of the trustees.

We have noticed all of the objections which we deem of importance, and are of the opinion, upon the whole case, that the judgment should be affirmed; and it is so ordered.

BLOCK v. COMMISSIONERS—COMMISSIONERS v. BLOCK.

(9 Otto, 686-699. 1878.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—These are writs of error complaining of one judgment. The plaintiff Block brought suit against the board of commissioners of the county of Bourbon, Kansas, to recover the amount of \$16,800 alleged to be due him upon past-due interest coupons detached from bonds made and issued by that county. From the findings of fact made by the court below it appears that the plaintiff is the *bona fide* owner of twenty of the bonds from which part of the coupons in suit were taken, and that he purchased them in open market without actual notice of any defense the county now sets up against them. The remaining coupons are the property of one William J. Lewis, delivered by him to the plaintiff to be collected, not for the benefit of Block, but for that of Lewis, the true owner. Whether in view of such a finding a recovery for them

can be had in this suit, if there were no other objection to it, we do not now determine. There is another and graver question to be considered. The Lewis coupons had been in litigation before this suit was commenced. In January, 1873, he applied to the supreme court of the state for a *mandamus*, suggesting that he was the owner of bonds of the county, one hundred in number, and numbered from one to one hundred, and of the coupons attached to the same; that he was the holder, bearer and owner of one hundred coupons due and payable July 1, 1872, part of the coupons now in suit; that a tax had been levied and collected amply sufficient to pay those coupons, but that the county had refused to pay them. The suggestion further represented that the proper officers of the county had neglected and refused to take the necessary steps to make provision for the payment of the coupons falling due in 1873, in January and July, and by an alternative writ the board of commissioners of the county were commanded to pay the coupons due in 1872 and to provide for levying a tax sufficient to pay the coupons as they should fall due in 1873.

To this alternative writ the commissioners answered in substance, denying the validity and the obligation of the bonds. Much of the answer was formal and quite immaterial, but there was also much of substance. It was denied that there had been any proper submission to the electors of the county of the question whether the county should subscribe to the stock or issue bonds to the railroad company to which the bonds were issued, to wit, the Tebo & Neosho Railroad Company. The answer further averred that though there was a submission of the question to the electors whether the county would vote \$150,000 to any railroad running east to connect with the aforesaid road, a majority of the votes cast at the election ordered was cast against the proposition. It further avers that though the commissioners canvassed the vote and decided from the returns before it that a majority had voted in favor of the proposition, the returns from one township were not brought in until after the canvass had been completed and until after the board had adjourned, and that if the return from that township had been made in season and had been counted, a majority would have appeared against the proposition submitted. This belated return remained unopened until years afterwards, until after the bonds had been issued, and after a new submission to the electors had resulted in the vote of a decided majority in favor of the bonds. This new submission, it was averred, was made in 1869, and it was not until after the vote had been taken that a subscription was made to the stock of the Tebo & Neosho Railroad Company and the bonds of the county were issued in payment. At the time when the subscription was ordered to be made and the bonds were directed to be executed and delivered to the railroad company, it was also ordered that the stock of the county in the railroad company should be sold to the Land Grant & Trust Company of New York for the sum of five dollars. Upon the issue thus tendered and made up the case was tried by the supreme court of the state and a judgment was given for the defendant. What the effect of this judgment was has a most important bearing upon the inquiry whether there can be any recovery in the present suit for the coupons belonging to Lewis, the relator in the application for the *mandamus*.

§ 1087. *If the validity of municipal bonds was tried on an application for mandamus, the decision is conclusive in a subsequent suit on the bonds.*

To obtain a clear appreciation of that, it is necessary to observe closely what was in issue in the proceeding in the state court, and consequently what was adjudicated. It was not denied that Lewis was the owner of the one hundred

bonds to which the coupons now in suit for his use were attached. It was not denied that the coupons were due and unpaid, as averred in the suggestion and alternative writ. Nor was it denied that the officers of the county had power, and that it was their duty, to levy a tax to pay them and to make payment, if they were a lawful debt of the county. In legal effect all this was admitted. The only issue tendered and the only issue tried was that tendered by the answer; namely, that the bonds and coupons were unauthorized by law, because a majority of the voters of the county, voting at the election in 1867, had not sanctioned a subscription to the stock of the railroad company, and approved the proposition submitted for the issue of the bonds. If they had not, the bonds were unauthorized, and the coupons, of course, constituted no debt of the county. Then the relator was not entitled to his *mandamus*. If, on the other hand, the bonds and coupons were lawfully issued, either in pursuance of the vote of 1867 or that of 1869, they did constitute a debt of the county, and a *mandamus* to enforce their payment necessarily followed. The court gave judgment for the defendant, as we have seen, and thus decided that the bonds and coupons held and owned by Lewis were invalid. Such was the necessary effect of the judgment. The issue tried was a material one, and the judgment could not have been rendered without deciding it. Now that a judgment in a suit between two parties is conclusive in any other suit between them, or their privies, of every matter that was decided therein, and that was essential to the decision made, is a doctrine too familiar to need citation of authorities in its support. A few cases go farther and rule that it is conclusive of matters incidentally cognizable, if they were in fact decided. To this we do not assent. But it is certain that a judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which it must necessarily have been founded. As between Lewis, therefore, and Bourbon county, the judgment of the state supreme court finally established that the coupons which he held, and which he subsequently placed in the hands of Block, the plaintiff in the present suit, were invalid and constituted no part of the debt of the county. As that judgment was pleaded in the present case, it was a conclusive answer to the suit so far as it was founded upon those coupons. The plaintiff's writ of error, consequently, cannot be sustained.

§ 1038. *A bona fide purchaser of bonds is bound to look no further than the authority to issue them, and that the proper officers have decided that all precedent conditions have been complied with.*

The coupons held and owned by Block are in a different position. As between him and the county there is no estoppel. He was not party to the suit in which the Lewis coupons were adjudged invalid, and he is unaffected by the judgment therein. Of the coupons which he holds he is a *bona fide* holder, having purchased them for a valuable consideration, without actual notice of any defense which could be set up against them. When he bought he was under no obligation to look farther than to see that there was legislative authority for the issue of the bonds, and that the conditions upon which it was allowed to be exercised had been fulfilled. If there was such authority and the precedent conditions had been performed, the bonds and coupons are valid obligations of the county, which he, as their owner, may enforce. The bonds are dated July 1, 1870, and on their face they purport to have been issued by order of the board of county commissioners of the county of Bourbon, Kansas, dated March 8, 1867, and they are made payable to the Tebo & Neosho Railroad Company or bearer. The authority under which it is claimed they were

issued was an act of the legislature of the state of February 10, 1865, amended by an act passed February 26, 1866. By that it was enacted "that the board of county commissioners of any county to, into, from or near which, whether in this state or any other state, any railroad is or may be located, may subscribe to the capital stock of any such railroad corporation in the name and for the benefit of such county, not exceeding in amount the sum of \$800,000 in any one corporation, and may issue the bonds of such county, in such amounts as they may deem best, in payment of said stock; . . . but no such bonds shall be issued until the question shall first be submitted to a vote of the qualified electors of the county at some general election, or at some special election to be called by the board of county commissioners, . . . and in submitting such question said board of directors shall direct in what manner the ballots shall be cast. If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners of the county shall issue the same."

In this act several things are to be noticed. The bonds were allowed to be issued in payment for subscriptions to stock of *any* railroad company, whether its road was then located, or might be thereafter, whether it *was in the state or out of it*, in the county or out of it, provided the question of subscription to the stock and issuing the bonds was first submitted to a vote of the qualified electors, and a majority was found in favor of issuing the bonds. Another thing is manifest. It was the legislative intention that the board of commissioners should be the body which should submit the question of subscription and issue of the bonds to popular decision, and they were also deputed to determine the result of the election,—we mean the board as it was constituted at the time when an election might be held. Authorized by this statute, the board of county commissioners, on the 8th of March, 1867, submitted to the electors of the county the question whether there should be subscribed for the county \$150,000 to the stock of any railroad company then organized, or that might thereafter be organized, that should construct a railroad, commencing at a point on the Tebo & Neosho Railroad, running westward, *via* Fort Scott (in Bourbon county), and should issue bonds to the company for the same. Pursuant to this submission an election was held, the returns of which were canvassed at the proper time by the board, and the result declared to be that a majority of the votes had been cast in favor of the subscription and the issue of the bonds. This was on the 10th of May, 1867. The declaration of the result was duly entered upon the minutes of the board. Subsequently an additional return was made from one township, which was not before the board when the canvass was made. Had it been, the result would have been different. But this return was not opened until June 27, 1872, long after the bonds had been issued. Upon the records of the board nothing appeared to impeach the canvass made in 1867, though in the files of the office the belated poll-book remained unopened. It is hardly necessary to say that the board, *as it was in 1872*, had no authority to make a new canvass of the election held in 1867, after the bonds had been issued and purchasers had bought on the faith of the canvass first made.

The bonds, it is true, contain no recitals. If they did contain a recital that an election had been held, and that a majority had voted for the issue of the bonds, the recital would have been conclusive upon the county, and a purchaser would have needed to look no farther than to the act of the legislature. This is according to all our decisions. But, in the absence of any recital, it may be

conceded he was bound to inquire whether a majority vote had been returned for the issue of the bonds. But where was he to inquire? Plainly only of the board, whose province it was to ascertain and declare the result of the election. Had he gone to their records, they would have shown that the popular vote was in favor of the bond issue. They showed nothing else until 1872. He was not bound to canvass the vote for himself, or to revise and correct a mistaken canvass, any more than he was bound to inquire into the qualification of the electors. And if, relying upon the canvass of the board and the declared result, he accepted the obligations of the county, it would be a strange doctrine were we to hold that a second canvass, made many years afterwards, could reverse the first and annul rights that had been acquired under it. There is no such law. For all legal purposes the result of an election is what it is declared to be by the authorized board of canvassers, empowered to make the canvass at the time when the returns should be made, until their decision has been reversed by a superior power, and a reversal has no effect upon acts lawfully done prior to it. The county of Bourbon is therefore estopped, in a suit by a bondholder whose bonds were issued in 1870, from asserting that the canvass of 1867 was incorrect, and that in fact no majority of the qualified electors had voted in favor of the issue of the bonds. All that took place afterwards, all the new evidence that was discovered, the new election ordered and held in 1869, and the action of the board after the bonds were issued, are immaterial. It follows that much of the argument of the learned counsel for the county, who has argued against the validity of the bonds and coupons, is unsound. It assumes, what cannot be admitted, that a majority of the votes cast at the election in 1867 was against the issue of the bonds, when it was conclusively established by the decision of the tribunal appointed by law to determine the result of the election, that the contrary was the fact.

We pass now to the consideration of some of the objections made to the order of the county board of March 8, 1867, submitting to the qualified electors the question whether there should be a subscription made to the stock of any railroad organized, or that might thereafter be organized, that should build a railroad commencing at a point on the Tebo & Neosho Railroad and running westward to Fort Scott, and whether county bonds should be issued to said company therefor. It is said this did not authorize a subscription to the stock of the Tebo & Neosho Railroad Company, or the issue of bonds to it. The objection, in view of the facts that appear in the record, is of no weight. When the order was made, that company had been incorporated by the legislature of Missouri, and had projected its road along and near the northern boundary of that state through a county adjoining Bourbon. The order of the county board contemplated a connection of Fort Scott with that road, and the issue of bonds to any company that would make that connection. A part of the connecting road was necessarily in Missouri and a part in Kansas. The Missouri corporation could only build, by its own direct action, to the state line, and a Kansas corporation could only build the part in Kansas; but the Tebo & Neosho Company could and did cause the entire line to be constructed. It had power by its charter to extend, construct, maintain and operate its railroad and branches beyond the limits of the state, so far as Missouri could give it that power. In 1869 that company, under legislative authority, sold all its privileges, rights, powers and franchises to the Missouri, Kansas & Texas Railway Company, organized under the laws of Kansas, stipulating that the vendee

should assume all indebtedness incurred for the construction, or otherwise, of the line between Sedalia, Mo., and Fort Scott (in Bourbon county, Kansas). Accordingly the road begun by the Tebo & Neosho Company was constructed and extended to and beyond Fort Scott, and is now in operation. There can be no doubt that this was a compliance by the Tebo & Neosho Company with the conditions prescribed by the order of the county board. It built the road through the agency of the Kansas corporation, and it therefore answered the description made in the order of submission. The county commissioners subscribed to its stock and issued the bonds to it, or bearer, and their action was warranted, as we have said, by the terms of the submission and its approval. It was not a case of authority given to issue bonds to one railroad company, and their issue to another.

We have said enough in refutation of the argument that because the Tebo & Neosho Railroad Company was a Missouri corporation, and could not therefore extend its road into Kansas, it was excluded from the roads contemplated in the order and election. If it was, then every railroad company was excluded, for even a Kansas company could not build a road into Missouri. Yet the order and election meant something. No company was named in the order. None could be. But a description was given that pointed unmistakably to the company that caused the work to be done. In *Commissioners of Johnson County v. Thayer*, 94 U. S., 631 (§§ 1030-36, *supra*), this court held that under the Kansas statute of 1865 it is not necessary to name any particular company in the submission to the popular vote. A description of a railroad company may well be made without mentioning its corporate name. This is all that, in our judgment, these cases require. We have not deemed it necessary to invoke in aid of our conclusions the provisions of the curative act of 1868, for we think it is not open to question that a majority of the qualified electors of the county approved the subscription that was made and the issue of the bonds. That was finally determined by the board, whose duty it was to canvass the result of the election and declare the result. Their decision has never been reversed by any competent authority, and it cannot be impeached collaterally. Nor do we place any reliance upon the second order made in 1869, and the election held thereunder, resulting in a large majority in favor of the subscription and issue of the bonds. The bonds stand on the order and vote of 1867, as determined by the canvassing board at that time.

Nor can we yield assent to the claim that the acts of 1865 and 1866 were repealed by the General Statutes of 1868. Certainly there was no express repeal, and we can discover no necessary implication of a repeal. And it may be added that the supreme court of the state seems to regard those acts as still in force. *Lewis v. Commissioners*, 12 Kan., 186, gives no intimation to the contrary, though the court had before it the questions we are now considering. In *Morris v. Morris County*, 7 id., 576, decided in 1871, the court said: "The acts of 1865-66 have never been expressly repealed; and if they have ever been impliedly repealed, all rights, power and authority that had accrued under them prior to their repeal had at least been impliedly reserved." And again: "Whatever was done under the acts of 1865 and 1866, prior to the passage of the acts of 1868, continued in force the same as though the acts of 1868 had never been passed." We have not overlooked the opinion delivered by the supreme court of the state in *Lewis v. Commissioners*, *supra*. The judgment in the case was not given until after the bonds were issued, and after the rights of the holders thereof had become fixed. We are, therefore, at liberty to fol-

low our own convictions of the law. To those expressed by the state court we cannot assent. They are not in harmony with many rulings of this court, made and repeated through a long series of years, and they are not such as, in our opinion, would administer substantial justice if applied to this case.

Judgment affirmed.

In the first case MR. JUSTICE CLIFFORD dissented.

CONVERSE v. CITY OF FORT SCOTT.

(2 Otto, 508-509. 1875.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The general legislation of Kansas confers unusual power upon municipal corporations in that state. Not only are they authorized to subscribe for and take stock in any railroad company duly organized under any law of the state or territory, and to loan their credit to such corporations upon such conditions as they may prescribe (Acts of 1869, c. 29), but the act of February 28, 1868 (Gen. Stat., c. 19), confers upon some of them much more extended powers. It enlarges the range of municipal authority and duty far beyond the limits within which such corporations are commonly understood to be confined. That was an act providing for the incorporation of cities of the second class, of which the city of Fort Scott is one. By the twenty-ninth section, the mayor and council of each such city governed by the act are empowered to enact, ordain, alter, modify or repeal such ordinances as it shall deem expedient "for the benefit of trade and commerce," among others. Section 30, subsection 32, grants power "to take all needful steps to protect the interest of the city, present or prospective, in any railroad leading from or towards the same, but not to take stock in any railroad without a vote of a majority of the legal voters." Subsection 33 of section 30 authorizes all such ordinances as may be expedient, and not inconsistent with the laws of the state, maintaining *inter alia* "the trade, commerce and manufactories" of the city; and the thirty-seventh subsection (which has a very direct bearing upon the case now before us) empowers the mayor and council "to take private property for public use, or for the purpose of giving the right of way or other privilege to any railroad company, or for the purpose of erecting or establishing market-houses and market-places, or for any other necessary public purpose. Provided, however, that in all cases the city shall make the person or persons whose property shall be taken or injured thereby adequate compensation therefor, to be determined by the assessment of five disinterested householders of the city," etc. Subsection 39 authorizes the mayor and council to borrow money on the credit of the city, with no other limitation than that no money shall be borrowed on any contract thereafter made exceeding \$2,000, without the instruction of a majority of all the votes cast at an election held in the city for that purpose; and subsection 40 authorizes the issue of bonds to fund any and all indebtedness existing, or subsequently created, due or to become due.

§ 1039. *Legislation held to warrant the donation by a city of right of way to a railroad.*

By these sections, the legislature manifestly contemplated a lawful acquisition by the city of interests in railroads leading from or towards it, and authorized municipal legislation in their favor for the promotion of trade and commerce. The thirty-seventh section expressly conferred the power to give

to a railroad company a right of way into or through the city; authorized the expenditure of money to enable the city thus to aid the company; and, for the purpose of such aid, empowered the city to make use of the state's right of eminent domain. Nothing can be clearer, it appears to us, than that the power to make a donation of a right of way, or of a site for station-houses, machine-shops, and other like conveniences, was thus vested in the mayor and city council.

If we are correct, therefore, it remains only to inquire whether the issue of the bonds held by the plaintiff was within the authority thus conferred on the city. On the 25th day of July, 1870, a city ordinance was passed by which it was ordained, among other things, that a special election should be held in the several wards of the city on the 30th of August next following, for the purpose of submitting to the qualified electors the question of authorizing the mayor and city council to issue bonds in a sum not exceeding \$25,000, for the purpose of procuring the right of way for the road of the Missouri, Kansas & Texas Railway Company through the corporate limits of the city, and also procuring grounds for depots, engine-houses, machine-shops and yard-room, and donating the same to the company. By the eighth section of the ordinance it was declared to be the duty of the mayor and council, in case the election should result in favor of the donation, to confer forthwith with the officers of the railroad company and ascertain at the earliest possible moment the route selected by the company for the line of their road through the corporate limits of the city, and also the ground chosen by them for depots and other purposes, and to proceed in such manner as might be deemed most conducive to the interests of the city; to purchase so much land as might be necessary for the right of way, and also twenty-five acres exclusive of the right of way, at such convenient point within the city as the officers of the railroad company might select for depots, engine-houses, machine-shops and yard-room, and to issue the bonds of the city to an amount not exceeding \$25,000 to pay for the same. The tenth section ordained that, as the mayor and city councils purchased or procured the right of way and grounds above specified, they should donate or convey the same for a nominal consideration, or cause the same to be donated or conveyed for a nominal consideration, by an indefeasible title in fee simple to said company; provided, however, that, in their judgment, the company had first given evidence of their determination to comply with certain conditions specified in the fourth section of the ordinance.

At the election thus ordered the proposition submitted was approved by a large majority of the legal voters, and the case finds that the railroad company did comply with the conditions mentioned in the ordinance.

Why this action of the city councils and the donation proposed to be made under it were not authorized by the act of the state legislature of February 28, 1868, we are unable to perceive, and the argument submitted to us on behalf of the defendant in error has made no serious attempt to show. Indeed, it may be doubted whether the act of 1868 was called to the attention of the circuit court. It has been contended here that another act, passed in 1869, gave no such authority to the mayor and city council; but the argument quite overlooks the grant of powers expressly made by the act of 1868. The act of 1869 authorized the council of any city to subscribe for stock for the city in any railroad company organized under the laws of the state or territory of Kansas, or to loan the credit of the city to such company upon such conditions as might be prescribed by the city authorities, provided such subscription was previously

assented to by a majority of the qualified electors voting at a general or special election; and, in case such an assent was given, the act made it the duty of the city authorities to make the subscription. This act speaks only of subscriptions and loans of credit, but the act of 1868 contemplated donations.

§ 1040. *Authority granted to a city to donate right of way held to authorize it to issue its bonds in lieu thereof.*

If, then, the mayor and city council were authorized to make donations of land for the right of way and other privileges to a railroad company and to expend money for the purpose of acquiring land to be given, and if they were authorized to borrow money to an unlimited extent when instructed so to do by a popular vote, and further to issue bonds to fund any indebtedness of the city, existing or to be created, it is clear they had the power to agree to give upon conditions. We have noticed that, by the ordinance of July 25, 1868, conditions were attached to the proposed gift,—conditions to be performed by the railroad company. It was after this—after the submission of the proposition to the people and its approval, and after a compliance with its conditions by the company,—that the ordinance of December 22, 1870, was passed. Its preamble recites the submission of the proposition to issue the bonds for the purposes mentioned to a popular vote; its approval by a large majority; that the railway company had so far complied with the conditions on their part to be done and performed as to enable them to demand from the city the right of way and grounds; that in the exercise of this right they had made a proposition to the city to accept the \$25,000 of bonds so voted in lieu of said grounds and right of way, and in full satisfaction and discharge of all the obligation resting on the city in relation thereto, and that, after full and careful consideration, it was deemed advisable to accept the proposition and issue to the company the bonds. With such a preamble the ordinance directed the mayor and city clerk to execute and deliver to the railroad company bonds to the amount of \$25,000, for the avowed purpose of discharging the city's obligation.

The bonds were accordingly issued, and registered in the office of the auditor of the state, who certified upon each that it had been regularly and legally issued, that the signature to it was genuine, and that it had been duly registered in accordance with a statute of the state. The plaintiff then purchased the bonds and coupons before their maturity, without any actual knowledge of the defenses set up against them. Indeed, no defense is set up except an alleged want of authority for their issue,—a defense which, in view of the legislation of the state and of the city ordinances, has, in our opinion, no foundation. Certainly it has none, unless a power conferred upon a municipality is different from what the same power would be when possessed by another holder; a doctrine which no one will venture to assert. It follows that, on the facts found by the circuit court, the judgment should have been given for the plaintiff.

Judgment reversed, and cause remanded for a new trial.

SCIPIO v. WRIGHT.

(11 Otto, 665-677. 1879.)

ERROR to U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—At the trial of this case in the circuit court the extraordinary number of thirty-three exceptions were taken by the plaintiff in error, and signed by the judge. It does not, however, always happen that the merits

of a case brought in error are to be measured by the number of exceptions taken in the inferior court, or by the number of errors assigned. In this case the real questions — the only ones that need particular attention — are few.

The plaintiff below brought suit upon twenty-five bonds, or rather notes, each for the sum of \$1,000, which, as he alleged, had been issued by the township in pursuance of and under authority of law. Of course, it was incumbent upon him to prove that the town was authorized to create the instruments, and to dispose of them in the manner in which disposition of them was made. The authority relied upon was an act of the legislature passed on the 16th of April, 1852, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York & Erie, or Susquehanna & Cayuga Railroad." The first section enacted as follows:

"It shall be lawful for the supervisor of any town in the county of Cayuga" (the town of Scipio being one), "and the assessors of such town, who are appointed by this act as commissioners to act in conjunction with the said supervisor in effecting and executing the purposes of this act, to borrow, on the faith and credit of said town, such a sum of money as they may deem necessary, not to exceed \$25,000, for a term of time not to exceed twenty years, with such rate of interest as may be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds on which the interest shall be made payable annually or semi-annually during the term said money may be borrowed. . . . All moneys borrowed under the authority of this act shall be paid over to the president and directors of such railroad company (now organized, or such company as may be organized, according to the provisions of the general railroad law, passed April 2, 1850), as may be expressed by the written assent of two-thirds of the resident tax-payers of said town, to be expended by such president and directors in grading, constructing and maintaining a railroad or railroads passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna & Cayuga Railroad, or the New York & Erie Railroad: *Provided always*, that the said supervisor and commissioners shall have no power to do any of the acts authorized by this act, until a railroad company has been duly organized according to the requirements of the general railroad law for the purpose of constructing the aforesaid described railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga county, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment roll next previous thereto."

The second section we also quote, as follows, so far as is needful: "SEC. 2. It shall be lawful for the supervisor and commissioners of any town in said county, on obtaining and filing such assent, as provided in the first section, to subscribe for and take in the name of and for said town such a number of shares of the capital stock of such company as shall or may be organized for the purpose of constructing the aforesaid described railroad or railroads, as will be equal to the amount of the bonds executed under the authority of this act."

The tenth section made it the duty of the electors of the town to elect at the next annual town meeting two commissioners to act in conjunction with the town supervisor in carrying into effect the provisions of the act. At the time when this act was passed, so far as it appears, there was no organized company in existence with power to build such a railroad as the act described; but on the 23d of August next following, articles of association of such a company, organized under the general railroad laws of the state, for the purpose of constructing a railroad from Lake Ontario to the Cayuga & Susquehanna Railroad, passing through Auburn and Scipio, were filed in the office of the secretary of state. Subsequently to the formation of this company, the supervisors and assessors of the town obtained a written assent of three hundred and one residents and taxables of the town appearing on the assessment roll for the year 1852, and on the 8th of December, 1852, two of the assessors made oath that the persons whose written assents were attached thereto comprised two-thirds of all resident tax-payers of the town of Scipio on the assessment roll thereof for the year 1852. These assents and the affidavit indorsed thereon were filed in the clerk's office of Cayuga county on January 11, 1853. On the 1st of March, 1853, two railroad commissioners were duly elected for the town, and on the 16th of May next following they, together with the supervisor, in the name and for the town, subscribed upon the books of the said railroad company for five hundred shares, of \$50 each, of its capital stock. On the 20th of the same month they executed by their official signatures the twenty-five notes in suit, payable to bearer. Eight of them were sold by the commissioners to Slocum Howland at par, and the proceeds of the sale were paid to the railroad company on account of the stock subscription, the commissioners taking from the company for the town a certificate for the five hundred shares of stocks, which, so far as it appears, the town now holds. To this extent money was borrowed upon the bonds and paid over in accordance with the statute. Howland also bought the remaining seventeen bonds from the railroad company, to which they had been delivered by the railroad commissioners under an arrangement we shall notice hereafter, and the company indorsed the certificate of stock as full paid. It is out of these facts that the principal questions involved in the case arise.

§ 1041. *In assenting to a municipal subscription for stock, it is not necessary that voters should "express the railroad" by its corporate name.*

It is contended by the plaintiff in error that the bonds were unauthorized, because, as it is alleged, the written assent of the tax-payers did not conform in substance or meaning to the requirement of the statute, in that it did not "express the railroad corporation to which the moneys to be borrowed by the town should be paid." We think this position is quite untenable. The identification of the company in the written assent is as perfect as it would have been had it been described by its corporate name. The statute did not require that the tax-payers should "express" (that is, designate) the company by its name. Any mode of description that designated it was sufficient. The assent authorized the commissioners to pay the money borrowed, for which the bonds were to be given, "to the president and directors of a railroad company organized according to the requirements of the general railroad laws for the purpose of constructing a railroad connecting Lake Ontario with the Susquehanna & Cayuga Railroad, and passing through the city of Auburn." This was in strict conformity with the description given in the statute. It fitted exactly the company organized in August, 1852, and there cannot be a doubt that the

assent was intended to designate that company. There was no other company in existence to which the description could apply. Unless, therefore, the word "express," as used in the statute, was intended to convey some other meaning than "described" or "designated" (which can be maintained with no show of reason), the assent in form was all that was required for authority to issue the bonds.

§ 1042. *Municipal bonds are not void because they were not issued until after the assessment roll of the year on which they were founded had "spent its force."*

A second position taken by the plaintiff in error is that all the bonds except three are void, because they were issued after the assents of the tax-payers as appearing on the assessment roll of the town for the year 1852 had spent their force and ceased to be authority. This is founded upon the phraseology of the statute, which requires as a prerequisite to any action by the commissioners that the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll made next previous to the time such money may be borrowed, shall be obtained, verified, and filed in the clerk's office. Recalling the facts, heretofore stated, the written assent of the required number of tax-payers on the assessment roll of 1852 was obtained and verified, and it was filed on the 11th of January, 1853. Then the authority to issue the bonds, borrow the money, subscribe for the stock and elect railroad commissioners became perfect. The town did elect railroad commissioners on the 1st of March, 1853, the subscription for the stock of the company was made, a debt of \$25,000 therefor was incurred, and the bonds or notes for an equal amount were executed, and at least some of them were sold at par and the proceeds of the sale were paid on account of the subscription, all before any new assessment roll could be completed and before the law required any to be made. For all this there was complete authority. Everything had been done which was required to authorize the creation of the indebtedness to the railroad company. Did the legislature intend that after the town had lawfully created a debt and lawfully executed bonds with which to borrow the money necessary to pay it (bonds confessedly authorized at the time when they were made), the bonds should become void if the money could not be borrowed within two months and a half, or between May 20 and August 1, 1853? Did it intend thus to leave the debt in existence, and at the same time to take away the power to provide means for its payment? Such a construction of the act would be most unreasonable. It would be standing upon the letter and ignoring the spirit of the statute. It would be closing our eyes to the only substantial reason for requiring the assent of two-thirds of the resident tax-payers before the commissioners could exert the power given to them by the legislature. That was to ascertain whether the tax-payers would consent to the creation of a town liability, not to ascertain how or when the debt, when incurred, should be evidenced. The substance of the power was the creation of a town debt. All the rest was formal. The legislature, it may be admitted, did not intend that the power conferred upon the railroad commissioners should continue indefinitely. Hence the assent of two-thirds of the taxable residents as appearing on the assessment roll made next previous to the borrowing of the money was required. But evidently by this was meant that the assent should be given by the tax-payers appearing on the roll made next before any debt of the township should be incurred. It was protection against a town debt that was intended, rather than protection against the form of the debt or the shape it might assume after it had been incurred or when the security for it should be given. Two distinct powers were given by

the statute, each dependent for its exercise, though not for its creation, upon the prior consent of the taxables. The one was described by the first section. It was to borrow money and execute bonds therefor, paying over the money borrowed to a railroad company to be expended in grading, constructing and maintaining its road. This section made no reference to a subscription for the stock or to a debt directly to the railroad company.

But the second section authorized a subscription to the capital stock and the consequent assumption of a legal liability to the company, equal to the amount of the bonds issued, which might be discharged afterwards by levying a tax, or by borrowing money, giving bonds therefor, and paying it over. Nothing in the act postponed a subscription for stock until the money to pay for it could be borrowed. This debt was incurred before the assessment roll of 1853 had any existence. The right to incur it when it was incurred was, therefore, complete. The exercise of the power was warranted by the written assent filed. For these reasons we think the instruments sued upon are not invalid, because they were not issued until after August 1, 1853, when the assessment roll for that year was by law required to be completed.

§ 1043. *Under the laws of New York and the decisions of its highest courts, it is not competent for a municipal body to exchange bonds directly for railroad stock.*

The only other question raised by the assignments of error, and by the numerous exceptions, is whether the circuit court erred in refusing to rule, as requested by the defendant, that the plaintiff could not recover for the last seventeen bonds, because, instead of having been issued for money borrowed, they were issued directly to the railroad company in exchange for its stock. This objection has no application to the first eight bonds, numbered from 1 to 8 inclusive. They were sold at par, and the proceeds were paid over to the company. This was, as we have said, a substantial borrowing. The facts respecting the remaining seventeen, as they appear in the record, may be thus summarized:

On the 7th of January, 1854, the railroad company received from the "railroad commissioners" of the town the seventeen bonds, nominally at par, and indorsed "full paid" on the certificate of stock, which the town had previously taken, and upon which \$8,000, the proceeds of the first eight bonds, had been paid. This arrangement was accompanied by a written understanding that the company might at any time within eight months from October 11, 1853, redeliver the bonds, or any part of them, to the town, and reduce the amount of credit on the certificate accordingly; and that if the company should sell the bonds for more than par, it should account to the town for the excess, but that the town might at any time within the said eight months, and prior to the sale of the bonds by the company, have the right to demand the redelivery thereof on payment to the company of the par value. The bonds were never redelivered, nor were they demanded. Some time after January 7, 1854 (when does not exactly appear), Slocum Howland bought the seventeen bonds from the railroad company, with notice that money had not been borrowed upon them, but that they had been transferred by the town supervisor and railroad commissioners, or one or more of them, in the first instance to the company in exchange for its stock. What Howland paid for them, whether the company obtained their full par value, is not proved.

Howland held the bonds until 1874, after they became due, when he sold them to the plaintiff, taking his note for the whole price, and that note remains unpaid. Neither Howland, therefore, nor Wright, the purchaser from him,

stands in the position of a *bona fide* purchaser without notice of the exchange of the bonds for stock. Had either of them been such a purchaser, the plaintiff's right to recover could not be gainsaid. But the question now is, whether the fact that the bonds were not issued for borrowed money, but were exchanged for stock of the railroad company, is a defense for the town against a holder who, when he purchased, had notice of the manner of their issue. Were the question an open one, it would seem that it ought not to be a defense. It might be regarded as a fair presumption that the bonds were sold to Howland for not less than their par value, and that the company received their full amount in money; or the transaction might be regarded as practically a borrowing of the money by the town through the agency of the railroad company. So far as discharging the debt of the town for its stock subscription is concerned, and so far as relates to obtaining a full-paid certificate, the transaction is, in legal effect, the same as if the money had been borrowed by the town directly and paid over to the company. And, if it had appeared affirmatively that Howland had paid the full face of the bonds and interest, without any discount, when he bought, every object which the statute could have had in view in enacting that it should be lawful for the town officers to borrow on the credit of the town a limited amount of money and pay it over to the railroad company, executing town bonds therefor, would have been accomplished. In *Gould v. Town of Sterling*, 23 N. Y., 456, it was said by Selden, J., when speaking of a transaction like that we have now under consideration, where there had been an exchange of town bonds for railroad stock, "if what was done was the same in effect as if the money had been borrowed and paid over to the railroad company, the difference in form would not be material." Such a case, however, is not presented by this record.

The statute prescribed the manner in which the power it conferred should be exercised. The town was at liberty to subscribe for stock, but if bonds were used to pay for it the mode of use was directed to be borrowing money with them and paying the money to the railroad company. It is quite conceivable that the purpose of such a direction, instead of allowing an exchange of the bonds for the stock taken, was that the railroad company might obtain an amount of money equal to the amount of the bonds. This was important to the company, to the town as a stockholder, and to the public as interested in the projected railway. If the bonds might be delivered directly to the company in payment of the stock, it might sell them at a discount. Thus it would fail to obtain the assistance in building its road which the legislature contemplated it should have. Its stock would be practically sold for less than par, and it would not be worth as much to the town as it would be had all the money for which the bonds were given come into the company's treasury. Whether such were the motives that induced the peculiar phraseology of the statute or not, the highest court of New York has repeatedly construed it as prescribing the manner in which the bonds might be used or issued, and as denying the power to exchange them directly with the railroad company for the stock taken by the town. These decisions have been constructions of the identical statute we have now under consideration, and by which the bonds now in suit are alleged to have been issued. The construction given by the state court must, therefore, be our guide. *Starin v. Town of Genoa*, 23 N. Y., 439, was a suit for interest upon town bonds made under the act. They had been exchanged with a railroad company for capital stock taken for the town, and the exchange was accompanied by the same agreement as that made be-

tween the town and company in the present case. The plaintiff was a purchaser from the railroad company, with knowledge that it had received the bonds in payment of stock. In these respects the case was exactly like the present. The court of appeals ruled that issuing the bonds by exchanging them for the company's stock was not an execution of the power and authority granted by the statute, but an appropriation of them in a manner not contemplated by the legislature, or by the tax-payers' assent. The court said: "It was evidently the intention of the act that money should be raised and paid over to aid in the construction of a railroad, and no color is given to the idea or position that the credit merely of any town should be given, through and by which money might be raised." They therefore held that the bonds were issued without authority, and as the railroad company received them on a consideration not authorized, it was chargeable with a knowledge of their invalidity, and it never could have enforced them. It was further ruled that the plaintiff stood in no better position; that having purchased with notice of the manner in which they had been issued, he was not a *bona fide* holder. Gould v. Town of Sterling, 23 N. Y., 456, is a similar case, and the ruling of the court was the same. In The People v. Mead, 24 id., 114, we find a reassertion of the invalidity of bonds first negotiated by exchanging them for stock of the railroad company. The opinion was delivered by Denio, J. It was, however, said that a *bona fide* holder, who had no knowledge that the railroad company had received the bonds in payment for the stock taken for the town, would not be liable to the defense which existed against the railroad company. Horton v. Town of Thompson, 71 id., 513, is another case in which the court of appeals gave the same construction to another similar statute, holding that bonds exchanged for stock were unlawfully issued, and that a purchaser, with knowledge that they had been thus issued, could not enforce them.

It thus appears to be the settled construction given by the courts of New York to the act under which the bonds now in suit were issued, and to other similar acts, that they do not authorize an exchange of bonds for shares of the capital stock of railroad companies, and that a purchaser who had notice at the time of his purchase that such a disposition of the bonds was made by the town officers or railroad commissioners, cannot recover in a suit brought upon them. We find no decision of the court of appeals that is in conflict with what was ruled in the cases we have cited, or which weakens their authority, and as they are constructions of a state statute we are constrained to follow them. Gould v. Town of Oneonta, 71 N. Y., 298, to which we have been referred, presented an entirely different question. A statute enacted in 1859 had authorized the transfer of the bonds directly to the railroad company in payment of the stock.

Our conclusion, then, is that the circuit court erred in declining to instruct the jury, as requested, substantially, that upon the facts proven in the case (and not contradicted) the plaintiff was not entitled to recover upon any of the seventeen bonds, because the supervisor and commissioners did not issue them for borrowed money, but transferred them to the railroad company in payment of the stock subscription. We find no other error in the record. The judgment will be reversed and the cause remanded for a new trial; and it is so ordered.

Justices CLIFFORD and SWAYNE dissented.

COUNTY OF WILSON v. NATIONAL BANK.

(18 Otto, 770-779. 1880.)

ERROR to U. S. Circuit Court, Middle District of Tennessee.

Opinion by MR. JUSTICE WOODS:

STATEMENT OF FACTS.—On December 16, 1867, the legislature of the state of Tennessee passed "An act to incorporate the Lebanon & Gallatin Railway, and for other purposes." Section 3 of the act provided that the twenty-six persons named in section 1 should select by ballot five of their number to open books for subscription to the stock of the Lebanon & Gallatin Railway Company, and to apply to counties and municipalities for subscriptions thereto. Section 4 declared that such subscriptions might be payable in county and municipal bonds.

Section 19 declared as follows: "The five commissioners provided for in the third section may apply to the county courts of Sumner and Wilson counties, and to the corporate authorities of the towns of Lebanon and Gallatin, for subscription to the capital stock of the company, payable in the bonds of said counties and towns, running not less than ten nor more than thirty years, bearing six per cent. interest, payable semi-annually, and upon said application being made in writing the county courts and corporate authorities shall cause an election to be held under the laws now in force regulating elections for county and corporate officers, first causing thirty days' notice of the day of such election, the amount of stock to be subscribed, for what purpose, and how and when payable, to be given as required in county and corporate elections."

Section 35 declared "that the provisions of chapter 3, article 3, of the code [of Tennessee] shall be in force, and said company shall have the benefit of the same except so far as modified or changed by this act." These provisions were by section 40 extended to the Tennessee & Pacific Railroad Company.

Chapter 3, article 3, of the code of Tennessee provides as follows:

"SEC. 1142. Any county . . . may subscribe to stock to an amount not exceeding in the aggregate one-fifteenth of its taxable property, nor more than \$1,000,000, in railroads running to or contiguous thereto, upon the following terms and conditions:

"SEC. 1143. The approbation of the legal voters of the county . . . to the proposed subscription must be first obtained by election held by the sheriff in the usual way in which popular elections are held.

"SEC. 1144. The election may be ordered by the county court upon the application in writing of the commissioners appointed to open subscription books for the stock of such road, or of the board of directors if the company is organized.

"SEC. 1145. Before such application can be made, the entire line of the road in which the stock is proposed to be taken shall be surveyed by a competent engineer, and substantially located by designating the termini and approximating the general direction of the road, and an estimate of the grading, embankment and masonry made by the engineer under oath, and filed with the application."

"SEC. 1149. The money raised under the provisions of this article shall be expended within the county in which such stock is taken, or as near thereto as practicable.

"SEC. 1150. As soon as the stock is subscribed it is the duty of the county court to levy a tax upon the taxable property, privileges, and persons liable by

law to taxation within the county, sufficient to meet the instalments of subscription as made and the cost and expenses of collection, which tax shall be levied and collected like other taxes.

"SEC. 1151. The revenue collector or any other person may be appointed by the county authorities to collect the railroad tax, who shall first give bond with good security in double the amount of the instalment proposed to be received, payable to the state and conditioned to discharge the duties of the office and faithfully collect and pay over to the railroad company such railroad tax."

The suit was brought by the Third National Bank of Nashville, Tennessee, upon two hundred and ninety-four bonds for \$50 each, issued, as the plaintiff claimed, by the county of Wilson under authority of the laws above cited. The bonds were all of the same tenor and effect. The following is a copy of one of them:

"UNITED STATES OF AMERICA.

"STATE OF TENNESSEE.

COUNTY OF WILSON.

"SIX-PER-CENT. BOND.

"Subscription to the Tennessee & Pacific Railroad Company.

"Know all men by these presents, that the county of Wilson, in the state of Tennessee, is indebted to the Tennessee & Pacific Railroad Company, or the holder hereof, if this bond is transferred by the signature of the president of said company, at the office of the treasurer of said county, in the city of Lebanon, on the 1st day of January, 1879, with interest thereon at the rate of six per cent. per annum, on the 1st day of January and July ensuing the date hereof, until the principal sum is paid, upon the presentation and surrender of the interest warrants hereto attached at the said office of the treasurer of Wilson county, state of Tennessee,—this being one of a series of bonds, in all amounting to \$300,000, issued for stock in the Tennessee & Pacific Railroad Company.

"In testimony whereof, the county judge of said county hereunto sets his name and causes the seal of the said county of Wilson to be affixed, with the attestation of the clerk of said county, this 1st day of January, 1869.

"W. H. GOODWIN, Judge County Court.

"J. S. McCLAIN, Clerk."

The bonds were indorsed as follows:

"For value received, this bond is transferred to bearer.

"GEO. MAURY, President Tenn. & Pacific R. R. Co."

The defendant demurred to the declaration. The grounds of demurrer were first, because the court had no jurisdiction of the case; and second, because no right of action on said bonds was shown by the declaration to have accrued to the plaintiff. The demurrer was overruled. The defendant thereupon filed twelve pleas. Demurrers were filed to all of them, and were sustained as to the fourth, fifth, sixth, seventh, eighth, ninth and tenth, and overruled as to the others. The ninth plea, upon which the defendant specially relied, and which contains the substance of all the other pleas to which the demurrer was sustained, reads as follows:

"And for a further plea to said first count in plaintiff's declaration, defendant says that, before application was made by any authorized commissioners, or by the president and directors of the Tennessee & Pacific Railroad Company, to the county court of said county of Wilson to order an election to obtain the approbation of the legal voters of said Wilson county to any pro-

posed subscription of stock in said company, no survey of the entire line of said road had been made by a competent engineer, and the said road had not been substantially located by designating the termini thereof and approximating the general direction thereof, and no estimate of the grading, embankment and masonry, by a competent engineer, of the entire road had been made, and of all said facts the plaintiff had actual notice when it obtained the said bonds; and it does not appear upon the face of said bonds, or any of them, upon what authority they were executed and delivered to the said company other than that of the ministerial officers whose signatures appear thereto; and this defendant is ready to verify." The ground of demurrer to this plea was that it was virtually the plea of *non est factum* and was not sworn to.

Upon the trial of the case the plaintiff offered in evidence the bonds on which the suit was brought, and proved their execution by the officer whose official signature was appended to them, and by the impression on them of the county seal, and proved the indorsement of them by George Maury, the president of the Tennessee & Pacific Railroad Company. The plaintiff also read the acts of the legislature of Tennessee above mentioned, and rested. Thereupon the defendant introduced one Falconett, who testified that he was engineer of the Tennessee & Pacific Railroad Company; that as such he had made an experimental survey of the entire line of the road from Nashville to Knoxville before any application was made to the county to order an election, as provided by the statute, to determine whether it should subscribe to the capital stock of the company; and, if so, on what terms the subscription should be made; that the survey of one hundred and eighty-one miles was not final, but that by it the line was substantially, and the main points of said road definitely, located, and an approximate estimate of the cost of the road made; that he afterwards had located finally and definitely about one-half of the entire line, and made a report thereof to the directors of the company. It was after this report that application was made to the defendant as per statute in that case made and provided to order an election and subscribe stock, etc., for the payment of which the bonds sued on were issued. The plaintiff proved in rebuttal the payment of interest on the bonds by the county for several years. This was all the evidence in the case.

The court charged the jury as follows: "1. That the defendant county had legislative authority to issue the bonds declared on, upon the conditions prescribed in the acts having reference to the matter, and that if the jury find, from the evidence adduced in the case, that said bonds had been issued by the county judge and clerk as alleged and verified by the county seal, and that plaintiff was a *bona fide* holder for value without notice; that the same was issued by virtue of an election ordered and held before a final and definite survey and location of the line of said road had been made, the same would be valid in the plaintiff's hands, and the jury ought to find a verdict against defendant." "2. That if the evidence of Falconett were true, the condition contained in the acts aforesaid, requiring a survey and location of the line of said road, and an estimate of the cost thereof made before an election to determine whether the county should subscribe stock in said railroad, etc., could be lawfully ordered and held, had been substantially complied with, and there was nothing in Falconett's testimony militating against plaintiff's right to recover."

The jury found a verdict for the plaintiff, on which judgment was rendered. To reverse this judgment this writ of error is brought. The plaintiff in error

claims that it is apparent on the face of the declaration that the circuit court was without jurisdiction because both the parties were citizens of the state of Tennessee.

§ 1044. *Circuit courts of the United States have jurisdiction in cases in which national banks are parties.*

Section 629 of the Revised Statutes of the United States declares that the circuit courts shall have original jurisdiction as follows: . . . "Tenth. Of all suits by or against any banking association established in the district in which the court is held, under any law providing for national banking associations." This section gives the circuit courts jurisdiction of suits brought by or against a national bank, without regard to the citizenship of the parties, and it has been so held by this court. *Kennedy v. Gibson*, 8 Wall., 498 (BANKS, §§ 6-12). The jurisdiction of the circuit court was, therefore, clear.

§ 1045. *Bonds payable to a company "or order" (or equivalent expression) are negotiable paper.*

It is next claimed that the bonds sued on were not negotiable paper, and that, therefore, the plaintiff below showed no right of action in itself. In order to make a promissory note or other obligation, for the absolute payment of a sum certain, on a certain day, negotiable, it is not essential that it should in terms be payable to bearer or order. Any other equivalent expressions demonstrating the intention to make it negotiable will be of equal force and validity. *Com. Dig., Merchant, F. 5*; 3 *Kent, Com.*, lect. 44, p. 77; *Chitty, Bills*, c. 5, p. 180 (8th ed.); *Bailey, Bills*, 120 (5th ed.); *Story, Prom. Notes*, sec. 44. The purpose of the plaintiff in error, that the bonds on which the suit is brought should be negotiable, is perfectly clear. They are payable to the railroad company or holder if the bond is transferred by the signature of the president of the company. This is equivalent to making the bonds payable to the company or order, provided the "order" or indorsement is made by the president of the company. They bear his indorsement transferring them to bearer. On what ground their negotiability can be denied it is difficult to imagine. They are in precisely the same plight as a promissory note payable to order and indorsed in blank, or to bearer, the title to which passes by mere delivery. *Chitty, Bills*, 252, 253 (8th ed.); *Bailey, Bills*, c. 1, sec. 10, p. 31 (5th ed.).

§ 1046. *Party assigning error must show he was injured.*

It is next objected that the court erred in sustaining the demurrer of the plaintiff to the fourth, fifth, sixth, seventh, eighth, ninth and tenth pleas. It is quite evident, however, from the record, that all the defenses set up in these pleas were allowed to be made under the other pleas, to which the demurrers were overruled. Whether the court was right or wrong in its judgment on the demurrers is, therefore, entirely immaterial. "There must be some injury to the party to make the matter generally assignable as error." *Greenleaf v. Birth*, 5 Pet., 132; *Randon v. Toby*, 11 How., 493.

§ 1047. *Wilson county, Tennessee, after the prescribed election had been held, could lawfully subscribe for railroad stock.*

It is next alleged as error that the court instructed the jury that the county of Wilson had legislative authority to issue the bonds sued on, upon compliance with the conditions prescribed by the law. There is certainly no express provision in chapter 3, article 3, of the code, which authorizes the issue of bonds. It has been so held by the supreme court of Tennessee. *Justices of Campbell Co. v. Knoxville & Kentucky R. Co.*, 6 Cold. (Tenn.), 598. The implication against the power to issue bonds is very persuasive. The act contemplates the

payment of the stock subscribed for in instalments, and provides the means of payment, as they fall due, by a special tax. The bond of the officer who collects this tax requires him to pay it over to the railroad company. If the purpose of the act had been to authorize the payment of the stock in bonds, the county, after paying in bonds, would not have been required to pay over to the railroad company the railroad tax collected to satisfy the bonds. In other words, the county would not have been required to pay twice for its stock,—once in bonds and once in money. See *Wells v. Supervisors*, 102 U. S., 625 (§§ 846-848, *supra*).

But the act of December 16, 1867, to incorporate the Lebanon & Gallatin Railway Company, some of the provisions of which have been stated, clearly implies the power in the county authorities to subscribe stock in the Tennessee & Pacific Railroad Company, and to issue bonds in payment therefor. Section 4 declares that subscriptions to the capital stock of the railroad company may be taken in county bonds, and section 19 authorizes the commissioners provided for in section 3 to apply for a subscription to the capital stock of the railroad company, payable in the bonds of the county, whereupon the county authorities are required to cause an election to be held, first causing thirty days' notice of such election, the amount of stock to be subscribed, for what purpose, and how and when payable, to be given as required in county elections. There can scarcely be a stronger implication of the power to issue bonds. What is implied in a statute is as much a part of it as what is expressed. *United States v. Babbit*, 1 Black, 55; *Gelpcke v. City of Dubuque*, 1 Wall., 175 (§§ 1367-70, *infra*). We think, therefore, that the power of the county, under the act of December 16, 1867, to issue bonds in payment of stock taken by it in the Tennessee & Pacific Railroad Company, is beyond question, and that the circuit court did not err in saying to the jury that such power existed.

Plaintiff in error claims next that there was evidence tending to show that the bonds in suit were issued by virtue of an election ordered and held *before* a final and definite survey and location of the railroad had been made, and that the court erred in instructing the jury that, if plaintiff was a *bona fide* holder without notice of that fact, the bonds would be valid in his hands, and there should be a verdict against defendant. The charge was not erroneous, because the law does not require that there shall be a final and definite survey and location of the road before an election is held to decide whether or not the county shall subscribe stock. Its requirement is that the entire line of the road shall be surveyed by a competent engineer, and substantially located by designating the termini and approximating the general direction of the road. The evidence of Falconett, the engineer, showed that this had been done. The law even contemplated that this survey might be made before the railroad company was organized, for it declared that the application to the county authorities to order an election might be made by the commissioner appointed to open subscription books for the stock of such road, or by the board of directors if the company was organized. It would be a strange enactment, indeed, which should require a final and definite survey and location of the line of a railroad before any company had been organized to construct it.

§ 1048. *All that was necessary as preliminary to a popular election was an estimate of the cost of the road.*

The next complaint of the plaintiff in error has reference to the charge of the court to the effect that, if the evidence of Falconett, the engineer, were true, the election to decide whether the county would subscribe to the stock of

the railroad company was lawfully held. The contention seems to be that before an application could be made to the county authorities to order an election to decide whether or not the county should subscribe to the stock of the railroad company, an estimate in linear and cubic feet and yards of the embankment, grading and masonry should be made on oath and filed with the application. It is asserted that no such estimate of quantity was made, but merely an estimate of the cost, and that this was not a compliance with the law. We think the circuit court gave a correct construction of the law in instructing the jury substantially that it was an estimate of the cost and not of the quantity of the grading, embankment and masonry that was required to be made by the engineer. The point upon which information was necessary to enable the people of the county to vote intelligently on the question whether or not they should subscribe to the stock of the railroad company was what would the road cost, and not how many yards of embankment or excavation or what quantity of masonry would be required to construct it.

If we are right in these views, then all the conditions precedent upon authority of which the power to issue bonds depended were performed, and there being legislative authority for the issue of the bonds upon such performance, no valid objection can be raised to their enforcement.

Judgment affirmed.

MELLEN v. TOWN OF LANSING.

(Circuit Court for New York: 19 Blatchford, 512-522. 1881.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.— This suit is brought on coupons cut from bonds purporting to have been issued by the town of Lansing, in Tompkins county, New York, and bearing date December 1, 1871. The coupons sued on are forty-seven in number, falling due September 1, 1879, cut from forty-seven bonds, the principal of which bonds amounted to \$38,000, the coupons amounting to \$1,330. The suit was tried before the court and a jury, and the plaintiff had a verdict, under the direction of the court, for \$1,457.59, being the amount of the coupons and interest thereon. The defendant now moves for a new trial, on a bill of exceptions, containing exceptions taken at the trial. The bonds state on their face that they are obligations of the town, and that they are issued under the provisions of the act of the legislature of New York, passed April 5, 1866, entitled "An act to facilitate the construction of the New York & Oswego Midland Railroad, and to authorize towns to subscribe to the capital stock thereof," and the several acts amendatory thereof and supplementary thereto, especially the act entitled "An act to authorize the New York & Oswego Midland Railroad Company to extend its road, and to facilitate the construction thereof, passed April 5, 1871." The bonds purport to be attested by the hands and seals of three persons, who style themselves "duly appointed commissioners of said town of Lansing," and the bonds state that they have caused each of the annexed coupons to be signed by one of their number.

The statutes set up in the complaint, as those under which the town was authorized to issue the bonds, are the said act of April 5, 1866 (Laws of New York, 1866, vol. 1, ch. 398, p. 874); the act of May 15, 1867 (Laws of New York, 1867, vol. 2, ch. 917, p. 2290); and the said act of April 5, 1871 (Laws of New York, 1871, vol. 1, ch. 298, p. 586). The complaint alleges that, by the provisions of said acts, the said town was authorized to execute,

issue and deliver said bonds; and it refers to said acts and makes them a part of the cause of action. The act of 1866 provides for the appointment by the county judge of the county in which the town is situated of not more than three commissioners to carry into effect the purposes of the act. The commissioners are to execute the bonds under their hands and seals, and to issue them. When issued lawfully, they become the obligations of the town. All the statutes then speak of them as bonds issued by the town. In order to make them bonds of the town there must be commissioners appointed. At the trial the plaintiff offered in evidence a petition to the county judge of Tompkins county, by freeholders and residents of said town, requesting the appointment of the three persons, who afterwards executed the bonds, as commissioners, to carry into effect the purposes of said acts, "in accordance with the provisions of said acts." The defendant objected to the admission in evidence of said petition, on the ground that there was no evidence to show that the county judge had jurisdiction to appoint commissioners for said town, and on the further ground that there was no law giving him such jurisdiction, and that he had no authority whatever to appoint commissioners for said town. The court overruled the objection and admitted the petition as evidence, and the defendant duly excepted to the ruling. Under an objection by the defendant on the same grounds, and a like ruling and exception, a paper was admitted in evidence, signed by the county judge, appointing the said three persons commissioners to carry into effect the purposes of said acts, "in accordance with the provisions of said acts;" and, under a like objection, and a like ruling and exception, the oath of office of the commissioners was admitted in evidence. The coupons sued on and the forty-seven bonds were admitted in evidence, under an objection and exception by the defendant, that the county judge had no jurisdiction or authority to appoint any commissioners for said town to act for it in bonding it in aid of said railroad. At the close of the evidence on both sides, the defendant requested the court to direct a verdict for it, "on the ground that the county judge had no power to appoint commissioners for the town," and that, "no action by the railroad company towards the location of its road having been shown, and no determination by the officers of the railroad to build the road on any such route, the road was not located at all." The court refused to direct as requested, and the defendant excepted to the ruling. The court directed the jury to find a verdict for the plaintiff for \$1,457.59, and the defendant excepted to such ruling or direction, and the jury rendered said verdict.

These proceedings raise the question whether there was any statute authorizing the bonding of the town, either by direct description or otherwise. If there was not, there was no jurisdiction to appoint the commissioners, and there were no commissioners and no bonds. It required special legislative authority to enable the town to issue bonds in aid of the railroad. Even without what is on the face of these bonds, every person taking them or their coupons is referred to the source of authority to issue them in some statute. A *bona fide* purchaser of them is thus referred equally with every other taker. There may be no informality, or irregularity, or fraud, or excess of authority in an authorized agent, capable of operating to the prejudice of a *bona fide* holder, but there must be some statute providing for the constitution of authorized agents. Every one is bound to inquire and take notice as to whether there is, in fact, such a statute. If there is not, there is a total want of jurisdiction and authority in county judge and in commissioners. There is no authority in

the act of 1866 for the issuing of bonds by any town in Tompkins county. That act is confined to towns and cities in eleven counties which are named, not including Tompkins. The act of 1867, as amended by the act of March 31, 1869 (Laws of New York, 1869, ch. 84, p. 142), authorizes the board of directors of the company to construct a branch railroad from the line of its railroad "at any point in the counties of Chenango or Madison, through the counties of Chenango, Madison, Cortland, Cayuga, to the city of Auburn, in the county of Cayuga, whenever, in the judgment of the directors, the same shall be for the interest of said corporation," and also, "in like manner," to construct a branch road from the village of Delhi to the line of said road, and also a branch road from the village of Ellenville to the most feasible point upon the line of said road in the county of Sullivan or Orange, and also a branch road in the counties of Madison, Oneida or Oswego. Then the act, as so amended, gives to towns, cities and villages along the line of the said branch railroads, or interested in the construction thereof, in any county through which said railroad shall run, the same power to issue bonds "to aid in the construction thereof," as is given by that act, as so amended, and by the said act of 1866. It is not contended by the plaintiff that there is anything in this act of 1867, as so amended, which authorizes the issuing of bonds by any town in Tompkins county.

§ 1049. *Under the New York act of April 5, 1871, a town could not issue bonds in aid of a railroad until after its termini, etc., were settled.*

We come now to the act of 1871, under which the power is asserted to exist. It is provided as follows by section 1 of that act: "The New York & Oswego Midland Railroad Company are hereby authorized and empowered to extend and construct their railroad from the city of Auburn, or from any point on said road easterly or southerly from said city, upon such route and location, and through such counties, as the board of directors of said company shall deem most feasible and favorable for the construction of said railroad to any point on Lake Erie or the Niagara river. The said New York & Oswego Midland Railroad Company are also authorized and empowered to connect their railroad at any point in the county of Delaware with the Erie Railway, and to locate and construct such spur or branch railroad as shall be deemed necessary by the board of directors of said company to make such connection, in the county of Delaware; and the said New York & Oswego Midland Railroad Company are further authorized and empowered to extend and construct the branch road to the village of Delhi, from said village, or some point near the same, northerly to the Albany & Susquehanna Railroad, and easterly to or near the village of Andes and the village of Margarettsville, in the county of Delaware; and any town, village or city in any county through or near which said railroad or its branches may be located, except such counties, towns or cities as are excepted from the provisions of the general bonding law, may aid or facilitate the construction of the said New York & Oswego Midland Railroad, and its branches and extensions, by the issue and sale of its bonds, in the manner provided for" in the said act of 1866, and the acts amendatory of and supplementary thereto. This statute does not give power to every town in the state, nor to any town by name, nor does it designate by name any county. It confers power on any town "in any county through or near which said railroad or its branches may be located." What is meant by "located?" The words are very vague and loose. "Through or near which" probably refers to "county," as not only is that the last antecedent, but if the

words "through or near which" refer to "town, village or city," the words "in any county" would be superfluous. So, if Lansing is a town in a county through or near which the railroad or its branches "may be located," that is, if Tompkins county is such a county, then Lansing may issue its bonds to aid the construction of the railroad and its branches and extensions. The act of 1866 (§ 15) empowers the company to build two branch railroads, which are designated. The act of 1867, as amended in 1869, empowers it to construct other branch railroads. The act of 1871 empowers it to construct other extensions or branches. By the act of 1866, the branch railroads thereby authorized to be built are to be built "whenever, in the judgment of the directors, the same shall be for the interest of said corporation." The same language is used in the act of 1867, in regard to the branch railroads thereby authorized. In the act of 1871, the authority is to extend and construct their railroad (1) from the city of Auburn, or from any point on said road easterly or southerly from said city; (2) upon such route and location and through such counties as the board of directors shall deem most feasible and favorable for the construction of said railroad; (3) to any point on Lake Erie or the Niagara river. These three things concern, (1) the starting point, (2) the route, and (3) the terminus. But the "route and location" necessarily involve the starting point and the terminus, as there cannot be a complete route and a complete location which do not comprehend the entire structure throughout its length. So the starting point and the terminus as well as the transit route between the two are embraced within the "location," which the board of directors are to determine upon as "most feasible and favorable" for the construction of the railroad, in respect to the extension now under consideration. So, in regard to the second branch railroad authorized by the act of 1871, it is to be such one "as shall be deemed necessary by the board of directors of said company;" and the other extensions authorized by the act of 1871 must necessarily have a "route and location" or be "located."

It is not here contended that either the railroad or any one of its said branches was located through or near the county of Tompkins, in the sense of the act of 1871, unless it was the extension so provided for to a point on Lake Erie or the Niagara river; and it is contended that that was located through Tompkins county and through the town of Lansing. In *The People v. Morgan*, 55 N. Y., 587, the said acts of 1867, as so amended, and 1871, were under consideration, in respect to the town of Scipio, in Cayuga county. The court of appeals held that that town might be embraced in the act of 1867, as so amended, but that before it could have the authority under that act, as so amended, to issue bonds, the board of directors of the railroad company must have exercised the discretionary power vested in them, to establish a branch railroad through the county of Cayuga; that the counties through which the branches should run were the only ones where towns were empowered to issue bonds; that it was not the intention of that act, as so amended, that any towns should issue bonds unless the road should run through it, or through the county in which the town was situated; that such result might follow if the town bonds should be issued before the branch road was located or the board of directors of the company had even determined whether or not they would exercise the privilege of constructing the branch; and that it did not appear in that case, in any manner, that the branch to Auburn had been located or ever determined upon, when the proceedings then under review were instituted. The case was a *certiorari* to review the proceedings of the assessors of the town, in the matter

of bonding it in aid of said company. In respect to the act of 1871, the court held that that act made the location of the road or branch a condition precedent to the right to issue bonds; that there was no proof that any such location had been made at the time of the proceedings to bond the town; that there was no evidence of any authority to bond that town in aid of the railroad; and that the most that appeared was, that acts had been passed purporting to authorize the bonding of the towns in Cayuga county in certain events, which were not shown to have occurred. The court held this objection fatal, and vacated the proceedings. The case cited does not decide what is "location," or what is sufficient evidence of location. It decides that there was no evidence of location in that case. It implies that location is something which is to follow a determination by the board of directors to construct the branch, and it would seem further to imply that, where location is established, such prior determination may be inferred. It is quite clear that such decision of the court of appeals of New York in regard to the act of 1871 gives a correct view of the act. The location of the first branch authorized by that act was a condition precedent to the right of the town of Lansing to issue the bonds in question, and is a condition to be enforced even where the bonds or coupons are in the hands of a *bona fide* holder. The absence of such a location is as fatal as if there were no act. The location is made by the act itself expressly to precede the aid.

§ 1050. *Insufficient evidence of location.*

It is not proper to decide what evidence must be given to be sufficient evidence of location. It is only necessary to say that the evidence of location given in this case was not sufficient, and that there was error in directing a verdict for the plaintiff. On another trial the difficulty may, perhaps, be obviated. With a view to showing precisely what the insufficiency of evidence was, it is necessary to examine it. This is the whole of it: "Egbert Williams, sworn on behalf of plaintiff, testified as follows: I reside in Lansing. Have lived there about fifty-five years. In 1871 or the fall of 1870 a road was graded into the town of Lansing. In 1872 it began running. Lansing is south and a trifle east from Auburn. The railroad started from Freeville, Tompkins county, in the town of Dryden, ran through part of Dryden and Lansing and into the towns of Genoa and Venice, and then into Scipio, and there stopped. Cars were run on it with the Midland name on — N. Y. & O. M.,— and other cars. Freeville is ten miles west of Cortland. There was a road from Freeville to Cortland and from Cortland to Norwich. The main line of the Oswego Midland Railroad goes through Norwich. From where the road stopped, in Scipio, it was about eleven miles to Auburn. I went once from Cortland to Norwich on a branch of the New York & Oswego Midland Railroad. The road begins south from Auburn, about seven miles now from Auburn, runs southerly through the town of Lansing and goes to Freeville. This road stops there. A railroad called the Utica, Ithaca & Elmira runs from Elmira through Ithaca and Freeville to Cortland. The branch from Norwich to Cortland is by the New York & Oswego Midland Railroad. I went by stage from Scipio to Auburn. *Cross-examined.* The Utica, Ithaca & Elmira is another road and runs to Freeville and through it. It was understood that this branch of the New York & Oswego Railroad began at Freeville. When the proceedings to bond the town began no work had been done on the road. The grading was begun in 1872, I think, and finished in 1873. It was some time after my appointment as commissioner that grading was begun. I think it was begun in the fall of 1872. I think grading was not begun until after I was appointed. *Re-direct.*

Grading was not commenced till after we were appointed commissioners (October 21, 1871). There was surveying in the summer previous. I saw stakes being driven where the road was afterwards graded." This witness was one of the three commissioners who issued the bonds.

It is necessary not only that the branch should have been located, but that it should appear to have been located by this company. Surveying a route first, then grading it where it was surveyed, and then making a railroad where it was so graded, amounts to nothing unless it be shown that the railroad so made was made by this company. It was only to aid the construction of this railroad and its branches and extensions that this town could issue its bonds. It is here that the evidence is defective. There was surveying before the commissioners were appointed, but that it was done by this company does not appear. Stakes were then driven where the road was afterwards graded, the grading having been begun after the commissioners were appointed. But it does not appear that it was graded by this company. Nor does it sufficiently appear that the road made from Freeville through Dryden and Lansing into Genoa, Venice and Scipio, and which began running in 1872, was a road constructed by this company. The witness says that cars were run on it with the name of this company on them; but he also says that other cars were run on it. As it connected at Freeville with the road running from Freeville to Cortland, and there was a branch of the Midland road from Cortland to Norwich, the Midland cars may very well have been sometimes used from Cortland to Freeville and on by a continuous track, under some arrangement. This does not show that the road was the road of the Midland Company. The expression of the witness, that it was understood that this branch of the Midland road began at Freeville, amounts to nothing as proof that this was a branch of the Midland road. There is nothing else on the subject of the testimony. As Freeville was not a point on the Midland road, it could not, under the act of 1871, be a starting point for the first extension authorized by that act, and the starting point must be Auburn. But it does not follow that the starting point may not be Auburn, and the road be located, within the act, as an extension from Auburn, although work in surveying and grading and otherwise, in a direction towards Auburn, be first done at a distance from Auburn. At the trial it was supposed that the evidence showing that this road was a branch constructed by the Midland Company was more full and distinct, but a careful consideration of it, as it appears in the bill of exceptions, leads to the conclusion that a new trial must be granted, for the reasons above set forth.

I have not overlooked the decision in *Smith v. Town of Yates*, 15 Blatch., 89. The question there was, whether the town was a town "situate along the route" of the railroad. It was contended that the route ought to have been located in the manner prescribed by the general act under which the company was organized. But the court held that, as the road had not yet been built, the language referred to a town on the contemplated or proposed route of the road. The difficulty in the present case is, that the branch in question is not shown to have been a contemplated or proposed or constructed road of the Midland Company. The motion for a new trial is granted.

LYNDE v. THE COUNTY.

(16 Wallace, 6-16. 1872.)

STATEMENT OF FACTS.—The facts not fully stated in the opinion are as follows: The county judge made a contract with one Bumgardner to build a court-

house, and executed and delivered to him bonds to the amount of \$20,000. The judge and Bumgardner afterwards went to New York, and the judge there made and delivered new bonds, for the sum of \$20,000, but differing from the first ones as to the amount of each bond, time of payment, etc. They were signed, sealed and delivered at New York, the seal used being made at the time at New York. The old bonds were delivered up and canceled. While the judge was thus absent in New York, another person was acting as county judge in his place, and transacted business for the county.

Opinion by MR. JUSTICE SWAYNE.

The case involves the validity of certain bonds issued by the judge of the county of Winnebago. Such cases have been numerous in this court. The one before us, though new in some of its aspects, presents no point which has not been substantially determined in preceding cases. The parties waived a jury, and the court, according to the provisions of the statute upon the subject, found the facts. The findings are set forth in the record. The proposition for us to decide is whether the facts found warrant the judgment given.

§ 1051. *A vote empowering a county judge to build a court-house held to give him authority to issue bonds for the purpose of raising the money.*

The Code of Iowa of 1851 (chap. 15, § 129, p. 26) authorizes the county judge, sitting as the county court, "to provide for the erection and reparation of court-houses, jails and other necessary buildings within and for the use of the county." In Iowa every county is a body corporate. *Id.*, chap. 14, § 93, p. 19. In *Clapp v. The County of Cedar*, 5 Ia., 15, it was said by the supreme court of the state that the office of county judge being created and his powers and duties defined by statute, the principles of the law of agency, where those powers and duties are drawn in question, have no application; that "he is the living representative and embodiment of the county," and that "his acts are the acts of the corporation." In *Hull v. County of Marshall*, 12 Ia., 142, it was held that, by virtue of his general authority, he might contract for the building of a court-house, to be paid for out of the revenue of the county, but that, when a debt was to be incurred for that purpose, special authority must be conferred by a popular vote in the manner provided by the statute. It was further held that, where a loan was thus authorized, the form of the securities not being prescribed, negotiable bonds might be issued. The statute provides that the judge may submit to the people, at a regular or special election, "the question whether money may be borrowed to aid in the erection of public buildings," and other questions not necessary to be mentioned; and that "when the question so submitted involves the borrowing or expenditure of money," it "must be accompanied by a provision to lay a tax for the payment thereof," and that "no vote adopting the question proposed will be of effect unless it adopt the tax also." Code of 1851, chap. 15, §§ 114-116, pp. 23, 24.

Upon looking into the record in this case, we find that the question submitted to the voters was "whether the county judge, at the time of levying the taxes for the year 1860, should levy a special tax of seven mills on a dollar of valuation, for the purpose of constructing a court-house in said county, and said tax to be levied from year to year until a sufficient amount is raised for said purpose, not, however, to exceed ten years." There was the requisite majority in favor of the proposition. It was expressed in this formula that a court-house was to be built, and we think it was implied that money was to be borrowed to accomplish that object. Otherwise the vote gave no authority which did not already exist, and was an idle ceremony. The statute author-

ized an appeal to the voters only that they might give or refuse authority to incur a debt. It could not have been intended that the erection should be delayed until a sum sufficient to pay for the structure had been realized from the tax authorized to be imposed, or that the work should proceed only *pari passu* with the progress of its collection from year to year. What is implied is as effectual as what is expressed. *United States v. Babbit*, 1 Black, 55. Viewing the subject in the light of the statutory provisions and of the action of the people, we cannot say that the bonds were issued without due authorization.

§ 1052. *The decision of the designated functionary, that bonds have been sanctioned by the required vote, is final.*

But if the authority were doubtful, there are other facts bearing upon this point which, in our judgment, are conclusive. The county judge is the officer designated by the statute to decide whether the voters have given the required sanction. He executed and issued the bonds, and the requisite popular sanction is set forth upon their face. It is a settled rule of law that, where a particular functionary is clothed with the duty of deciding such a question, his decision, in the absence of fraud or collusion, is final. It is not open for examination, and neither party can go behind it. Here the bonds are in the hands of a *bona fide* purchaser, and under the circumstances he was not bound to look beyond the averment on their face.

§ 1053. *Bonds payable and sold without the county and state.*

It is not a valid objection that the bonds were made payable and were sold beyond the limits of the county of Winnebago and of the state of Iowa. The power to issue them carried with it authority to the county judge as to both these things—to do what he deemed best for the interests of the county for which he was acting. These points have been so frequently ruled in this way that it is needless to cite authorities to support them.

§ 1054. *Seal affixed by county judge outside his county and state.*

It was competent for the county judge to visit New York for purposes connected with the proper disposal of the bonds. A statute of the state authorized him to procure a seal, and prescribed certain regulations to which all such seals should conform. While there, he might well take up bonds which had been previously issued, but not put on the market, and give others in their place, affixing to them a seal there procured for that purpose. There is nothing in the statutes of Iowa forbidding either, and we are aware of no principle of general jurisprudence which was violated by such a proceeding. Certainly the county could sustain no injury by the change, and it has therefore no right to complain. At most there was only an irregular execution of a power, of the existence of which we entertain no doubt. Admitting an irregularity to have occurred, it certainly cannot affect the rights of a holder for value without notice.

§ 1055. *Ministerial powers are not necessarily local.*

It is insisted that the county judge was *functus officio* at the time he issued the bonds in question, and that they are for this reason void. The statute of the state provides that, in case of the *absence* of that officer, the county clerk shall fill his place. The absence spoken of is doubtless absence from the county seat. In that event unlimited authority is given to the clerk to act as his substitute. But it is not declared that the judge shall be regarded as out of office while absent, or that he shall do no official act during that period. Judicial power is necessarily local in its nature, and its exercise to be valid must be local also. But it is otherwise as to many ministerial acts, and dif-

ferent considerations apply where they are drawn in question. It does not appear that there was any conflict between what the judge did abroad and what the clerk did at home. All the judge did was purely ministerial in its character, and we see no sufficient reason for holding that to this extent he did not bring with him his official character and exercise his official authority. He did not for the time being wholly abdicate his office. Certain powers with which it was clothed fell into abeyance, and continued in that state until his absence ceased. The authority to do all that he did in New York touching the bonds, we hold not to have been in this category. *Galveston Railroad v. Cowdrey*, 11 Wall., 459. Judgment reversed, and the cause remanded with directions to enter a judgment for the plaintiff in error.

MR. JUSTICE FIELD (CHASE, C. J., and MILLER, J., concurring) dissented: (1) That the county judge had no authority to issue bonds without a vote of the people. (2) As the bonds were issued without authority, there was no estoppel by reason of recitals. (3) That by the laws of Iowa, the judge had no power to act in New York.

§ 1056. Sufficiency of petition.—Where a municipality is authorized to issue bonds on the application of tax-payers by verified petition, if the petition as verified contains all the statutory allegations and requirements it will be sufficient, though the petition proper is defective in its allegations and statements. *Whiting v. Town of Potter*, * 18 Blatch., 165.

§ 1057. A plea to a declaration in a suit on county bonds, which alleges that no legal proposition was made to the county by the railroad company as required by law, and that the plaintiffs are not *bona fide* holders of the bonds, is good on demurrer, the proposition referred to having been made a necessary preliminary to the issue by the act giving authority. *Chambers County v. Clews*, 21 Wall., 317.

§ 1058. The judgment of a county judge under the statutes of New York, that the conditions have been performed on which a town could legally subscribe for shares of railway stock and issue its bonds therefor, is final until reversed. *Lyons v. Munson*, 9 Otto, 685. See §§ 976, 994.

§ 1059. Under the statutes of New York, a county judge has jurisdiction to decide whether the conditions have been performed on which a town can legally subscribe for shares of railway stock and issue its bonds therefor. *Ibid.*

§ 1060. An act of the state of New York enacts that whenever the majority of the tax-payers of any municipal corporation shall, by petition, make application to the county judge of the county in which said corporation is situated, representing that they desire that the corporation shall issue bonds, and invest them in the stock of any railroad company in the state, the judge shall take proof of the allegations in the petition, and if it appear to him that such petitioners do represent such majority, he shall so adjudge, and his judgment shall have the same effect as any other judgment of record; and that, upon such judgment, he shall appoint commissioners to issue the bonds and make subscription to stock. It is held that the fact that the petition in such case was not in conformity with the act, and contained conditions which were unauthorized, will not render the jurisdiction of the county judge void, so as to defeat the action of a *bona fide* holder of the bonds. *Munson v. Town of Lyons*, * 13 Blatch., 539. See § 1058.

§ 1061. Election.—An act which requires the approval of the inhabitants of a township to the issue of township bonds is satisfied by the approval of the legal voters. *Walnut v. Wade*, * 13 Otto, 683. See § 978.

§ 1062. The statutes of a state provided that, before a county should issue bonds in aid of the construction of public roads, the county court "may, for the purpose of information," submit the question of the loan to a popular vote. The county court, holding this provision directory instead of mandatory, issued bonds, without the sanction of a popular vote, for the construction of certain roads, which passed into the hands of *bona fide* holders. A law subsequently passed provided that county courts should have the power to issue bonds to pay for improvements theretofore made. New bonds were accordingly issued to replace the old ones. *Held*, that, as no constitutional provision required the question of the improvements to be submitted to a popular vote, the authority conferred on the county courts was valid; that the act in question was valid considered either as an original power or as a curative act, and that,

as the court had the power to issue bonds under it, it had the power to replace the old bonds with new ones. *Ritchie v. Franklin County*, 22 Wall., 67 (§§ 858-860).

§ 1063. The acts of February 25, 1867, and of February 24, 1869, of the state of Illinois, conferring on certain townships authority to make their bonds as a donation to a railroad company, upon vote of the electors, is not in conflict with the constitution of that state, allowing counties, townships, etc., to levy taxes for corporate purposes. It is held that such a donation is a corporate purpose. The first of these acts did not authorize bonds. The second authorized the issue of bonds, where the donation had already been voted, without further vote, but also provided for a vote to determine whether the townships would give aid in the shape of taxes levied or bonds. It is held that bonds issued under the second act by a second vote determining that kind of aid are not void, under the constitution which requires elections in all such cases. *Harter v. Kernochan*, 18 Otto, 562 (§§ 1421-80).

§ 1064. Where a city can make a contract for the borrowing of money with the assent of the voters, the assent will be presumed; want of assent is a matter of defense. *Gelpcke v. City of Dubuque*,* 1 Wall., 221. See §§ 1367-70.

§ 1065. The act of March 23, 1868, of Missouri, which requires the consent of two-thirds of the qualified voters of the township to the subscription by the township to the stock of a railroad company, is not in conflict with the constitution of Missouri, which requires two-thirds of the qualified voters, voting at the election, to give their assent. And bonds issued for such subscription, in accordance with the statute, are valid. *Westerman v. Cape Girardeau Co.*,* 5 Dill., 112.

§ 1066. The act of March 18, 1870, of the state of Missouri, allowing certain municipalities to purchase lands and donate, lease or sell them to a railroad company, to induce it to build its machine shops on the land, and to issue its bonds in payment, on the sanction of a majority vote, is in conflict with the constitution of 1865, forbidding the legislature to authorize any city or town to loan its credit to any railroad company, unless two-thirds of the qualified voters shall assent thereto. The power given by the act is a loan of credit, and the bonds issued under the act are void. (*Krekel, J.*, dissents.) *Jarrott v. Moberly*,* 5 Dill., 253.

§ 1067. Voting a subscription to a railroad, annexing the conditions that the company shall establish its depot at a particular place, and construct a wagon bridge across a river, is not liable to the objection that three propositions were submitted, or that the proposition submitted involved three distinct subjects. *Union Pac. R. Co. v. Merrick Co.*,* 3 Dill., 359.

§ 1068. Where the law authorizes a subscription on the vote of "a majority of the legal voters of the township," the provision is satisfied by a majority of the legal voters of the township voting at the election. *St. Joseph Township v. Rogers*, 16 Wall., 644 (§§ 1674-77).

§ 1069. If a state statute, providing for the submission of the question of subscribing to the capital stock of a railway to a popular vote, does not prohibit a second submission, a second vote is proper, and bonds issued in pursuance thereof are valid. *Supervisors v. Galbraith*, 9 Otto, 214 (§§ 881-883).

§ 1070. The legislature of Mississippi in 1860 authorized the board of police of Calhoun county to subscribe for the stock of a railway company, provided the question should be submitted to a vote of the qualified electors of the county, and the subscription should or should not be made according as the vote was favorable or unfavorable. At an election in 1860 a majority of votes were cast against the subscription. In 1869 the board again submitted the question to the electors, and they voted to subscribe. *Held*, that as the act did not expressly provide that the first vote of the electors should be final, the board might properly submit the question to the electors at a future time, and that the electors, like individuals in the case of similar contracts, might reconsider the proposition if circumstances should so change as to make it advisable. *Held*, also, that the validity of the acceptance was not affected by the fact that in 1860 only whites were allowed to vote, while in 1869 blacks were also allowed to vote. *Held*, also, that in view of the civil war, nine years was not an unreasonable time to wait between the first and the second submission. *Woodward v. Board of Supervisors of Calhoun County*,* 2 Cent. L. J., 397.

§ 1071. Where the commissioners of a county order an election to vote upon a proposition to subscribe to the stock of a railroad company, payable in bonds of the county, the proposition fixing the time of delivery of the bonds as follows, to wit: \$16,000 when one-third of the road-bed is graded, \$17,000 when two-thirds is graded, and the balance of the \$50,000 when the entire road-bed is graded, a subsequent proposition of the company that the company is to have an extension of time for any delays occasioned in the construction of the road by acts of the board of commissioners, the courts or the trustee to whom the bonds were delivered, is held to be a withdrawal *pro tanto* of the original proposition, and not being submitted to the voters a sufficient time before the election to give the notice required by statute, will entitle the tax-payers to restrain the delivery of the bonds to the company. *Packard v. Board of Commissioners*,* 2 Colo. Ty, 338.

§ 1072. **Time of payment.**— Under power to issue county bonds, payable within thirty years, bonds payable within thirty years from the time they are delivered are valid. And the county possessing power to issue bonds may make the interest payable at any time. It is no objection that interest is payable semi-annually, while the proposition to the voters stipulated that the interest was to be paid annually. *Commissioners v. Clark*, 4 Otto, 278 (§§ 1882-88).

§ 1073. Under authority given to a city to subscribe to the stock of a railroad company, which subscriptions were by the act to be paid in four or six years, and to issue *short bonds* in anticipation of the annual levies of taxes to pay these subscriptions, it is held that the bonds shall not be longer running to maturity than the time within which the subscriptions are payable. And bonds issued under this authority to run for a longer time than four or six years, and bearing a greater rate of interest than that allowed by the act, are void. *Green v. Dyersburg*, 2 Flip., 477 (§§ 909-914).

§ 1074. **Signing; registration.**— Municipal bonds issued under authority of an act which provides, among other things, that "said bonds or notes shall be signed by the selectmen, and countersigned by the treasurer of the town issuing the same, and shall be dated, numbered and registered in the town clerk's office of such town; and said notes or bonds, so made and issued, shall create a valid obligation against such town, according to their tenor," are not void for being signed by only a majority of the selectmen instead of all of them, since a statute in that state expressly authorizes a majority to act in such cases. They are not void for want of registration, because registration is not made a condition to their issue and negotiation. *First Nat. Bank of North Bennington v. Town of Arlington*, * 16 Blatch., 57.

§ 1075. The certificate on the face of county bonds, that the county has caused the same "to be signed by the chairman of the board of county commissioners, attested by the county clerk, and the seal of said county affixed," is a sufficient compliance with the law requiring them to be signed and attested. *Commissioners v. Clark*, 4 Otto, 278 (§§ 1882-88).

§ 1076. **Validity of bonds generally.**— In an action on the bond of a county, reciting that it was issued for subscription to the stock of a railroad company, it is no objection that the county has received no certificate for the stock, nor can it be objected that no subscription was actually made by the commissioners of the county. *McCoy v. Washington Co.*, * 3 Wall. Jr., 881.

§ 1077. Municipal bonds issued in pursuance of law, and containing recitals to that effect, are not invalidated by the fact that the subscription by the city to the stock of the railroad company, in aid of which the bonds were issued, was made in place of, and substituted for, the subscription of certain private individuals, there being no evidence that the city was deceived by the transaction. *Davis v. Kendallville*, * 5 Biss., 280.

§ 1078. A town is liable on interest coupons which are headed with the name of the town, and the bond to which they were attached recited that the town was indebted to the bearer in a certain sum, with interest at the rate expressed in the coupon, and the coupon is countersigned by the town clerk, though the bonds were issued in accordance with statute by commissioners therein appointed as agents of the town, and the coupons are signed by such commissioners. The acts of the agents thus constituted bind the town. *Town of Queensbury v. Culver*, 19 Wall., 88 (§§ 854-857).

§ 1079. It is no objection to the validity of funding bonds, issued by a county in pursuance of due authority and a vote of the people, reciting pursuance of the law, and in the hands of *bona fide* holders, that the bonds in place of which they were issued were issued by the board of supervisors of the county, when the county court alone had authority to issue them. The county, in issuing the funding bonds, recognized the old bonds as a subsisting legal obligation on the county. And the old bonds did create a debt against the county, since the money advanced to the county would constitute an equitable claim against the county at all events. *Ballou v. Jasper County*, * 3 Fed. R., 620.

§ 1080. In a suit on municipal bonds issued to a railroad company, the defendants' offer to prove that, before the assent of the tax-payers was executed, one of the directors of the road, to whom the bonds were delivered, and who was also president of the plaintiff bank, addressed a public meeting of tax-payers and said that, if they did not assent, he should tear up the track of a road which ran through the town, in which he had a controlling interest, and that they had heard the last whistle, which speech induced some to assent, is rightly excluded. *First Nat. Bank of North Bennington v. Town of Arlington*, * 16 Blatch., 57.

§ 1081. Where a township has authority to subscribe to the stock of a railroad company and issue its bonds in payment, in case the county commissioners shall not be authorized by a vote of the electors to make a subscription, and the abstract of the acts of the commissioners, made record evidence by law, shows that the commissioners, in whom the law vested power to decide the question, have decided that the vote of the electors authorizes a subscription by the county, the bonds of the township afterwards issued are without authority,

and void even in the hands of *bona fide* holders. *Northern National Bank v. Porter Township*, * 5 Fed. R., 568.

§ 1082. A county may, under authority of an act held constitutional by the supreme court of the state, subscribe for stock in a railroad company, and issue its bonds in payment therefor. In a suit on such bonds by a *bona fide* holder for value, the fact that by the act of the legislature the bonds were to issue upon the recommendation of the grand jury, that the grand jury made it a condition of their recommendation that the bonds were not to be sold below par, and that this condition was annulled by an act of the assembly unlawfully procured by the managers of the railroad, will not constitute a defense. Nor will the provision in the act, that the railroad company was to pay the interest on the bonds until the road was completed, prevent an action against the county on the coupons falling due before that time, even where such provision is recited on the bonds. *Wood v. Allegheny Co.*, * 8 Wall. Jr., 267.

§ 1083. Bonds of a city were issued in pursuance of an act of the legislature and an ordinance of the city. The original ordinance, passed March 20, 1855, contemplating an immediate issue, directed the bonds to be made payable fifteen years after the date thereof. But the bonds were not authorized by legislative act until 1859. May 19, 1859, the city passed another ordinance reviving the ordinance of March 20, 1855, and ordering the bonds to be filled up and executed as provided in that ordinance. The bonds were dated June 1, 1859, and were payable on or before July 1, 1870, and were sold. *Held*, that the bonds were not void because payable at a shorter date than fifteen years, the act of the legislature not prescribing the time the bonds were to run. *Gilchrist v. Little Rock*, * 1 Dill., 261.

§ 1084. A county court in Missouri, authorized to subscribe to stock in a railroad and to issue bonds of the county in payment therefor, without submitting the question to the voters of the county, made an order for such subscription and for the issue of bonds upon certain conditions, which by a subsequent order were modified so that the bonds could issue at once. The county received stock for its bonds and exercised the rights of a stockholder. In an action upon interest coupons attached to the bonds, *held*, that the bonds were valid. *Huidekoper v. Dallas County*, * 8 Dill., 171.

§ 1085. Location of road.—An act in New York empowers a certain railroad company to extend and construct their road from the city of Auburn, or from any point on said road easterly or southerly from said city, upon such route and location, and through such counties, as the directors may think most feasible, to any point on Lake Erie or on the Niagara river. The same act authorizes any town in any county through or near which said railroad or its branch may be located to aid in the construction of the road, its branches and extensions by issuing its bonds. A resolution is passed by the company fixing the eastern point, but fixing no route or location, or counties through which the road is to run, and no western terminus. *Held*, that this is not a sufficient location to authorize the issue of the bonds by a town. *Mellen v. Town of Lansing*, * 11 Fed. R., 829. See §§ 971, 983, 991, 992.

§ 1086. In the act of April 19, 1869, of New York, authorizing any town in a certain county "situate along the route of the Lake Ontario Shore Railroad" to issue bonds in aid of the construction of the road, the words "situate along the route" have reference, not to the route on which the road shall be actually constructed, nor to the paper location of the road filed in the county clerk's office as required by the general railroad act, but to the contemplated or proposed location of the road. *Smith v. Town of Yates*, * 1 Blatch., 89.

§ 1087. Denomination of bonds.—Where the officers issuing the bonds have the power to make them of such denomination as they and the railroad company may agree upon, but not above or below a certain denomination, the bonds may be issued in any denomination within the limits specified, without regard to the denomination mentioned in the proposal. *County of Greene v. Daniel*, * 12 Otto, 187.

§ 1088. Bonds antedated.—Under the act of March 22, 1869, of the state of Michigan, which enacts that the township "shall, within sixty days after the vote of the electors, issue its coupon bonds for the amount so determined," bonds issued by the township clerk more than sixty days after that date, and antedated, are not therefore invalid. *Chickaming v. Carpenter*, * 16 Otto, 669.

§ 1089. Antedating will not validate a void instrument; a false date is equivalent to a false signature. *Anthony v. County of Jasper*, 11 Otto, 693 (§§ 1230-54).

§ 1090. Subscription.—It is not necessary to the validity of county bonds, issued in payment for railroad stock, that there should be an actual subscription by the county on the books of the company. Any transaction which entitles the county to the stock is sufficient. *County of Cass v. Gillett*, * 10 Otto, 585.

§ 1091. A sufficient vote of subscription to the stock of a railroad company, had under authority of a law providing that, if a majority of those voting vote for subscription, then it shall be deemed and held that said town has taken stock in said railroad company, is just as

valid as a subscription as if it had been made on the books of the company. *East Lincoln v. Davenport*, 4 Otto, 801 (§§ 1208-9).

§ 1092. Disposing of bonds.—The delivery of municipal bonds to the railroad company in payment of stock subscribed by the town is authorized by an act which required the commissioners to dispose of the bonds to the best advantage, and invest the proceeds in stock of the company. *Foot v. Hancock*, * 15 Blatch., 848.

§ 1093. An act authorizing certain commissioners to issue town bonds to aid a railroad company empowered them to "dispose of the bonds to such persons or corporations as they should deem most advantageous to the town, but not for less than par," and it prohibited them from paying over "any money or bonds" until certain assurances were given. *Held*, that under this statute it was not necessary that the bonds should be sold, but that the bonds might be delivered by the commissioners to the company. *Town of Queensbury v. Culver*, 19 Wall., 83 (§§ 854-857).

§ 1094. County bonds having been executed by the commissioners according to the powers conferred on them, and delivered to the railroad company in payment for stock, who have paid them to contractors, who have again assigned them to laborers and other *bona fide* holders, for their market value, are not affected by a proviso in the authorizing act "that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value." This is no condition precedent which affects the covenants on the bonds. It assumes that the bonds have been issued and given in payment for stock. *Adams v. Lawrence County*, * 2 Pittab. R., 60.

§ 1095. An act of a state legislature provided that bonds issued by a certain county should be made payable to the president and directors of a certain railway and their successors and assigns. They were, however, made payable to the railway company or bearer. *Held*, that the variance was immaterial, as the payee was, in effect, the same, and the bonds were evidently of the character intended, *i. e.*, negotiable commercial paper. *Woodward v. Board of Supervisors of Calhoun County*, * 2 Cent. L. J., 397.

§ 1096. The right of the agents or officers of a city to dispose of its bonds below their par value cannot be inquired into for the purpose of defeating the bonds, where the duty to dispose of them at par is not made a condition to the lawful issue of the bonds, but is simply required as a duty of the officers by the ordinances of the city. The city is bound by the acts of its agents. *Memphis v. Brown*, * 11 Am. L. Reg. (N. S.), 629.

§ 1097. Bonds, where payable.—Where a city has power by law to borrow money, it may issue bonds and make them payable in New York; but the holder in such case cannot recover exchange on New York. *Mygatt v. City of Green Bay*, * 1 Bias., 292. See § 995.

§ 1098. A state statute relating to the issue of bonds by a county in aid of a railway company provided that they should be made payable to the president and directors and their successors and assigns. The bonds as issued were made payable in New York in two years to the railway company or bearer. *Held*, that the statutory provision above mentioned is directory merely; that the defect is one of form and not of substance, and the irregularity is one committed by the servants of the county and one which the county is estopped to take advantage of; and that as the bonds were payable in New York, and as by the New York law they pass from hand to hand by delivery after assignment in blank, the effect was the same as if the statute had been literally complied with. *Supervisors v. Galbraith*, 9 Otto, 214 (§§ 881-883).

§ 1099. Where no place is designated by statute for the payment of municipal bonds, they may be made payable in another state. *Ibid*.

§ 1100. Corporate authorities.—Under a constitutional provision prohibiting the legislature from authorizing any person to impose a burden of debt on a township except the corporate authorities, the supervisor and clerk of the township are the proper authorities to subscribe to the stock of a railroad company and issue the bonds of the township therefor, where the electors of the township have first voted their assent. *Walnut v. Wade*, * 13 Otto, 683.

§ 1101. Where a county in Illinois was organized under the act of 1851, providing for township organization, the county board succeeded to the functions of the county court, and in the case of a proposed subscription it became their duty to act instead of the county court in ordering the election and issuing the bonds, and the county is liable on the bonds thus issued. *County of Kankakee v. Aetna Life Ins. Co.*, 16 Otto, 668 (§§ 919, 920).

§ 1102. Limit of subscription.—Where the charter of a railway company provides that certain municipalities along its route may subscribe to its stock to a certain amount, the fact that one of the municipalities specified has subscribed to its stock for a less amount and issued bonds therefor does not prevent such municipality from making a valid additional subscription within the limit; the first subscription did not exhaust the capacity of such municipality to subscribe. *Empire v. Darlington*, 11 Otto, 87 (§§ 1218-20).

§ 1103. **Failure to publish ordinance.**—The provisions of a city charter, that no ordinance authorized by a particular section of its charter should be valid which was not published and recorded in a certain way, does not apply to an act of the city in issuing certain bonds, which it could not have done under its charter, but which it was specially empowered to issue by a state law, and such failure to publish and record does not affect the validity of the bonds. *Amey v. Mayor, etc., of Allegheny City*, 24 How., 864 (§§ 1237-39).

§ 1104. **Bonds issued without authority.**—A county was given authority to renew a loan already contracted, when the same should become due, by issuing new bonds in place of the old ones. The act provided that these bonds should be executed by attaching the seal of the corporation, and be signed by the director of the board and the clerk thereof, and be countersigned by the collector. A large number of these bonds were signed by the other officers of the county and placed in the hands of the collector to be countersigned by him and the corporate seal affixed, and issued as it might be necessary in exchanging them for old bonds, or selling them to pay old bonds. The collector issued one hundred and two more of these bonds than were necessary to retire the old issue. Some of these he issued while he was collector and some by him after his retirement from office. All these fraudulent bonds, one hundred and two in number, came into the possession of the defendant. And in an action to compel their surrender, it was decided that the defendant must surrender them all, as some were forgeries, being issued by the person after he ceased to be collector, and all were beyond the statutory power of the county, as it could issue only such as were necessary to retire the old issue. *County of Bergen v. Merchants' Exch. Nat. Bank*, * 12 Fed. R., 748.

§ 1105. **Mistake as to location of town.**—The town of C. was platted on part of section 23, and the plat was recorded. On applying to the county court to be incorporated, the order of the court by mistake described the town as being located on section 24. In a suit on coupons attached to bonds issued by the town, *held*, that the town was estopped to deny its liability. *Aller v. Town of Cameron*, * 8 Dill., 198.

§ 1106. **Borrowing money.**—A contract under which a party is to pay the interest on the debts of a city, the city to refund the amount paid, is not a borrowing of money on the part of the city. *Gelpcke v. City of Dubuque*, * 1 Wall., 221. See §§ 1367-70.

§ 1107. **Form of bonds; recitals.**—The omission in the recital of the bond of the word "qualified" in describing the electors is immaterial. The electors are the qualified electors, *Thayer v. Montgomery County*, * 3 Dill., 389.

§ 1108. **Where city bonds refer upon their face to the ordinance under which they were issued (which is printed on their backs), and the ordinance recites that the provisions of the law authorizing the issue have been complied with, it is not error to sustain a demurrer to pleas which simply tendered an issue as to the authority of the city to issue the bonds and as to the fact of the election.** *Nauvoo v. Ritter*, 7 Otto, 391.

§ 1109. **Where a statute declares that certain municipal bonds shall be signed by the chairman of the board of supervisors and countersigned by the town clerk, and the bonds appear to be in strict conformity with the statute, it will be presumed that they were issued by the board of supervisors.** *Burleigh v. Town of Rochester*, 5 Fed. R., 667.

§ 1110. **Counties are authorized to issue bonds only for limited or specific purposes, and hence it should appear by averment in the petition or by recital in the bonds that they were issued for one of these specified purposes.** *Thayer v. Montgomery County*, * 3 Dill., 389.

§ 1111. **It is recited in the bonds of a county that they "are issued in accordance with a law of the state of Iowa, and authorized by a vote of the people of the county, at the general election," etc., "all the requirements of the law having been complied with, and a tax authorized by said vote to be levied from year to year for the payment of said bonds." It is held that in an action on such bonds this recital is to be taken as true, and it need not be alleged in the petition that the bonds were issued for the purpose of constructing public buildings, roads or bridges, or any other specific purpose authorized by the laws of the state.** *Carpenter v. Buena Vista Co.*, * 5 Dill., 556.

§ 1112. **Seal.**—Municipal bonds must be executed in the manner provided by statute. Thus, where the statute provided that the bonds should be under the hands and seals of the commissioners, and neither the bonds nor coupons were sealed, although the wording of the bonds showed that a sealing was contemplated, it was held, in a suit on the coupons, that the bonds and coupons were void. *Avery v. The Town of Springport*, * 14 Blatch., 272.

§ 1113. **The cases which hold that a party who executes a bond without a seal cannot insist on his own omission give no countenance to the idea that a mere statutory power can be so executed as to impose an obligation, unless the statutory authority is pursued.** *Ibid.*

§ 1114. **Interest.**—A statutory provision that city bonds, issued for a subscription to the capital stock of a railway, should bear interest at a rate not higher than ten per cent. per annum, is not violated by making such interest payable semi-annually at the rate of ten per cent. *Meyer v. City of Muscatine*, 1 Wall., 884 (§§ 921-925). See § 975.

§ 1115. The law of Illinois fixes the rate of interest at six per cent. per annum where it is not settled by contract, but allows the parties to contract for any sum not exceeding ten per cent. It is held that bonds, bearing interest at ten per cent., shall bear interest at the same rate after maturity, such having been established by the courts as the local rule in that state. *Ohio v. Frank*,* 13 Otto, 697.

§ 1116. Where a city, authorized to issue bonds "bearing interest at the rate of six per cent.," made them bear interest at the rate of ten per cent., a holder, claiming only six per cent., may recover that amount, the constitution of the state, in force at the time of the issue of the bonds, declaring "that no law limiting the rate of interest shall ever be passed," and a statute, in force at the time, also declaring that it shall be lawful for parties to stipulate for any rate of interest. *Lewis v. Clarendon*,* 5 Dill., 329.

§ 1117. Miscellaneous.—It is no objection to the validity of bonds, issued under the "Township Aid Act" of Missouri, that the railroad, in aid of which the bonds were voted, was not incorporated till the day of the election. *County of Cass v. Johnston*, 5 Otto, 860 (§§ 901-904).

§ 1118. Where counties along the route of a contemplated railroad are authorized to subscribe to the stock of the company, and the validity of the county bonds depends on whether the county is so situated, the test is, not the actual location of the road, nor the paper location of the road, but the route contemplated or proposed by the act. *Smith v. Town of Yates*, 15 Blatch., 89.

§ 1119. Where a legislature provides that a certain specified municipality shall have the power to issue its bonds in aid of a railway company in a certain manner, that act repeals *pro tanto* all existing laws relating to the issue of such bonds, and none of the formalities and requirements prescribed by previous laws need be observed. *Railroad Company v. County of Otoe*, 16 Wall., 667 (§§ 849-853).

§ 1120. Where bonds were issued by a city alone, and it was contended that they ought to have been issued by the city and county jointly, *held*, that the bonds ought to be held valid unless it was clear that the law did not in fact authorize the city to act alone. *Portsmouth Savings Bank v. City of Springfield*,* 4 Fed. R., 276.

§ 1121. The Denver & Rio Grande Railroad Company made their petition to the commissioners of Pueblo county, to order an election for voting to subscribe \$50,000 to the stock of the company for the purpose of extending its road to certain coal fields in Fremont county, and to be paid in county bonds. Pursuant to this petition an election was ordered, which resulted in favor of the subscription. The bonds were, by the proposition, submitted to the voters, to be delivered on completion of the road to a certain point and the fulfilment of other conditions. On the completion of the road and fulfilment of the other conditions, but before the county had made any subscription to the stock of the company, the company brought a writ of *mandamus* to compel the delivery of the bonds. *Held*, that it would not lie. *People v. Commissioners*,* 2 Colo. T'y, 360.

III. CORPORATION MAY CANCEL ITS SUBSCRIPTION AND BUY UP BONDS.

SUMMARY — *Vote confers no vested right*, §§ 1122-1124. — *Withdrawal of assent*, § 1125. — *Corporation may buy its outstanding bonds*, § 1126.

§ 1122. Though a statute authorizes a county to subscribe to the stock of a railway company and issue bonds therefor, if a majority of the qualified electors of the county shall vote to do so, yet such vote in favor of the subscription confers upon the company no vested right in the bonds of the county to the amount of the subscription voted. *Aspinwall v. Commissioners of Daviess County*, §§ 1127, 1128; *Wadsworth v. Supervisors*, §§ 1129-1132.

§ 1123. Neither the provision of the charter of a railway company, that counties through which it might pass might subscribe for its stock if a majority of the qualified electors of such county should vote to do so at an annual election, nor a vote authorizing such subscription, constitutes a contract within the meaning of that clause of the constitution which prohibits a state from passing any laws impairing the obligation of a contract. So where a new state constitution went into effect between the time of such vote and the time of making the subscription, which prohibited counties from lending their credit to railway companies, it was held that county bonds issued in payment of such subscription were void. *Aspinwall v. Commissioners of Daviess County*, §§ 1127, 1128.

§ 1124. Where a state law authorized a county board to issue bonds in aid of a railway, if a majority of the electors vote to do so at an election, the board may in their discretion refuse to issue the bonds; and though the railway company may have built their road on the expec-

tation that such bonds would be issued, yet the legislature may repeal the law authorizing such donation. *Wadsworth v. Supervisors*, §§ 1129-1132.

§ 1125. An act, authorizing municipal aid to a railroad, provided that no subscription should be made unless the assent in writing thereto of a majority of the tax-payers should be obtained, and that, when obtained, the persons named in the assent for commissioners should be commissioners, who should append their certificate that a majority had assented, and that any contract made by the commissioners in pursuance of such assent should be binding upon the town. After the commissioners had found that the required consent had been executed in writing, but before the certificate by the commissioners, some of those who had assented, sufficient to destroy the majority, executed and delivered to the commissioners a withdrawal of their assent. The withdrawal was held to be without effect, and the bonds issued in pursuance of the original assent valid. *First Nat. Bank of North Bennington v. Town of Dorset*, § 1133.

§ 1126. A municipal corporation acting in good faith has a right to purchase its outstanding bonds from a corporation in aid of which they were issued, and a transaction will be upheld which amounts to this, though not denominated as such by the parties thereto. *New Albany v. Burke*, §§ 1134-1136.

[NOTES.— See §§ 1137, 1138.]

ASPINWALL v. BOARD OF COMMISSIONERS OF THE COUNTY OF DAVIESS.

(22 Howard, 364-380. 1859.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—The case comes up from the circuit court of the United States for the district of Indiana. The suit was brought by the plaintiffs against the board of commissioners of the county of Daviess, to recover two instalments of interest accruing upon certain bonds issued by the board for stock subscribed to the Ohio & Mississippi Railroad Company; and on the hearing the following questions arose, upon which the judges of the court divided in opinion:

1. Whether, by the said act of incorporation of the said railroad company, and the amendment thereto of January 15, 1849, any such right to county subscriptions vested in said company as would exclude the operation of the new constitution of Indiana, which took effect on the 1st day of November, 1851.

2. Whether, by virtue of the said acts, and of the said election in the declaration set forth, the Ohio & Mississippi Railroad Company acquired any such right to the subscription of the defendants as would be protected by the constitution of the United States against the new constitution of Indiana, which took effect on the 1st day of November, 1851.

The charter of the railroad company, passed February 14, 1848, provides that it should be lawful for the county commissioners through which the road passed to subscribe for stock on behalf of the county, at any time within five years after the opening of the books of subscription, if a majority of the qualified voters of said county, at an annual election, shall vote for the same. The amended act of January 15, 1849, made the holding of the election in the county peremptory on the first Monday of March (then) next, to determine the question of subscription or not to the stock. The election was held in pursuance of this law, and a majority of the votes of the county cast in favor of the subscription. This was on the first Monday of March, 1849; and on the 10th September, 1852, the board of commissioners, in pursuance of the acts and of election aforesaid, subscribed for six hundred shares of the stock of the railroad company, of the value of \$50 per share, in the whole amounting to \$30,000, and in payment of said stock issued thirty bonds, of \$1,000 each, duly signed and sealed by the president of the board of commissioners, and attested by the auditor of the county, and delivered the same to the president and

directors of the railroad company. By the terms of the obligations, they were made payable at the North River Bank in the city of New York, twenty-five years from date, to the railroad company or bearer, with interest at the rate of six per cent. per annum, payable annually on the 1st March, at the bank aforesaid, upon the presentation and delivery of the proper coupons attached, signed by the auditor of the said county. The plaintiffs are the holders and owners of sixty of these coupons.

The new constitution of the state of Indiana contains the following provision: "No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company." Sec. 6, art. 10, Constitution of Indiana.

This constitution took effect on the 1st November, 1851. The subscription was not made nor bonds issued by the board of commissioners of the county, as we have seen, until the 10th September, 1852. The question therefore arises whether the subscription and bonds, thus made and issued after the constitution went into effect, were not forbidden by the sixth section of the tenth article above cited, and, therefore, null and void.

§ 1127. *A provision in a railroad charter, authorizing subscriptions to its stock by counties, is not a contract within the meaning of the constitution.*

The precise question first presented by the court below, upon which the judges divided, is as follows: Whether by the said act of incorporation of said railroad company, and the amendment thereto of January 15, 1849, any such right to county subscriptions vested in said company as would exclude the operation of the new constitution of Indiana, which took effect on the 1st November, 1851.

The question admits, at least by implication, that this sixth section of the constitution applies to the acts of the board of commissioners in making the subscription and issuing the bonds; but presents the question whether, at the time it went into effect, there was not such a right to the subscription and bonds vested in the railroad company as could be upheld, notwithstanding the constitutional prohibition? This view is sought to be sustained by force of the tenth section of the first article of the constitution of the United States, which provides that no state shall pass any law "impairing the obligation of contracts." The argument is, that the provisions in the railroad charter and amendment, conferring power upon the board of commissioners of the county, and making it their duty to subscribe for stock and issue bonds therefor, if a majority of the qualified voters of the county should determine at an election in favor of the same, import a contract with the railroad company on behalf of the state, which is protected by the clause referred to in the constitution of the United States; and hence the state constitutional prohibition is inoperative to annul the subscription or the bonds. That this right to the subscription and bonds, resting upon a contract in the charter, is unaffected by any subsequent statute or organic law of the state.

Without stopping to inquire whether or not the power conferred upon the board of commissioners in the charter and amendments of the railroad company, in the form and with the conditions therein mentioned, constitutes a contract, the court is of opinion that, in view of the body upon which the power is conferred, and of the nature of the power itself, no such contract existed, if any, as is contemplated by this clause of the federal constitution. The power or authority contained in the charter, and out of which the right in question is

claimed to arise, is conferred upon the county, a public corporation or civil institution of government, and upon public officers employed in administering its laws; and the power or authority itself concerns this body in its public political capacity. Chief Justice Marshall observed, in *Dartmouth College v. Woodward*, 4 Wheat., 627, that the word contract, in its broadest sense, would comprehend the political relations between the government and its citizens; would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control. But, he observes, the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed. P. 629. And Mr. Justice Washington observed, in the same case (p. 663), in respect to public corporations, which exist only for public purposes, such as towns, cities, etc., the legislature may, under proper limitations, change, modify, enlarge or restrain them; securing, however, the property for the use of those for whom, and at whose expense, it was purchased. See, also, pages 693, 694. It would be difficult to mention a subject of legislation of more public concern, or in a greater degree affecting the good government of the county, than that involved in the present inquiry. The power conferred upon the board of commissioners by the provisions in the charter, among other things, embraced the power of taxation, this being the ultimate resort of paying both the principal and interest of the debt to be incurred in the subscription and issuing of the bonds.

§ 1128. *An election by the voters of a county, authorizing a subscription to the stock of a railroad company, is not such a contract as is protected by the constitution.*

The second question presented, upon which the judges differed, is as follows: Whether, by virtue of said acts, and of the said election in the declaration set forth, the Ohio & Mississippi Railroad Company acquired any such right to the subscription of the defendants as would be protected by the constitution of the United States against the new constitution of Indiana, which took effect the 1st November, 1851.

The acts of 1848 and 1849, already referred to, made it the duty of the board of commissioners to subscribe for the stock, if a majority of the qualified voters at an election determined in favor of the subscription. The election took place on the first Monday of March, 1849, when a majority of the votes was cast for the subscription. The constitution of Indiana took effect 1st November, 1851. But the subscription was not made till the 10th September, 1852, and the bonds were issued after this date. It is insisted that the contract of subscription became complete when, at the election, a majority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties; and which, if true, it is agreed the contract would be protected within the constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the court is unable to concur in this view. It holds that a subscription was necessary to create a contract binding upon the county, on one side, to take the stock and pay in the bonds; and upon the other, to transfer the stock and receive the bonds for the same. Until the subscription is made, the contract is unexecuted, and obligatory upon neither party.

We have arrived at the conclusion that both of the questions presented to us by the court below must be answered in the negative with some reluctance, as, for aught that appears in the case, the subscription to the stock by the board of commissioners was made, and the bonds issued, in good faith to the railroad company, and also sold by it and purchased by the plaintiff in confidence of their validity; but, after the best consideration the court has been able to give the case, it has been compelled to hold, for the reasons above stated, that the subscription was made, and the bonds issued, in violation of the constitution of Indiana, and therefore without authority, and void. We have not been able to find that the courts of Indiana have passed upon this clause of their constitution, and have, therefore, been obliged to expound it with the best lights before us. We should have felt very much relieved if a construction had been given to it by the judicial authorities of the state, and have readily followed it.

WADSWORTH v. SUPERVISORS.

(12 Otto, 584-541. 1880.)

APPEAL from U. S. Circuit Court, Western District of Wisconsin.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—By an act of the legislature of Wisconsin, approved April 1, 1864, the legal voters of certain counties, among which are the counties of Eau Claire and St. Croix, were authorized to vote upon the subject of municipal aid in the construction of a railroad from Tomah to Lake St. Croix by the Tomah & Lake St. Croix Railroad Company, subsequently called the West Wisconsin Railway Company. The act declared that, "if a majority of the ballots cast in any of said counties be for railroad aid, the county board of supervisors of said counties shall have power, by resolution, to cause to be issued bonds of the denomination of one hundred to one thousand dollars each, to an amount not exceeding \$50,000 for each of said counties, payable thirty years after the date thereof, with interest at the rate of seven per cent., payable semi-annually in the city of New York, at such place as the treasurer of the state shall designate." The board of supervisors of each of the counties voting such aid were required to "annually cause to be levied and collected, as other state and county taxes are collected, a sum of money sufficient to pay the interest accruing and existing by reason of the bonds which either of said counties may issue, at the rate aforesaid, and such further amount to defray any expense attending the payment of such interest." The act further provided that "the said bonds, when authorized to be issued as aforesaid, shall be held by the county board of supervisors of each of said counties, and the same, or the avails thereof, shall be expended in the counties which issue the same (provided the railroad passes through the said county), in the grading of said railroad, or in the purchase of ties therefor; and the said bonds shall be delivered to the said railroad company when the board of supervisors of each of said counties are satisfied that the same will be applied for such purpose."

On the 5th of November, 1867, an election was held in the county of Eau Claire, at which a majority of votes were cast in favor of aid, to the extent of \$50,000, to the Tomah & Lake St. Croix Railroad Company. The road was constructed through the county prior to March 10, 1870, but it does not appear when the work of such construction was commenced. The entire road was, however, fully constructed on or about December 1, 1871, since which date it

has been operated as a railway. On and prior to March 15, 1870, the company demanded of the board of supervisors for the county of Eau Claire county bonds to the amount of \$50,000, and payable as required by the statute. The board refused to comply with that demand, and made the following record of such refusal, viz.: "The county board of supervisors of Eau Claire county met at the office of the clerk, all members present. The board took up the subject of issuing the bonds of the county to the West Wisconsin Railroad Company as voted in 1867, and expressed themselves as willing to issue the bonds of the county if they could be paid by a tax as understood at the time the vote was taken, but as our highest courts have decided that it is illegal to levy and collect a tax to pay such bonds, they refuse to issue them. They are unwilling to issue the bonds of the county which cannot be paid, but must be repudiated in the end, for the reason that it would be unjust to the bondholder and a disgrace to the county, and requested the county board of supervisors of said county to cause said bonds to be issued and delivered to the said company as required by law and the aforesaid vote of the electors of said county." There is some confusion in the language employed in this minute of the proceedings of the county board, but there can be no doubt as to the grounds upon which it refused to execute and deliver the bonds.

By an act approved March 25, 1872, so much of the act of April 1, 1864, as authorized the counties of St. Croix and Eau Claire to issue bonds in aid of the construction of a railroad from Tomah to Lake St. Croix was *repealed*. On or about September 1, 1875, the railroad company, for a valuable consideration, assigned and transferred to Wadsworth all and every cause of action, in law or equity, it then had, or to which it was entitled, against the county of Eau Claire, by reason of the failure and refusal of its board of supervisors to issue and deliver county bonds in accordance with the vote of the people. The object of the present suit in equity by Wadsworth, as assignee of the company, is to compel the execution and delivery to him of such bonds. To the bill filed a demurrer was sustained, and a decree entered for the defendants. In the view which the court takes of this case, it may be assumed that due notice was given of the election held on the 5th of November, 1867.

§ 1129. *A board of supervisors is under no legal obligation to issue bonds of the county merely because the conditions upon which it is empowered to do so have been fulfilled.*

The main question, then, presented is, whether the county of Eau Claire ever came under a legal obligation to execute and deliver to the railroad company county bonds to aid in the construction of the road from Tomah to Lake St. Croix? The decision of that question, it seems to the court, is controlled by the principles announced in *Aspinwall v. Commissioners, etc.*, 22 How., 364 (§§ 1127-28, *supra*). That case involved the validity of certain county bonds which were in the hands of *bona fide* holders for value, having been issued by the board of commissioners for Daviess county, Indiana, in payment of a subscription made in behalf of the county to the capital stock of an incorporated railroad company. The subscription was made under the sanction of a popular vote and in conformity with the charter of the railroad company, which made it the duty of the commissioners to subscribe for the stock and issue bonds in payment thereof, whenever a majority of qualified voters of the county, at an election held for that purpose, should declare in favor of such subscription. It, however, appeared that after the people had voted in favor of the subscription, but before any subscription was in fact made, a new constitution for

Indiana went into operation, containing, among others, the provision that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company; nor borrow money for the purpose of taking stock in any such company." It was argued in that case that as the statute under which the election was held made it the duty of the commissioners to subscribe for the stock and issue county bonds in payment thereof, the right of the railroad company to receive the bonds became complete and perfect when a majority of legal voters declared in favor of the subscription; and that such right was not, and consistently with the contract clause of the national constitution could not be, affected by any subsequent changes in the organic act law of the state. To that position this court was unable to give its assent. The reluctance expressed in its opinion is not to be construed as implying doubt as to the correctness of the legal conclusions there reached, but only as referring to the fact that the bonds in suit were in the hands of those who, for aught that appeared, had purchased them in the belief that they were valid obligations of the county. We held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds, and that a subscription was necessary to create a contract binding the county to issue bonds in payment of the stock, and binding the company to issue stock for the bonds. "Until the subscription is made," said Mr. Justice Nelson, speaking for the whole court, "the contract is unexecuted and obligatory upon neither party." Hence, the new state constitution was held to govern the case, and from the time of its adoption to have withdrawn from the county commissioners all authority to make subscriptions to the stock of incorporated companies, except in the manner and under the circumstances prescribed by that instrument.

§ 1180. *A vote of the county in favor of a subscription creates no vested right.*

Applying the doctrines announced in *Aspinwall v. Commissioners, etc.*; to the present case, it is clear that there was no binding agreement or contract between the railroad company and the county of Eau Claire, by which the latter became legally bound, through its board of supervisors, to execute and deliver bonds to aid in the construction of the road from Tomah to Lake St. Croix. The act of April 1, 1864, neither in express words nor by necessary implication, made it imperative upon the board of supervisors to issue bonds in pursuance of the popular vote. The act was an enabling one, and its legal effect was to invest the board with power to supplement the expressed will of the people by an issue of bonds. We find nothing in its provisions justifying the conclusion that the popular vote was to be taken as an absolute direction that the supervisors should issue the bonds, at all events, and without regard to the circumstances intervening after the people had voted in favor of county aid to the enterprise in question.

It will be observed that the act of 1864 did not contemplate a subscription of stock upon the part of the county, but simply a donation of bonds to aid in the construction of the road. We can understand why the legislature might invest the constituted authorities of the county with large discretion as to the exercise of a power to issue bonds by way merely of donation to aid in the construction of a railroad. But whether sound policy indicated such a course, it is not material to inquire, since our duty is to ascertain the legislative intent, and, if possible and consistent with the law, to give it effect according to the

reasonable interpretation of the words employed to express that intent. As the statute only declared that the supervisors should have *power*, by resolution, to cause bonds to be issued when the people voted in favor of railroad aid, we are not at liberty to say that the legislature meant such vote to be a positive command to exercise that power without regard to the circumstances arising after the expression of the popular will.

§ 1181. *A statute enabling a county to issue bonds is repealable if no vested rights have accrued.*

But if we should be mistaken in this construction of the statute,—if the statute had, in terms, made it the duty of the supervisors to issue bonds, to the extent indicated by the popular vote,—we should feel bound, upon the authority of *Aspinwall v. Commissioners*, etc., to hold that the legislature could, at any time before the bonds were in fact issued, or before the county came under a legal obligation to issue them, repeal, as it did, the statute conferring the power to issue, and thereby withdraw from the supervisors all authority in the premises. The election at which the people gave their sanction to railroad aid had, as we have seen, no other effect than to confer power upon the supervisors to issue bonds, and did not place them under any legal obligation to the railroad company to exercise the power granted. The railroad company had not, prior to the passage of the act of 1872, acquired any perfect or vested right to the donation. The repealing statute of 1864 was, under the circumstances, a total abrogation or obliteration of the law repealed, as much so as if the latter had never existed.

We have not overlooked the averments in the bill that the company constructed its road through Eau Claire county at a cost, in grading and in the purchase of ties, exceeding the sum of \$50,000; that such work was done and such money expended upon the faith of the aid voted, and with “the full understanding and belief” that the bonds would be issued and delivered to the company; and that the company would not have built the road and expended the money except in reliance upon an issue of the bonds as authorized by the statute. With whom such understanding was had, and upon what special facts such belief was based, does not appear from any specific allegations in the bill. The seventh section of the act of 1864 directed that the bonds, “when authorized to be issued as aforesaid,” that is, when issued under the power conferred by popular election, should be held by the supervisors, and not delivered until they should be satisfied that the proceeds would be expended in the grading of the road in the county issuing them, or in the purchase of ties therefor. Had the bonds been in fact executed before the act of 1872, but retained by the supervisors under an agreement for their delivery when the purposes indicated by the section just cited had been met, there might have been some ground for holding that the power given by the statute to issue the bonds had been finally and fully exercised by the supervisors, and that, in such case, the railroad company would have been entitled to enforce their delivery, upon the completion of the road through the county, or after the expenditure of an equal amount, either in the grading of the part of the road which lay in that county, or in the purchase of ties therefor. But we have seen that the bonds had not in fact been executed, when the power to issue and deliver them was withdrawn by the legislature. The discretion conferred upon the supervisors had not then been exercised. If the company chose to enter upon the work of construction in the county before the supervisors had, in fact, elected to exert the power conferred by the statute, and without any agreement, upon sufficient consideration, bind

ing the county to execute and deliver the bonds, their understanding, however induced, and their belief, upon whatever facts based, that the bonds would, at some future time, be issued and delivered, could not trammel the power of the legislature, or prevent it from withdrawing the authority conferred upon the supervisors in the act of 1864.

§ 1132. *Though the refusal of a county board to issue its bonds be based upon untenable grounds, the courts will not interfere where the issuance is discretionary.*

Nor do we think it at all material in the determination of this case that the supervisors expressed upon their records a willingness to issue the bonds, and that they were restrained from so doing by the circumstance that the supreme court of Wisconsin had judicially declared that the payment of the bonds, if issued, could not be enforced. The cases in that court to which, as we suppose, the supervisors referred were *Curtis v. Whipple*, 24 Wis., 350, and *Whiting v. Sheboygan & Fond du Lac R. Co.*, etc., 25 id., 167, in the former of which, decided in 1869, it was held that the legislature had no power to raise money, or to authorize it to be raised by taxation, for the purpose of donating it to a private educational institution; and in the latter, decided in 1870, that no such power existed to make a donation in aid of the construction of a railroad owned, managed and operated by a corporation in all respects private, except that in its behalf the power of eminent domain might be exercised, and except also that it was charged with certain public duties and was subject to certain public uses. Notwithstanding the reasons assigned by the supervisors for the non-issue of the bonds, the fact remained that they did not, prior to the repealing act of 1872, assume to impose any legal obligation upon the county, either by an actual issue of the bonds or by an agreement to issue and deliver them upon the completion of the road through the county. Under this view of the case we need not consider the question suggested by counsel, as to how far the rights of parties are to be controlled by the decisions of the supreme court of the state, rendered after the election of 1867, upon the subject of municipal donations to railroad and other private corporations. What has been said is sufficient to dispose of the case. The decree below sustaining the demurrer was correct, and is affirmed.

FIRST NATIONAL BANK OF NORTH BENNINGTON v. TOWN OF DORSET.

(Circuit Court for Vermont: 16 Blatchford, 62-65. 1879.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.— This is a motion for a new trial after a verdict for the plaintiff at the last term, and involves no question not involved either in *First National Bank of North Bennington v. Bennington*, 16 Blatch., 57, or in *First National Bank of North Bennington v. Arlington*, 16 Blatch., 62, heard at the same time with this, except that in this it appears that after the required majority, or what the commissioners found to be such majority, had assented in writing, executed as required, and before the commissioners had certified to that fact, some forty of the tax-payers executed, in the same manner that the assent was executed, what they called a recantation, notwithstanding their assent, which was shown to, and a copy of it taken by, the commissioners. The withdrawal of this number would leave the number assenting clearly below a majority. It is urged that after this the commissioners had no authority to proceed with making the certificate, and that it was void, and that this would invalidate the bonds.

§ 1133. *Under an act of Vermont, held, that the assent of tax-payers to the issue of town bonds could not be withdrawn by writing executed in the same manner as the assent.*

The provisions of the act affecting this question are, that no subscription, purchase or contract shall be made, "unless the assent in writing thereto of a majority of the tax-payers . . . shall be obtained," and that, when obtained, the persons named in the assent for commissioners shall be commissioners, who shall append their certificate that a majority have assented, and that any contract made by such commissioners in pursuance of the terms of the assent, and not inconsistent therewith, shall be binding upon the town. There is no provision for any dissent after assent by any person, or for any mode of making such dissent known to the commissioners, if it should arise.

This method of obtaining an expression of the sense and will of the tax-payers is treated by the supreme court of the state, in *Bennington v. Park*, 50 Vt., 178, and *Bank v. Concord*, id., 257, as a mode of voting, in which all those assenting vote for, and all those not assenting vote against, the proposition in the instrument of assent. In that view, when a tax-payer had executed the instrument of assent, he had exercised his right of voting and voted on that question. In all deliberative assemblies, each member has the right to change his vote upon any question, at any time before the vote is declared. Perhaps the voters, in this mode of voting, would have the same right at any time before the result should be certified to by the commissioners. They would probably have it, unless the provisions for this method of voting have cut it off. Perhaps the legislature intended, by not providing any mode for changing any votes, that it should be cut off. But if not, and the right was left, it could only be exercised in some proper mode. None of the dissenters went in person to the commissioners and made known their wish, or claimed any right to dissent. They merely executed an instrument in writing expressing their dissent, and sent that. If a voter in town meeting, or a member of a legislature, should, in absence, after voting on any question and before the result of the vote should be declared, send, in writing, a change of his vote, probably no notice would be taken of it, however formal and solemn the execution of it might be. He would be required to be personally present, or compelled to leave the subject to stand, so far as he should be concerned, as it was when he was present. *State v. Tudor*, 5 Day, 329. In that case, *Ingersoll, J.*, said: "I agree most fully that, by the common law, every vote given in a corporation instituted for the public good, either the good of the whole state or of a particular town or society, must be personally given. So, also, every vote given by a freeman for his representative must be given by him in person. There is no deviation from this rule; the authorities on this subject are uniform." Even the right to vote by proxy in private corporations is not a general right, and authority for it must be shown by some law or by-law made pursuant to law. *Angell & Ames on Corp.*, § 130. Perhaps if those desiring to dissent had gone personally to the commissioners, and claimed the right to withdraw their assent and to take their names or have them taken from the assent, the commissioners would have been bound to heed them, and perhaps not; but, if they would, nothing of the kind was done, nor anything that would be an equivalent for it in fact, and nothing was provided by law that should, in law, be an equivalent. What they sent was, in its nature, mere hearsay. It was authenticated the same as the assent, but the law made the assent so authenticated equal to a vote, and did not make a withdrawal so authenticated

equal to a change of vote. There was no law requiring the commissioners to regard, or authorizing them to act upon, the recantation. Further than this, the law made the decision of the commissioners final, and the supreme court of the state has construed this law as making it final for all purposes, where others are concerned, however erroneously they may have acted in making it. *Aldis v. Lamoille Valley R. Co.*, 50 Vt., 281. And, still further, if there was misconduct or fraud even, of these commissioners, as their recorded proceedings were regular upon their face, it would not affect the rights of a *bona fide* holder of the bonds. *East Lincoln v. Davenport*, 94 U. S., 801 (§§ 1208, 1209, *infra*). The motion is overruled and judgment entered on the verdict.

NEW ALBANY v. BURKE.

(11 Wallace, 96-108. 1870.)

APPEAL from U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—The city of New Albany subscribed stock to a railroad company and issued its bonds to the company for the amount. The citizens and tax-payers were dissatisfied with the arrangement, and brought suits and applied for injunctions to such an extent as very greatly to reduce the market value of the bonds, and finally a compromise was made by which the city paid the debts for which its bonds had been hypothecated by the company, took back the remaining bonds, and was released from its engagement to issue more. This took place in 1857, at which time the railroad was nearly or quite insolvent. Burke was a creditor of the company, obtained judgment against it in 1857, issued execution, made all out of it he could, and had a large balance unpaid. Nothing further was done until 1868, when Burke filed a bill against the city and the company, alleging that the compromise between them was fraudulent and void, that the cancellation of the city's subscription was invalid, and that it was largely the debtor of the company. There was a decree in favor of the complainant, and the city appealed.

Opinion by MR. JUSTICE STRONG.

Assuming that the subscription made by the city to the capital stock of the company in 1853, though undoubtedly invalid at first, became valid by the ratification ordinance adopted March 7, 1855; that thereby the city came under obligation to give its bonds to the company in payment for the stock, so far as they had not already been given, we come directly to the question, what was the effect of the arrangement made in August and September, 1857? Here the situation of the parties at the time is of importance to be considered. The railroad company had undertaken to build a railroad from New Albany to Sandusky City, and it had commenced the work, relying mainly upon the bonds of the city to raise the money necessary. It had, however, been disappointed. Suits had been commenced for injunctions to restrain the collection of a tax for paying the interest, and the consequence was that the bonds could not be sold without a ruinous sacrifice, if sold at all. These suits were still pending. Meanwhile the company had borrowed \$36,000, pledging the bonds to the amount of \$80,000 as collateral security. The loan had fallen due, and the holders were demanding payment, and threatening to sell the collaterals. The company was utterly unable to redeem the pledge. Its available means were completely exhausted. It could neither go on with its work nor in any manner relieve itself. According to the weight of the evidence, the bonds

pledged, together with all the others still held by the company, would not have sold for enough to have paid the \$86,000 borrowed.

§ 1134. *It is competent for a municipal corporation having negotiable bonds outstanding to buy them in at their market value.*

Turning now to the condition of the city. It had ratified its invalid subscription with an irrevocable engagement on the part of the company that not more than \$250,000 should be called for until the railroad should be completed and put in running order at least to its junction with the Ohio & Mississippi Railroad, and then only for the purpose of furnishing the road with depots, rolling stock, etc. It had paid its bonds to the extent of \$200,000 on the subscription, and it was liable to be called upon for \$50,000 more. For the remainder it was liable only upon a contingency that has never happened, and that never can happen. The consideration for its subscription, it is true, had not failed, though the motive that induced it, namely, the construction of the railroad, no longer existed. The credit of the bonds which it had issued was gone, and had it issued the remaining \$50,000 they could not have been sold for more than \$8,000 or \$10,000. It was in these circumstances that the company applied to the city, stating its own helplessness, and it was then that the arrangement was made by which the city assumed to pay the debt of \$36,000 due by the company, and sundry other moneys, and in consideration thereof obtained from the company one hundred and ninety-three bonds, which had not been negotiated, and a cancellation of the stock subscription. Was this transaction valid?

The bonds were negotiable instruments, payable to bearer in not less than ten and not more than twenty years, and, of course, passing from hand to hand by delivery. Had the whole subscription been paid, it must have been with similar bonds. And the manifest design of the subscription was to create bonds for sale in the market as the convenience or the necessities of the railroad company might require. There was no restriction in the contract upon the power of disposition, and none at law, or in equity, unless it be that the company could not part with the bonds in fraud of its stockholders or its creditors. And it had the right, which all other debtors had at the time, to make preferences among its creditors — to pay one rather than another. It is not to be disputed that, situated as the company was at the time when the contract of August and September, 1857, was made, with the debt of \$36,000 pressing upon it, and with no other means of relief, it might have sold the entire lot of two hundred and forty-three bonds, which it held, or was entitled to call for, at the best price that could have been obtained, and might have applied the entire proceeds, had they been needed, to pay that single debt. Of this, neither the stockholders nor the other creditors could have complained. What more has been done now? No doubt such a course would have involved an equal sacrifice to the company, and would, in the end, have been more disastrous to the city. Time has revealed that the bonds were worth more than they could have been sold for, but we are to look at the circumstances as they were when the transaction took place, in considering what was its nature and whether it was legal. But if a sale by the company at the market price, and an application of the whole proceeds to the payment of the \$36,000 debt, would have been unimpeachable, why is it less so because the city became the purchaser? Beyond doubt, the city might lawfully buy its own bonds. Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no differ-

ence whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction, or the arrangement of August and September, 1857, was, in substance, plainly nothing more than a purchase by the city of its own bonds, some of which had been issued, and others of which it was under obligation to issue, at the call of the vendor. The price paid was \$36,000, besides some thousands more which the purchaser undertook to pay. Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. Certainly it did not place the company in any worse position than it must have held had it not been made.

§ 1135. *It is not beyond the powers of a corporation, which had a right to subscribe or not as it chose, to recall its subscription by buying in its bonds.*

It is, however, contended by the complainants that the arrangement was fraudulent, both in law and in fact, and that neither the common councils of the city nor the directors of the railroad company had power to make it. In support of the proposition that the transaction was *ultra vires* we are referred to *Bell v. Railroad Co.*, 4 Wall., 598, but that case is very unlike the present. There a popular vote, under legislative sanction, had instructed the police board to subscribe a defined amount, leaving to them no discretion. The police board were agents to carry out the popular will, with limited powers. It was not, therefore, for them to subscribe a less amount, or make any other contract than the one they had been directed to make; and this court well said that a municipal corporation, like the board of police, could not modify or alter the stock subscription voted by the people in the absence of power from the legislature. The decision, however, was placed upon other grounds. But in the present case the common council were free to exercise their own discretion. They were under no obligation to subscribe at all, and they might take as little or as much stock as they pleased, not exceeding \$600,000. Besides, as we have seen, the arrangement assailed by the complainants was not a modification of the subscription previously made, or a bonus given for a release. It was rather a purchase of the city debt. We think it was not beyond the power of the contracting parties.

And we are not able to perceive that it was fraudulent, either in law or in fact. It may well be doubted whether the complainants can be heard in alleging fraud. It is clear the arrangement made is binding upon the railroad company, through which, as well as against which, they claim. They can, therefore, have no standing in court unless the arrangement was absolutely null for want of power in the parties to make it, or unless it was fraudulent as against them, and therefore voidable at their suit. We have already seen that it was not a nullity, and the bill does not charge that it was fraudulent. It avers that the arrangement and compromise and attempted cancellation of the subscription was entirely null and void, but it does not allege that they were fraudulently made. In urging fraud now the complainants are setting up a case not made by the pleadings. But it is not necessary to place our decision on this ground. No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, as is also all its other property, and had the railroad company released, without equivalent consideration, or given it away, its action would have been fraudulent, and might have been set aside by a court of equity. But certainly it was in the power of the directors to

apply the subscription on bonds taken in payment to the extinguishment of debts, and if thus applied in good faith, all being obtained for it that it was worth, no one has been wronged. It is, therefore, a question of fact to be determined by the evidence, whether the bonds and the balance of the city's subscription were thus applied. Upon this subject we have already remarked at considerable length. We may add the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market.

§ 1136. *A delay of nine years after the ground of relief was perfected before bringing suit is laches.*

We will not pursue this branch of the case further. Were it even conceded that the arrangement of August and September, 1857, might have been set aside at the instance of creditors of the company, the laches of the complainants is fatal to their bill. This suit was not brought until the 29th day of January, 1868. The contract assailed was consummated September 8, 1857. It was not made in secret. There was no attempt at concealment. On the contrary, the ordinance of the city was published at the time. The insolvency of the company, as well as its abandonment of its work on the railroad, was known. It is asserted in complainants' bill. Injunction suits were then pending against the city. The return of *nulla bona* to the complainants' execution against the railroad company was made on the 1st of December, 1858. Then their right, if any they had, to attack the compromise as fraudulent was perfect. Yet they remained inactive more than nine years, and it was not until after a speculator had purchased a large part of the judgment that this bill was brought. An attempt has been made to excuse this long delay by the testimony of one of the complainants that he had never heard of the compromise of the city's subscription until a time which was subsequent to the commencement of the suit. But he does not say that he had not full possession of the means of detecting the fraudulent arrangement, if it was fraudulent, or that there had been any concealment; and the possession of such means of knowledge is, in equity, the same as knowledge itself. *Farnam v. Brooks*, 9 Pick., 212; 2 Story, Eq., § 1521. Moreover, the other evidence in the case is irreconcilable with this statement of the witness. He had attorneys who knew of the compromise from the first. He himself went to New Albany in the spring of 1858 for the purpose of making a thorough examination of the affairs of the company, and another witness thinks he was then informed of the arrangement. There is not the slightest evidence that any other one of the complainants was not fully apprised of what had been done from the time of the transaction; and certainly they all had the fullest means of knowledge. No excuse is, therefore, shown for their long delay, and it is difficult to see why they are not barred by the rule in equity analogous to the statute of limitations. Upon this subject it is unnecessary to cite authorities. They are to be found in numbers in the decisions of this court as well as elsewhere. It is not to be questioned that a direct suit at law founded upon alleged fraud in making the compromise would have been barred by the Indiana statutory limitation of six years. It cannot be maintained that supine negligence and lapse of time are less efficient in a court of equity.

These views of the case render it unnecessary to consider the other defenses

set up against the complainants' right to recover. Decree reversed, and the cause remanded with instructions to dismiss the complainants' bill as against the city of New Albany.

§ 1187. *Power of agent.*—The power conferred upon the agent of a county to issue bonds for it implies the power to take up and cancel bonds delivered by him to a contractor, which have not been negotiated by him, and replace them by new ones. *Lynde v. The County*, 16 Wall., 6 (§§ 1051-55).

§ 1188. *Action to compel issue of bonds.*—An act authorizing certain counties to subscribe to the stock of a railroad company, and issue bonds therefor, upon consent of the voters, provides that "if a majority of the ballots cast be 'for railroad aid' the county board of supervisors shall have power to cause to be issued bonds," etc. A county among those authorized votes in favor of railroad aid, and certain irregularities in the proceedings are expressly cured by a subsequent act. The supervisors fail to issue the bonds. The road is built. The act authorizing this county to issue bonds is subsequently repealed. It is held, in an action by the company to compel the county to issue the bonds, that it was in the discretion of the supervisors to issue the bonds or not, and that the action cannot be maintained. *Wadsworth v. St. Croix County*,* 4 Fed. R., 378. See §§ 1129-32.

IV. PUBLIC PURPOSE.

SUMMARY—*Money borrowed to build a plank-road*, § 1139.—*Toll bridge*, 1140.—*Bridge; recitals; bona fide holder*, § 1141.—*Court-house; bonds held invalid*, § 1142.—*Custom grist-mill*, §§ 1143, 1144.—*Manufacturing purposes*, §§ 1145-1150.

§ 1139. The charter of a municipal corporation authorizing it to borrow money for any public purpose, whenever, in the opinion of the city council, it is deemed expedient to exercise that power, is valid, if there is nothing in the constitution of the state to the contrary. Money borrowed to aid in the construction of a plank-road running to or through the city is borrowed for a public purpose, and bonds issued by the city to raise such money are within the power conferred by that provision and are valid. *Mitchell v. Burlington*, §§ 1151-1153.

§ 1140. A toll-bridge is a work of internal improvement, and county bonds issued under legislative authority to issue bonds in aid of works of internal improvement are valid. The fact that the bridge was intended and used as a toll-bridge, or the question of the right to demand tolls, will not affect the validity of the bonds. *Commissioners v. Chandler*, § 1154.

§ 1141. Where a county has issued its bonds to build a bridge, under authority of a valid law requiring the consent of the voters to such issue, and the bridge has been built with the proceeds of the bonds, the county cannot contradict the recital in the bonds that the necessary vote was had, in order to defeat an action by *bona fide* holders of the bonds. *Lewis v. Board of Commissioners*, §§ 1155-1157.

§ 1142. The bonds issued by the county of Sherman in the state of Nebraska to build a court-house in that county are void, because such authority is not given by the act allowing the issue of bonds by counties in aid of railroads and other internal improvements. The act providing for the building of court-houses forbids the borrowing of money for that purpose except on vote of the people, and does not authorize the issue of bonds in such cases. No vote as to the bonds in question was ever had, no court-house was ever built, and the bonds contained no recitals of compliance with law. *Ibid.* See § 1178.

§ 1143. A statute in Kansas empowers any municipal township to issue bonds "for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water-power, by donation thereto or taking of stock therein, or for other works of internal improvement." Another statute declares all water, steam, or other mills, which grind for toll or pay, are public mills. It is held under these acts that bonds, issued in aid of the construction of and to furnish the motive power for a custom grist-mill operated by steam, are valid. This is considered a public purpose, and does not fall within the rule laid down in *Loan Association v. Topeka*. *Township of Burlington v. Beasley*, § 1158.

§ 1144. It is held that the statute of Nebraska of February 15, 1869, authorizing counties to issue bonds in aid of the construction of any railroad or other work of internal improvement, does not authorize the issue of bonds in aid of the construction of a steam grist-mill, and bonds issued for this purpose are invalid. Such an enterprise is construed not to be within the act, since the only enterprise specifically mentioned is the construction of a railroad, and there is nothing in the decisions of the courts of Nebraska holding that the purpose in question is included in the act. *Osborne v. County of Adams*, § 1159.

§ 1145. Where a city has general authority to borrow money and issue bonds, it may, with the requisite assent of the voters, borrow money upon bonds for every purpose which may fairly be deemed municipal or corporate. *Hackett v. Ottawa*, §§ 1160, 1161.

§ 1146. And it seems that in Illinois a city might borrow money and issue bonds for the purpose of "developing the natural resources of the city for manufacturing purposes." *Ibid.*

§ 1147. So, where a city issued bonds, which appeared from references to the titles of certain ordinances to have been issued for the purpose of "developing the natural resources of the city for manufacturing purposes," the city was estopped to allege, as against a *bona fide* holder, that the bonds were issued in aid of a private enterprise. *Ibid.*

§ 1148. Municipal bonds, issued in pursuance of authority conferred by statute, to encourage manufactories conducted by private enterprise, are void, since they must be paid by taxes collected from the citizens of the town, and a tax cannot be levied except for public purposes; it cannot take the property of one individual for the benefit of another. (CLIFFORD, J., dissents.) *Loan Association v. Topeka*, §§ 1162-1168.

§ 1149. Bonds issued under authority of an act, authorizing the creation of a debt by a municipal corporation to raise money to be given as a donation to aid in the erection of certain buildings to be used for the purpose of manufacturing certain patent bridges, and as a foundry and iron works, and authorizing and requiring the levy and collection of such taxes as may be necessary to pay the principal and interest on these bonds, are void. Bonds issued for this purpose are not issued for a public purpose, and taxes for the payment of these bonds are not applied to a public purpose. *Commercial Nat. Bank v. City of Iola*, §§ 1169-1177.

§ 1150. The bonds issued under the act of Kansas of February 28, 1871, authorizing the city of Iola to issue bonds in aid of the erection of certain buildings to be used in manufacturing bridges, plows and stoves, are void, since that act is in conflict with the constitution of Kansas, forbidding the legislature from passing any special act conferring corporate powers. This act is unconstitutional, because (1) having been passed for the sole purpose of legalizing the issue of these bonds, it is a *special act*; (2) it confers corporate powers, the issuing of municipal bonds being a corporate power; and (3) it has been decided by the Kansas supreme court that this constitutional provision includes municipal corporations. *Ibid.*

[NOTES.—See §§ 1178-1180.]

MITCHELL v. BURLINGTON.

(4 Wallace, 270-275. 1866.)

ERROR to U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Plaintiffs sued the corporation defendants, in a plea of debt, declaring on five bonds of \$1,000 each, issued by the city on the 23d day of March, 1850, and made payable ten years after date to E. W. Clark, Brother & Co., or bearer, with interest on the same at ten per cent. per annum. The bonds were signed by the mayor and recorder of the city, and purport to have been issued in pursuance of an ordinance of the city, "to provide for procuring and investing the loan of \$10,000 to the city, to be invested in the stock of the Burlington & Mount Pleasant Plank-road Company, and for other purposes." Declaration alleged that the plaintiffs became the lawful owners and holders of the bonds before they were due, and that the defendants were liable to pay to them the amount of the bonds. Defendants appeared and pleaded, among other defenses, as set up in the answer, that the plank-road company mentioned in the declaration was a private corporation; that the bonds were executed for the purpose of procuring money to invest in the stock of that company, and that the obligees of the bonds purchased the same and loaned the money, well knowing that the proceeds of the bonds were to be used for that purpose. They also set up the defense that the officers of the city had no authority to issue the bonds, and that the bonds, as against the defendants, were void. Parties defendant, under the rules of practice which prevail in the court below, may set forth in the answer as many causes of defense as they may have; but when the facts stated in the answer, or any

division of the same, are not sufficient to constitute a defense the plaintiff may demur. Revised Code of Iowa, 520, 527. Neither party is allowed to demur generally, but the requirement in all cases is that the demurrer must distinctly specify, as the grounds of objection, the matters of error intended to be argued as defects in the pleading, and no joinder in demurrer is required. *Id.*, 518.

Pursuant to those rules of pleading, the plaintiffs demurred to the answer of the defendants, and assigned, among others, the following causes of demurrer: 1. That the answer did not allege that *the plaintiffs* knew for what purpose the bonds were to be issued, or to what use the proceeds of the same were to be applied. 2. That the answer is defective, because the allegation that the plank-road company was a private corporation contradicts the law of the state, of which the court will take judicial notice. 3. That the answer is insufficient, because the defendants, in their corporate capacity, had a right to borrow money, upon a proper vote of their citizens, for any public purpose, and that the construction of the plank-road mentioned in the pleadings was a public purpose within the meaning of their charter; and that, inasmuch as the money was not borrowed for any illegal purpose, the defense set up was no bar to the action.

Such being substantially the state of the pleadings, the court overruled the demurrer of the plaintiffs and decided that the answer of the defendants disclosed a good defense to the action; and the plaintiffs electing to stand on that demurrer, judgment was rendered for the defendants, and the plaintiffs sued out this writ of error.

§ 1151. *City bonds; charter construed.*

1. The pleadings raise the question as to the validity of the bonds mentioned in the declaration, and the effect of the decision in the court below was that they were issued without authority. Whether valid or invalid, it is certain that they were issued under the provision in the charter of the city which authorized the corporation defendants to borrow money for *any public purpose*, whenever, in the opinion of the city council, it should be deemed expedient to exercise that power. Certain important conditions, however, are annexed to the exercise of the power, as appears by the provision itself, but it is unnecessary to examine those conditions, as it is conceded by the defendants that there is no formal objection to the exercise of the authority. All the conditions annexed to the exercise of the power, as expressed in the provision, having been fulfilled, the only questions which, under any circumstances, could arise in the case, are whether the provision is a valid one, and if so, whether the power conferred was exercised for a purpose within the meaning of the provision? Questions of a similar character have been repeatedly before the court, and they have uniformly been decided in the same way. Present defendants presented the same questions to this court at the last term, and the court held that the power to borrow money for any public purpose, within the meaning of the provision, was conferred by the charter in express terms, and that there was nothing in the constitution of the state which limited the authority so conferred, or rendered it invalid. Satisfied with that conclusion, it is not deemed necessary to assign new reasons in its support, or to repeat those adduced in our former opinion. Proceeds of the bonds in that case had been appropriated in the construction of a railway, and the court held that railways were so far to be considered as in the nature of improved highways, and as indispensable to the public interest and the successful pursuit even of local business, that a state legislature might authorize the towns and counties of a state through which a

railway passes to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same, with a view of aiding those engaged in constructing or completing such a public improvement, and that a legislative act conferring such authority was not in contravention of any implied limitation of the power of the legislature. *Rogers v. Burlington*, 3 Wall., 654 (§§ 837-841, *supra*). Substantially the same decision, as to the power of the legislature, was made in the case of *Gelpcke v. City of Dubuque*, 1 id., 202 (§§ 1367-70, *infra*), and it is proper to remark that the opinion of the court in that case was chiefly founded upon a provision in the charter of that city, expressed in the same words as the provision under consideration in this case. Same question was presented to this court on a second occasion, at the last term, and the court unanimously held that, unless restrained by the organic law, the legislature of a state had the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. *Thomson v. Lee County*, 3 id., 330 (§§ 1669-72, *infra*).

§ 1152. *Plank-roads are public improvements when their construction is authorized by the legislature. (a)*

2. Applying these decisions to the present case, it is clear that nothing remains open for discussion except the question whether the bonds issued to aid in constructing a plank-road fall within the same principle as those issued granting aid to a railway? Plank-roads are as much highways as railroads, and if authorized to be constructed by the legislature, they are public improvements. Money borrowed to aid in the construction of such a work by a municipal corporation is borrowed for a public purpose, and if the road leads from, extends to, or passes through, the limits of the corporation furnishing the aid, the bonds of the corporation, given as the means of raising the money, are within the power conferred by that provision. *Meyer v. City of Muscatine*, 1 id., 384 (§§ 921-925, *supra*).

§ 1153. *State decisions not binding on federal courts.*

3. Attention is also called to the fact that the courts of the state have recently decided, in several cases, that the city had no authority to issue the bonds; and reference is made to the decisions of this court, where it is held that this court follows the decisions of the state courts in the settled construction of their constitutions and statutes. Similar suggestions, in this class of cases, have several times been presented to this court, and the court has on two occasions carefully examined the subject, and shown to a demonstration that they cannot avail where the bonds, at the time they were issued, were valid by the constitution and laws of the state, as expounded by the courts of the state. Discussion upon that topic is unnecessary, as the point is controlled by those decisions. For these reasons, we are of the opinion that the circuit court should have sustained the demurrer of the plaintiffs to the answer of the defendants. The judgment of the circuit court is, therefore, reversed with costs, and the case is remanded for further proceedings in conformity to the opinion of this court.

Judgment accordingly.

(a) The charter of the city, authorizing it to borrow money for public purposes, is valid, if there is nothing in the constitution of the state to the contrary. The borrowing of money to aid in the construction of a plank-road running to or through the city is for a public purpose. Bonds issued by the city to raise money for that purpose are valid. *Larned v. Burlington*, 4 Wall., 275.

COUNTY COMMISSIONERS v. CHANDLER.

(6 Otto, 205-211. 1877.)

ERROR to U. S. Circuit Court, Northern District of Nebraska.

STATEMENT OF FACTS.—Chandler sued the county commissioners on coupons of bonds issued in aid of a bridge used as a toll-bridge. There was an answer put in, setting up chiefly the fact that the bridge was a toll-bridge, to which the plaintiff demurred, and his demurrer was sustained and judgment rendered in his favor. There were three questions in the court below on which the judges were divided in opinion: (1) Whether the answer sets up a sufficient defense. (2) Whether the recital in the bond charged the holder with notice of the proposition. (3) Whether the fact that the bonds were issued for a toll-bridge rendered them invalid, without further notice to the holder than the recital of the bonds. By the laws of Nebraska, municipalities had power to aid railroads or other works of internal improvement. The bonds recited the proposition submitted to the voters—the building of a wagon-bridge across the Platte river.

§ 1154. *A bridge built for and used as a thoroughfare is a public highway and a work of internal improvement. It is not material that it is used as a toll-bridge.*

Opinion by MR. JUSTICE BRADLEY.

In approaching the solution of the questions presented by this certificate, the first inquiry that naturally presents itself is whether a toll-bridge like that referred to is a public bridge, and hence a work of internal improvement. And we can hardly refrain from expressing surprise that there should be any doubt on the subject. What was the bridge built for, if not fit for public use? Certainly not for the mere purpose of spanning the Platte river as an architectural ornament, however beautiful it may be as a work of art; nor for the private use of the common council and their families; nor even for the exclusive use of the citizens of Fremont. All persons, of whatever place, condition or quality, are entitled to use it as a public thoroughfare for crossing the river. The fact that they are required to pay toll for its use does not affect the question in the slightest degree. Turnpikes are public highways, notwithstanding the exaction of toll for passing on them. Railroads are public highways, and are the only works of internal improvement specially named in the act; yet no one can travel on them without paying toll. Railroads, turnpikes, bridges, ferries, are all things of public concern, and the right to erect them is a public right. If it be conceded to a private individual or corporation, it is conceded as a public franchise; and the right to take toll is granted as a compensation for erecting the work and relieving the public treasury from the burden thereof. Those who have such franchises are agents of the public. They have, it is true, a private interest in the tolls; but the works are public, and subject to public regulation, and the entire public has the right to use them. These principles are so elementary in the common law that we can hardly open our books without seeing them recognized or illustrated. Comyns' Digest, title "Toll-thorough," commences thus: "Toll-thorough is a sum demanded for a passage through an highway; or for a passage over a ferry, bridge, etc.; or for goods which pass by such a port in a river; and it may be demanded in consideration of the repair of the pavement in a high street; or of the repair of a sea-wall, bridge, etc.; cleansing of a river, etc. But toll-thorough cannot be claimed simply, without any consideration." These few sentences indicate conclusively

that the existence of a toll is not inconsistent with the public character of the work on which it is exacted.

Of course there may be private bridges as there may be private ways, and they are put in the same category by the text-writers. Woolrych on Ways, 195. But all bridges intended and used as thoroughfares are public highways whether subject to toll or not. Regularly, all public bridges are a county charge, and the county is bound to erect and maintain them. 1 Bla. Com., 357. But others may be charged with this duty, and a toll is the commonest of means for obtaining compensation for its performance. In Angell on Highways, it is said that public bridges may be divided into three classes: "First, those which belong to the public, as state, county or township bridges, over which all people have a right to pass without or with paying toll; these are built by public authority at the public expense, either of the state itself or of a district or portion of the state; secondly, those which have been built by companies (like turnpike and railroad companies) or at the expense of private individuals, over which all persons have a right to pass on the payment of a toll fixed by law; thirdly, those which have been built by private individuals and which have been surrendered or dedicated to the use of the public." Angell on Highways, sec. 38. Chancellor Kent says: "The privilege of making a road or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same; and the owners of the franchise are answerable in damages if they should refuse to transport an individual without any reasonable excuse upon being paid or tendered the usual rate of fare." In the same connection he enumerates in this class of franchises ferries, bridges, turnpikes and railroads. 3 Kent, Com., 458, 459. But it is unnecessary to continue the discussion further. In our judgment the bridge in question is a public bridge, and a work of internal improvement within the meaning of the statute.

Whether the precinct or the county commissioners have the right, without further legislative authority, to demand tolls for passing on the bridge is a totally different question, and one that does not, in our judgment, affect the validity of the bonds. The bridge being an internal improvement the precinct had the power to aid in its construction. This it resolved to do, and on this resolve is founded the issue of the bonds. Whether it should get any consideration from the public in return was a question in which the purchaser of the bond is not concerned. A resolve to make the bridge a toll-bridge was an incidental matter that might or might not be valid, and might or might not be carried out if valid, without affecting the main purpose—the construction of the bridge or the bonds issued in aid of its accomplishment. The toll question was an incidental one, in which the precinct alone was beneficially interested. If, in the execution of their power to aid in the construction of the bridge, the people of the precinct proposed to get some return in the shape of tolls, and should find that they had no authority to exact them, how can that affect their bonds, to issue which their power was undoubted? In voting the bonds they may have acted, and undoubtedly did act, under the expectation that the proposed tolls would relieve them from some taxation for their payment; but, if mistaken in this—that is, in their power to exact tolls—how can this affect the bonds? And how can their want of power to exact tolls concern the purchaser of the bonds? The truth is, the two things—the power to aid in the construction of the bridge and the power to stipulate for tolls thereon—are distinct, and in that light they should be viewed on the question of the validity of the bonds. The

bridge is an accomplished fact, a public improvement, of which the public and the people of Fremont have the benefit, and its erection is due to those who advanced their money on the bonds. There are some equities in the case that ought not to be entirely ignored in considering, not the powers of the precinct, but the manner in which it has attempted to exercise them. If any party is to suffer from a mistake of law in respect to the power of exacting tolls, equity and justice require that it should be that party which has received the benefit, and not the party that advanced the consideration. This principle should always govern when it involves no violation of any rule of law.

We deem it unnecessary to advert to other points made in the argument. They present nothing that requires distinct consideration. On the whole we are of opinion that the answer does not set up a sufficient defense in law to the cause of action stated in the petition, whether the plaintiff had notice of the election proceedings and of the character of the proposed bridge or not before purchasing the coupons on which the suit is brought. This conclusion requires, and our judgment is, that the first and third questions should be answered in the negative, and that the second question is immaterial; and consequently, that the judgment of the circuit court should be affirmed.

Judgment affirmed.

LEWIS v. BOARD OF COUNTY COMMISSIONERS OF SHERMAN COUNTY.

(Circuit Court for Nebraska: 1 McCrary, 377-383. 1891.)

Opinion by DUNDY, J.

STATEMENT OF FACTS.—This suit is based on a large number of coupons, long over due, detached from two series of bonds issued by Sherman county, or at least by officers representing the county. One of such series of bonds was issued for the purpose of building a court-house, and the other series for the purpose of building bridges in the county. The defense to the bonds is that they were never voted for by the people of the county; that they were never issued by the county; and that neither the court-house bonds nor the proceeds thereof were ever applied in any manner to the erection of a court-house. It is made to appear from the minutes of the county commissioners that the court-house bonds were issued and placed in the hands of a banker at Kearney, probably for the purpose of being negotiated. But some time thereafter, the bonds were recalled by the county board, for what particular purpose does not appear. At what time or in what manner, or for what particular purpose, these bonds were afterwards turned loose on the market, is not shown. Nor does it make any particular difference in that regard.

§ 1155. *Although court-houses are in one sense works of internal improvement, they are not such within the meaning of the Nebraska statute of 1869.*

It may be conceded, as a general proposition, that a "court-house" is a work of internal improvement. But it may very well be questioned whether our internal improvement law of the 15th of February, 1869; has any application to such a work of internal improvement. As early as the year 1856, the territorial legislature provided for the building of court-houses and jails, and made ample provision therefor. The same law has been in force almost ever since, and with few slight changes is the law to-day. When the internal improvement law of 1869 was passed, it was well enough understood that it was passed for the express purpose of enabling counties, cities and towns to vote aid to railroads and bridges, and works of a kindred character. No one supposed it

to be necessary to pass such a law to enable a county to build a court-house. Ample provision had already been made by law therefor. On the 27th of February, 1873, before these bonds were issued, the legislature re-enacted the old law with slight changes, which authorized the building of court-houses, and it is believed to be the only general law which authorized the expenditure of money for any such purpose. This law indicates pretty clearly the mode of proceeding when it is necessary or desirable to build a court-house. Section 14, page 234, of the "General Statutes of Nebraska," has this provision: "The board of county commissioners at any meeting shall have power: . . . III. To purchase sites for and to build and keep in repair county buildings. . . . IV. Apportion and order the levying of taxes as provided by law, and to borrow upon the credit of the county a sum sufficient for the erection of county buildings." "Sec. 15. The board of county commissioners shall not . . . borrow money for the purpose specified in the fourth division of the preceding section without first having submitted the question . . . of borrowing money as aforesaid to a vote of the electors of the county." Other provisions of the law perfect the details of the business to be transacted by the commissioners in connection with the voting and borrowing of money.

§ 1156. *A power to borrow money to build a court-house does not include a power to issue bonds for that purpose.*

It will be seen from the foregoing, that before the commissioners can lawfully borrow money for the purpose of building a court-house, the right and authority to do so must be conferred by a vote of the electors of the county. This is indispensable, as no right for such purpose exists without it. It must be observed that the authority here conferred on the county commissioners is to borrow money to build a court-house. The law does not authorize the people to vote bonds to erect the building. They may, by their votes, lawfully empower the commissioners to borrow money for the purpose in question, but they cannot authorize the commissioners to issue bonds for such a purpose and have them hawked around the county and sold to A., B. and C., to raise money at a ruinous discount for any such purpose. It is one thing to authorize the borrowing of money to build a court-house, when needed, but it is another and very different thing to vote for the issuing of bonds therefor, when the law does not authorize it. It is true, if the people, by a proper vote, should authorize the commissioners to borrow money, that on receiving the money a bond or other evidence of indebtedness might be given for the payment of the money when due under the terms of the loan. This would perhaps follow as an incident to the right to borrow. But even then, the amount of money so borrowed should equal the amount for which the bond was given. Otherwise there would be no end to the fraudulent practices of both officers and purchasers of bonds. Such a practice cannot be encouraged, and it is the duty of courts to close the doors against it. If, then, the law does not authorize the voting of bonds for any such a purpose as building a court-house, then the authority to borrow money cannot be enlarged by the commissioners or the people so as to include the right to issue bonds and sell them at such prices as can be procured therefor, when such authority has been withheld by the law-making power. This view is fully supported by a case recently decided by the supreme court. *Scipio v. Wright*, 11 Otto, 665 (§§ 1041-43, *supra*).

So far as the court-house bonds are concerned, then, they must be held invalid. For the reasons: *First*. Want of authority for voting bonds for the purpose of building a court-house. *Second*. Because no bonds were ever voted

by Sherman county for any such purpose. *Third.* Because none of the bonds or the proceeds thereof were ever used to build a court-house, or were ever used for any other purpose by the county; and *Fourth.* Because the bonds contained no recitals, showing that the same had been issued conformably to law, so as to cut off the defenses relied on.

§ 1157. *County bonds issued by Sherman county, Nebraska, to build bridges are good in the hands of innocent holders for value.*

But with reference to the coupons taken from the bridge bonds, it is different. There is full authority of law for the people of a county to vote for the issuing of bonds to aid in building bridges. The bridge bonds recite on their face that their issue was duly authorized by a vote of the people of the county, and that the result of such election was entered upon the commissioners' records, as provided by law. This recital is perhaps untrue, as the commissioners' proceedings show no such thing. But as stated, the law authorizes the voting of bonds for such a purpose, and the bond recites the fact that they were properly voted for and authorized by a vote of the people of the county on the 11th day of August, 1873, and that the result of the vote was spread upon the commissioners' journal of proceedings. The purchaser of the bonds, without notice of infirmity, was not in a position to know, or believe, that the bonds recited a falsehood on their face, and he was not, under the circumstances, bound to look beyond the bond itself. He might well believe what he saw stated in the bond. Fair dealing will not permit the defendant to gainsay what it has, through its proper officers, thus solemnly asserted. But this is not all. The law not only authorizes the issuing bonds for such purposes, but they were so issued, and used direct in payment for building several bridges in the county, the principal one being across the Loup river. The county has had the full benefit of the bridge bonds. They were turned over directly to the parties who built the bridges, and were by them put on the market and into circulation, with the statement on their face that they had been properly voted for and issued. Good faith and common honesty require their payment, when found in the hands of innocent *bona fide* purchasers. The plaintiff must, therefore, have judgment on the coupons detached from the bridge bonds, with lawful interest thereon from the time the same became due and payable.

TOWNSHIP OF BURLINGTON v. BEASLEY.

(4 Otto, 310-314. 1876.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The bonds which are the foundation of this action purport upon their face to be issued by virtue of an act of the legislature of the state of Kansas, approved March 2, 1872, of which the title is given in the bonds. They contain no specific statement of the purpose for which they were issued. There is nothing upon their face to indicate fraud, unlawful assumption of authority, or irregularity. If there was, in fact and in law, authority in the town under any circumstances to issue its bonds, and if these bonds bear the impress of such authority, there is nothing to vitiate them when taken by *bona fide* holders. The second answer alleges that the bonds were issued to John S. Stow to aid in the construction and completion and to furnish the motive power of a steam custom grist-mill in the town of Burlington; that an election to determine whether they should be thus issued was held under the

provisions of the statute referred to, and that a majority of the qualified electors of the town voted in favor of issuing the bonds. Certain proceedings between Stow and the town are also set forth, but as they are not referred to in the briefs, it is not necessary here to allude to them. The principal contestation of the plaintiff in error is that it had no power to issue the bonds in question under the statute of March, 1872. Statutes of Kansas, 1872, c. 68, 110.

§ 1158. *In Kansas, townships are authorized to aid the construction of a steam custom grist-mill.* (a)

The first section of this act provides that the trustee, clerk or treasurer of any municipal township is empowered to issue its bonds "for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power, by donation thereto or the taking of stock therein, or for other works of internal improvement." Certain restrictions and conditions are imposed, in relation to which no question here arises. If the motive power intended to be used by Mr. Stow, and to aid in the construction of which these bonds were issued, had been that of water accumulated by dams and discharged upon wheels, the purpose would have been within the specific language of the act. To aid in the construction of "water-power" is one of the purposes named. But the mill was a steam mill. It was a custom grist-mill operated by steam. Does such an establishment fall within the description of "other works of internal improvement?" This expression is usually applied to railroads and canals. To confine it to those two subjects would be to give to the statute a narrow construction; and that it was not so intended is evident from the ninth section, where "a bridge or other work of internal improvement, except railroads," is three times spoken of. Similar language is used in the eleventh section and in the twelfth section of the act. A state house is an internal improvement, as is a county court-house, a jail or a penitentiary (*Commissioners of Leavenworth Co. v. Miller*, 7 Kan., 479), as much as is a railroad, a canal or a bridge. A mill run by water is declared to be an internal improvement by the statute we are considering. A ferry falls within the same principle, and so does a steam mill. It would require great nicety of reasoning to give a definition of the expression "internal improvement," which should include a grist-mill run by water and exclude one operated by steam; or which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be a poor consolation to the people of this town to give them the power of going in and out of the town upon a railroad, while they were refused the means of grinding their wheat. Railroads, turnpikes, buildings, bridges, ferries, reclaiming swamps, and the like, are no doubt improvements. If such improvement is within the limits of a town or county it is internal to such town or county.

The statute of Kansas upon the subject of grist-mills is based upon the idea, and, indeed, upon the declaration, that all grist-mills are public institutions. In c. 65 of the statute of 1868, p. 573, it is thus enacted: "All water, steam or other mills whose owners or occupiers grind or offer to grind grain for toll or pay are hereby declared public mills." Regulation is then made for the order in which customers shall be attended to (first come first served), the liability of the miller, his duty in assisting to load and unload, and that the rates of toll

(a) Where a bond recites that it is issued to aid internal improvements in the township, and the bond was in fact issued in aid of a custom grist-mill operated by water-power, the purchaser may assume, without inquiry *abunde* the bond and legislative act, that the bond is within the competency of the legislature to authorize. A custom grist-mill, operated by water-power, is a "work of internal improvement." (*Township of Burlington v. Beasley*, 4 Otto, 310, cited.) *Guernsey v. Burlington Township*,* 4 Dill, 372.

shall be conspicuously posted. Under our recent decision in *Munn v. Illinois*, 4 Otto, 113, and the other cases upon kindred subjects, it would be competent to the legislature of Kansas to regulate the toll to be taken at these mills. It is a reasonable construction of this statute to hold that aid to this mill is aid of a public work within its meaning, and that the construction and equipment of a steam grist-mill was an internal improvement. The case of *Loan Association v. Topeka*, 20 Wall., 661 (§§ 1162-68, *infra*), will adjudge these bonds to be legal. The point is there expressly made that bonds, when issued for a public purpose, a public use, which it is the right and duty of the state government to assist, are valid. The issue we are considering falls within this definition.

Judgment affirmed.

MR. JUSTICE FIELD dissented.

OSBORNE v. COUNTY OF ADAMS.

(16 Otto, 181-183. 1882.)

ERROR to U. S. Circuit Court, District of Nebraska.

STATEMENT OF FACTS.—Action against the county on coupons detached from bonds issued by a subdivision or precinct of that county. The bonds in question were issued under the authority of a statute empowering such bodies to issue bonds in aid of railroads or other works of internal improvement. The bonds in question had been issued to aid in the construction of a steam grist-mill. There was judgment on a demurrer to the declaration in the court below, and a writ of error prosecuted by the plaintiffs.

§ 1159. *A steam grist-mill is not a work of internal improvement within the statute of Nebraska. (a)*

Opinion by MR. JUSTICE HARLAN.

A steam grist-mill is not, in our opinion, a work of internal improvement, within the meaning of the act of Nebraska approved February 15, 1869, which authorizes counties, cities and precincts of organized counties "to issue bonds to aid in the construction of any railroad or other work of internal improvement." *Township of Burlington v. Beasley*, 94 U. S., 310 (§ 1158, *supra*), is not, as supposed by counsel, an authority for a different conclusion. That case arose under a statute of Kansas, which empowered municipal townships in that state to issue bonds "for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power by donation thereto, or the taking of stock therein, or for other works of internal improvement." The bonds there in suit were issued to aid in the construction and completion of, and to furnish the motive power for, a steam custom grist-mill. It was held that the statute, reasonably interpreted, embraced a grist-mill operated by steam, as well as one run by water-power; that, since municipal aid was authorized for "the construction of . . . water-power," the phrase "other works of internal improvement," in the Kansas statute, might be fairly construed as embracing works of the same class, and consequently as embracing a steam grist-mill. The court was somewhat influenced, as plainly appears from its opinion, by decisions of the supreme court of Kansas, particularly that of *Commissioners of Leavenworth County v. Miller*, 7 Kan., 479. The present case is different. The only work of internal improvement specially described in the Nebraska statute is a railroad, and we are not justified by anything in *Township of Bur-*

(a) Affirming the ruling in the lower court in *Osborne v. County of Adams*, 2 McC., 97; S. C., 7 Fed. R., 441.

lington v. Beasley, or in the decisions of the courts of Nebraska, in holding that a steam or other kind of grist-mill is of the class of internal improvements which municipal townships in that state are empowered, by the statute in question, to aid by an issue of bonds. For these reasons we adjudge that the bonds issued by the county commissioners in behalf of Juniata precinct, in Adams county, Nebraska, in aid of the construction of a steam grist-mill in that precinct, are unauthorized by the act of February 15, 1869; and as authority for their issue is not claimed to exist under any other statute, they must be held to be without binding force against the precinct.

Judgment affirmed.

HACKETT v. OTTAWA.

(9 Otto, 86-96. 1878.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—This was a suit on certain bonds issued by the city of Ottawa, Illinois, in 1869, which bonds upon their face refer to the ordinances of the city council which authorized their issuance. The defense embodied in two pleas was in effect that the bonds were issued to Cushman as a donation in aid of a private enterprise, and not within the municipal powers of the city, and were for that reason void. Demurrers were filed to each of the pleas, which were overruled, and judgment rendered for the city.

Opinion by MR. JUSTICE HARLAN.

The bonds in suit upon their face import: 1st. That the faith of the city is irrevocably pledged for their payment. 2d. That they were issued in pursuance of the power which the council possessed to borrow money on the credit of the city and issue bonds therefor, and also in accordance with certain ordinances which provided for a loan for *municipal* purposes. The recitals of the bonds, in themselves, furnish no ground whatever to suppose that the council transcended its authority, or issued them for other than such purposes. They justify the opposite conclusion. The city, however, claims that they were not issued for municipal purposes, but as a simple donation to a private corporation, formed for business ends solely, and in no wise connected with or under the control of the city,—all of which, it is further claimed, appears from the ordinances, whose date and title are given in the face of the bonds.

The ordinance of June 15, 1869, authorizes the mayor to borrow, in the name, for the use, and upon the bonds of the city, the sum of \$80,000, "to be expended in developing the natural advantages of the city for manufacturing purposes," and provides "that no application shall be made of the proceeds of the said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured to the city." It further provides that a sufficient sum to pay interest on the loan should be annually provided by taxation, and set apart as a separate fund, to be applied solely to the payment of the interest on the bonds. That ordinance was ratified at an election held on the 20th of July, 1869, by a majority of all the legal voters of the city. The ordinance of July 30, 1869, was to carry into effect that of June 15, 1869. It directed the mayor to deliver the bonds to one Cushman, "to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is au-

thorized and directed to expend the sum in the improvement of the water-power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity." It provided that Cushman should execute and deliver to the mayor his obligation that he would, without unreasonable delay, and by proper appliances, bring into use all the available water of the two rivers at Ottawa, as fast as it might be required for actual use, and as fast as it could be leased at fair and reasonable rates,— "the intent of this ordinance being to secure the improvement and development of said water-power in this city by appropriating the loan obtained under the ordinance aforesaid for that purpose, or *pro rata* so far as said water-power shall be made available for practical use." The ordinance of July 30, 1869, further provided that Cushman should bind himself to return the bonds, and save the city harmless from all loss if the work should not be constructed.

The city avers that the franchises and powers referred to in the ordinance of July 30, 1869, were those granted to the Ottawa Manufacturing Company by an act approved February 15, 1851, and by an act amendatory thereof, approved February 16, 1865. The first act created certain persons therein named a corporation under the style of "The Ottawa Manufacturing Company," with authority to erect a dam across Fox river at a designated point, "for the purpose of creating a water-power," and to "use, lease or otherwise dispose of the same, and construct such other works, buildings and machinery as may be deemed necessary or proper to use such water-power to promote the interests and objects of the company." The second act conferred the additional right to build a dam across the Illinois river, and to construct races so as to introduce the water into the pool of the dam authorized to be erected across the Fox river. And for all the purposes indicated in the original and amendatory act the company was authorized to "take and use such portion of any highway, street, alley or public ground as may be deemed necessary." But neither of the ordinances, it will be observed, designates, by name, that or any other private company. Nor is it distinctly alleged by the city, nor asserted in argument, that the testator of the plaintiffs understood the ordinances as referring to that company, or that he read them or had any actual knowledge of their terms at the time of his purchase. If the council intended the general public and, particularly, purchasers of its bonds to know that the proposed development of the natural advantages of the city for manufacturing purposes was to be made under the franchises and powers, or for the benefit of that or any other private corporation, common fairness required that it should have so declared in the ordinances, and thereby distinctly informed all who should examine them, of what it now avows was its real purpose; namely, by a simple donation to give aid to a particular private corporation, established for business ends exclusively. If, by reason of the general reference, in the bonds, to the two ordinances of June and July, 1869, the purchaser is chargeable with notice of their provisions (a proposition to be hereafter examined), the utmost which the city, in view of the indefinite language of the ordinances, can claim is that he had notice that the bonds were issued for the purpose of "developing the natural resources of the city for manufacturing purposes." Nothing more. This brings us to a question which counsel have discussed with some elaboration in their printed arguments.

§ 1160. *It seems that under the Illinois constitution of 1848 municipal corporations may be empowered to borrow money to develop natural resources for manufacturing. (a)*

We have seen that the charter of the city confers upon the council power to borrow money upon the credit of the city and to issue bonds therefor. No limitation is prescribed as to the amount which may be borrowed. Nor is any express restriction imposed as to the objects or purposes for which bonds may be issued. It is clear, therefore, that the council, having secured the assent of the requisite majority of voters, might rightfully borrow money upon bonds of the city for every purpose which could fairly be deemed municipal or corporate. But the specific contention of the city is that the development of the natural resources of the city for manufacturing purposes is not, upon principle or within the meaning of the Illinois constitution of 1848, a corporate purpose. After a careful examination of the decisions of the supreme court of Illinois to which our attention has been called, we find this question by no means free from difficulty. The leading case, *Taylor v. Thompson*, 42 Ill., 9, involved the question whether a tax levied under the authority of an act of the legislature passed in 1865, upon the property of a township, to pay bounties to persons who should thereafter enlist or be drafted into the army of the United States, was for a corporate purpose within the meaning of the state constitution. The person who complained of the tax in that case was a non-resident of the township, but he owned taxable property within its limits. The supreme court of Illinois, through Judge Lawrence, in an opinion of marked ability, sustained the validity of the tax, defining the phrase "corporate purposes" to mean "a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it." It is suggested by learned counsel for the city that that and similar decisions rendered during the late civil war were exceptional, and were made almost *ex necessitate*, because the courts were unwilling to cripple the power of the government to raise troops by denying to counties, cities and towns the right to offer bounties when authorized by the legislature. An answer to this suggestion is found in the fact that the same court reaffirmed the doctrine of *Taylor v. Thompson* in the cases of *Briscoe v. Allison*, 43 id., 293; *Misner v. Bullard*, id., 470, and *Johnson v. Campbell*, 49 id., 317. In the subsequent case of *Chicago, etc., R. Co. v. Smith*, 62 id., 268, decided in 1871, the court, referring to the definition of corporate purpose as given in *Taylor v. Thompson*, announced their acceptance of it. In *People v. Dupuyt*, 71 id., 651, the same definition was referred to without disapproval. The court, declaring that it had gone far enough in upholding that tax, said: "It may be difficult to determine with precision what is a corporate purpose in the sense of the constitution, but it is less difficult to determine what is not such a purpose. The true doctrine is, such purposes, and such only, as are germane to the objects of the welfare of the municipality, at least such as have a legitimate connection with these objects and a manifest relation thereto." Again, in *Burr v. City of Carbondale*, 76 id., 455, the court sustained a tax imposed by the city in support of the Southern Illinois Normal University, to which the people of that city had voted a tax, and, referring to *Taylor v. Thompson*, said that a corporate purpose was there "held to mean a tax to be expended in a manner which

(a) The bonds issued by the city of Ottawa to the representative of a private corporation as a bonus to aid in the improvement of the Illinois and Fox rivers, to increase the water-power facilities of the city, are valid, since they were issued by authority of the charter of the city empowering it to borrow money and issue its bonds therefor, and in pursuance of an ordinance providing for the borrowing of money for municipal purposes. Bonds issued for this purpose are held to be issued for a municipal purpose. *Cary v. Ottawa*, 8 Fed. R., 190.

should promote the general prosperity and welfare of the municipality which levied it. But in that case a vote of the people authorizing the tax was first to be taken, and the people in fact voted the tax. This was an important fact in determining that case. We thought it difficult to determine with precision what was a 'corporate purpose' in the sense of the constitution, but came to the conclusion that it was such a purpose, and such only, as might have a legitimate connection with objects and purposes promotive of the welfare of the municipality and a manifest relation thereto." In view of the course of decisions in Illinois we should hesitate to declare that money borrowed by the city of Ottawa and expended in developing its natural resources for manufacturing purposes was not, in the sense of the Illinois constitution of 1848, as interpreted by the supreme court of that state, expended "to promote the general prosperity and welfare of the municipality."

§ 1161. *A city which issues bonds that recite the titles of ordinances which purport to declare the bonds to be issued for municipal purposes is estopped to deny such recital.*

But a direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois constitution, we pass to another point which, in our judgment, is fatal to the defense. It is consistent with the pleas filed by the city that the testator of plaintiffs in error purchased the bonds before maturity for a valuable consideration, without any notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for *municipal* purposes, with the previous sanction duly given of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances "providing for a loan for municipal purposes." Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empowered the council to borrow money upon the credit of the city and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordi-

nance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Supervisors v. Schenck*, 5 Wall., 772 (§§ 1683-86, *infra*). It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case the city, both upon principle and authority, is cut off from any such defense. What this court declared, through Mr. Justice Campbell, in *Zabriskie v. Cleveland, etc.*, R. Co., 23 How., 381, as to a private corporation, and repeated, through Mr. Justice Clifford, in *Bissell v. City of Jeffersonville*, 24 id., 287 (§§ 1449-50, *infra*), as to a municipal corporation, may be reiterated as peculiarly applicable to this case: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

What we have said disposes of the second plea filed by the city. As to the third plea, it is scarcely necessary to say that it does not present a defense to the action. The questions raised by that plea have not been alluded to or discussed in the printed arguments of counsel. The judgment will be reversed, with directions to sustain the demurrer to the second and third pleas, and for such further proceedings as may be consistent with this opinion; and it is so ordered.

LOAN ASSOCIATION v. TOPEKA.

(20 Wallace, 655-670. 1874.)

ERROR to U. S. Circuit Court, District of Kansas.

STATEMENT OF FACTS.—The city of Topeka issued bonds to the King Wrought-Iron Bridge Manufacturing and Iron Works Company, a private corporation, to encourage the establishment of bridge shops. Having been sued upon the coupons attached to those bonds, it demurred to the declaration, and the demurrer was sustained by the court below, on the ground that the city had no right to issue bonds for such a purpose under the acts of February 29, 1872, and March 2, 1872. The statute of February 29, 1872, authorized the issue of bonds for the encouragement of manufactories, but not to exceed in amount \$1,000, unless authorized by a majority vote at an election. In this case the city issued bonds to the amount of \$100,000. The provision of the constitution relied upon in defense is recited in the opinion.

Opinion by MR. JUSTICE MILLER.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional. The first of these is that, by section 5 of article 12 of the constitution of that state, it is declared that provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the state courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the circuit court.

§ 1162. *A legislature can authorize municipal bodies to issue bonds or levy taxes for public purposes only.*

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain. The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution. If these municipal corporations, which are in fact subdivisions of the state, and which for many reasons are vested with *quasi* legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

§ 1163. *A municipal promise to pay can only be founded on a power to tax.*

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose. *Sharpless v. Mayor of Philadelphia*, 21 Penn. St., 147, 167; *Hanson v. Vernon*, 27 Ia., 28; *Allen v. Inhabitants of Jay*, 60 Me., 127; *Lowell v. Boston*, Massachusetts (MS.); *Whiting v. Fond du Lac*, 25 Wis., 188. It is, therefore, to be inferred that when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference. With these remarks, and with the reference to the authorities which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that state to levy taxes to be used in aid of manufacturing

enterprises, conducted by individuals or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the state of Kansas.

§ 1164. *Aid to railroads and other improvements by virtue of state authority and by means of ultimate taxation is only justified by the fact that the objects are public.*

We have already said the question is not new. The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every state in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the states, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether. *State v. Wapello Co.*, 13 Ia., 388; *Hanson v. Vernon*, 27 id., 28; *Sharpless v. Mayor, etc.*, 21 Penn. St., 147; *Whiting v. Fond du Lac*, 25 Wis., 188. In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of state governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain — the roads which they built being under their control, and not that of the state — were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the state, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals, bridges, navigable streams and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the state, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation.

We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts, and which were predicted when it was first established, there can be no doubt. We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the

state legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. *Olcott v. Supervisors*, 16 Wall., 689; *People v. Salem*, 20 Mich., 452; *Jenkins v. Andover*, 103 Mass., 94; *Dillon, Munic. Corp.*, § 587; 2 *Redfield's Laws of R'ys*, 398, rule 2. It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognizes no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

§ 1165. *All power, state and national, is limited.*

The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B., who were husband and wife to each other, should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. *Whiting v. Fond du Lac*, 25 Wis., 188; *Cooley on Const. Limitations*, 129, 175, 487; *Dillon, Munic. Corp.*, § 587.

§ 1166. *The power to tax. No lawful tax can be laid except for a public purpose.*

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government. The power to tax is, therefore, the strongest, the most pervading, of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch v. State of Maryland*, 4 Wheat., 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no im-

plied limitation of the uses for which the power may be exercised. To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. Nor is it taxation. A "tax," says Webster's dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley on Const. Limitations, 479.

Coulter, J., in *Northern Liberties v. St. John's Church*, 13 Penn. St., 104 (see, also, *Pray v. Northern Liberties*, 31 id., 69; *Matter of Mayor of New York*, 11 Johns., 77; *Camden v. Allen*, 2 Dutch., 398; *Sharpless v. Mayor of Philadelphia*, *supra*; *Hanson v. Vernon*, 27 Ia., 47; *Whiting v. Fond du Lac*, 25 Wis., 188), says, very forcibly: "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose." We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a *public purpose*. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interfering when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

§ 1167. *Taxation for the benefit of individual manufacturers is not for a public purpose.*

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed, to sustain us in this proposition.

§ 1168. — *authorities reviewed.*

In the case of *Allen v. Inhabitants of Jay*, 60 Me., 124, the town meeting had voted to loan their credit to the amount of \$10,000 to Hutchins and Lane if they would invest \$12,000 in a steam saw-mill, grist-mill and box factory machinery, to be built in that town by them. There was a provision to secure the town by mortgage on the mill, and the selectmen were authorized to issue town bonds for the amount of the aid so voted. Ten of the taxable inhabitants of the town filed a bill to enjoin the selectmen from issuing the bonds. The supreme judicial court of Maine, in an able opinion by Chief Justice Appleton, held that this was not a public purpose, and that the town could levy no taxes on the inhabitants in aid of the enterprise, and could, therefore, issue no bonds, though a special act of the legislature had ratified the vote of the town, and they granted the injunction as prayed for. Shortly after the disastrous fire in Boston, in 1872, which laid an important part of that city in ashes, the governor of the state convened the legislative body of Massachusetts, called the general court, for the express purpose of affording some relief to the city and its people from the sufferings consequent on this great calamity. A statute was passed, among others, which authorized the city to issue its bonds to an amount not exceeding \$20,000,000, which bonds were to be loaned, under proper guards for securing the city from loss, to the owners of the ground whose buildings had been destroyed by fire to aid them in rebuilding.

In the case of *Lowell v. City of Boston*, in the supreme judicial court of Massachusetts, the validity of this act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regular series of that court. The *American Law Review* for July, 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose. The same court had previously decided, in the case of *Jenkins v. Andover*, 103 Mass., 74, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants. The same principle precisely was decided by the state court of Wisconsin in the case of *Curtis v. Whipple*, 24 Wis., 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting v. Fond du Lac*, already cited, the principle is fully considered and reaffirmed. These cases are clearly in point, and they assert a principle which meets our cordial approval.

We do not attach any importance to the fact that the town authorities paid one instalment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose. The act of March 2, 1872, concerning internal improvements, can give no assistance to these bonds. If we could hold that the corporation for manufacturing wrought-iron bridges was within

the meaning of the statute, which seems very difficult to do, it would still be liable to the objection that money raised to assist the company was not for a public purpose, as we have already demonstrated.

Judgment affirmed.

MR. JUSTICE CLIFFORD dissented, holding that the judgment in each case should be reversed for the following reasons: (1) Because the demurrer to the declaration in each case should have been overruled. (2) Because the bonds to which the coupons sued on were attached were issued in pursuance of the express authority of the legislature vesting that power in the corporation defendants. (3) Because the constitution of the state does not in any manner prohibit the passage of such a law as that under which the bonds were issued. (4) Because it is not competent for a federal court to adjudge a state statute void which does not conflict in any respect with the constitution of the United States or that of the state whose legislature enacted the statute. (Providence Bank v. Billings, 4 Pet., 563; Cooley on Const. Limit., 2d ed., 168; Calder v. Bull, 3 Dall., 398; Walker v. Cincinnati, 21 Ohio St., 41; Golden v. Prince, 3 Wash., 313; Bank v. Brown, 26 N. Y., 467; People v. Draper, 15 id., 532; Pine Grove v. Talcott, 19 Wall., 676; Hartford v. Bridge Co., 10 How., 534; Bissell v. Jeffersonville, 24 id., 294; Darlington v. Mayor, 31 N. Y., 187; Granby v. Thurston, 23 Conn., 416; 2 Kent, 12th ed., 275; Benson v. Mayor, 24 Barb., 248; Clarke v. Rochester, id., 446; Bank v. Rome, 18 N. Y., 38, cited.)

COMMERCIAL NATIONAL BANK v. CITY OF IOLA.

(Circuit Court for Kansas: 2 Dillon, 353-365. 1878.)

STATEMENT OF FACTS.—Action on coupons of bonds issued by the city of Iola in pursuance of an act of the Kansas legislature, which went into effect on the 23d of February, 1871. There was a demurrer to the declaration, on the ground that the act in question was unconstitutional. Further facts appear in the opinion of the court. Article 12, section 1, of the constitution of Kansas, entitled "Corporations," is in these words: "The legislature shall pass no special acts conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

§ 1169. *Without express legislative authority, a city has no power to aid manufactories. Special legislation.*

Opinion by DILLON, J.

Without express legislative authority the city of Iola would have no power to appropriate money or to loan its credit to aid private persons to establish manufactories either near to or within the corporate limits. This proposition admits of no dispute, and is well settled. Stetson v. Kempton, 13 Mass., 278; Cushing v. Newburyport, 10 Metc., 510; Cook v. Manufacturing Co., 1 Sneed (Tenn.), 698; Pennsylvania R. Co. v. Philadelphia, 47 Penn. St., 189; Dillon, Munic. Corp., sec. 106. No precedent authority, either by general or special act, was conferred upon the city to pass the ordinance to provide for the holding of the election to determine whether the citizens would extend the proposed aid to the bridge manufactory and foundry. The adoption of the ordinance and the holding of the election were without color of law. But subsequently the legislature passed the act mentioned in the statement of the case, which undertook to legalize the election and to authorize the issue of the bonds in question. The bonds were issued under the authority of this act, and

so the declaration alleges. Their binding obligation upon the municipality depends upon the validity of this enactment, and the question of its validity is raised by the demurrer to the declaration. Against the act two objections are urged in argument: 1st, that it contravenes certain special provisions of the constitution of the state; 2d, that it authorizes the levy and collection of taxes for objects or uses not within the scope of the taxing power.

The act whose constitutionality we have to determine purports to legalize the prior election in Iola and to authorize the issue of bonds pursuant to that election. If the legislature might have passed such an act prior to the election, it will not be disputed that it can ratify and confirm an election held without it; but the legislature, it is clear, cannot do by a curative or retrospective act what it could not have previously authorized. Cooley, Const. Lim., 281. The act which was passed and which went into effect February 23, 1871, after reciting the election and legalizing it, authorizes the city to appropriate \$50,000 to aid in the erection of buildings at or near the city of Iola, to be used for the purpose of manufacturing bridges, plows and stoves, and to issue and deliver the bonds of the city, with coupons attached, payable in fifteen years, and enjoins that it shall levy and collect taxes to pay the principal and interest of the bonds. It is objected that this act violates section 1 of article 12 of the constitution of the state, which provides that the legislature shall pass no *special* act conferring corporate powers. That the act in question is a special act is so plain as not to justify extended discussion. It is not only limited in its application to the city of Iola, but to a single election and the issue of specific bonds. Never was an act more manifestly special.

It seems to me to be almost equally clear that it is an act which undertakes to confer upon a city *corporate powers*. It ratifies an election held by the city, and authorizes it to do what, without an express grant, no municipality can do, namely, to issue bonds in aid of a manufacturing enterprise, and to levy and collect taxes to pay such bonds. If the power to create a debt binding upon the municipality, and to lay burdens upon all the property within it to pay the debt created, is not a corporate power, it is difficult to conceive what could justly be regarded as such. The powers given by the terms of the act under discussion are the most important of any which can be conferred upon municipal corporations. They are, indeed, precisely the powers the exercise of which is most to be feared, and which were particularly liable to be unwisely conferred by special legislation. If this prohibition in the constitution (sec. 1, art. 12) applies to municipal corporations, the special act in question plainly contravenes it.

§ 1170. *Article 12 of the constitution of Kansas applies to municipal corporations.*

Whether the twelfth article of the constitution of Kansas, quoted in the statement of the case, was designed to apply to municipal corporations, might admit of some discussion if the question were *res nova*. This article is taken from the constitution of Ohio. And the supreme court, not only of that state, but of Kansas, has, upon full consideration, repeatedly decided that it did include municipal corporations. *Atchison v. Bartholow*, 4 Kan., 124, 1866; *Wyandotte City v. Wood*, 5 Kan., 603, 1870; *State v. Cincinnati*, 20 Ohio St., 18, 1870; following *Atkinson v. Railroad Co.*, 15 Ohio St., 21, 1864.

§ 1171. *An act of the legislature of Kansas, legalizing a special election held in a specific city, which authorized a corporation to issue bonds, was a special act.*

In the first case cited, the supreme court of the state of Kansas held that the constitution compelled the legislature to regulate the grant of powers to mu-

nicipal corporations by *general laws*; and hence a *special act*, or an act specially amending the charter of the city of Atchison in respect to making local improvements and local assessments, was void. In the case next cited (*Wyandotte v. Wood*) the same court adhered to this view, and accordingly held that an act of the legislature specially extending the limits of the city of Wyandotte was unconstitutional, because it contravened both sections 1 and 5 of article 12 of the constitution. So in the case of *The State v. Cincinnati*, above cited, the supreme court of Ohio, under the same constitutional provisions, held that the legislature cannot, by special act, create a corporation; nor, by special act, confer additional powers on a corporation already existing, and that in these respects there was no difference between private and municipal corporations, since the constitution equally embraced and equally applies to both classes; and therefore the act of April 16, 1870, "to prescribe the corporate limits of Cincinnati," being considered a special act, was adjudged void. See, also, *Atkinson v. Railroad Co.*, *supra*. In this case, Ranney, J., thus expounds the constitution: "These provisions of the constitution are too explicit to admit of the least doubt that they were intended to disable the general assembly from either creating corporations or conferring upon them corporate powers by special acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such law applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation; and, finally, of making all judicial construction of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class. We must give such a construction to the constitution as will preserve its leading objects intact." One of these objects in Kansas, as well as in Ohio, was to cut up by the roots the mischief of special legislation, particularly in respect to corporations, both public and private. The object would be defeated if the special act relating to the city of Iola could stand.

If, under the doctrine of *Butz v. Muscatine*, 8 Wall., 575, this court is not absolutely bound, in this class of cases, to follow the interpretation of the state constitution given by its highest court, yet it seems that it ought to follow it where it appears to rest upon solid grounds, and was made in cases and in respect to questions where there was nothing to warp the judgment of its judges, and where the interpretation was settled or had been declared at the time the act in controversy was passed. In the latest case on this subject, decided by the supreme court of the United States, it is not denied that the supreme court of a state is the appointed expositor of its constitution and laws, and that the federal courts will adopt as rules for their own judgments the decisions of the highest courts of the state "respecting local questions peculiar to itself, or respecting the construction of its own constitution and laws." It only denies the binding force of the state adjudications which rest upon general principles of law, and not upon the meaning of special constitutional or legislative provisions. *Olcott v. Supervisors*, U. S. Supreme Court, December Term, 1872 — Reported 5 Ch. Leg. N., 397 (16 Wall., 678). I think the present case is one in which it is the duty of this court to follow the decisions of the state supreme court; and so far as my judgment rests upon the special provisions of the constitution above referred to, I place it upon the state adjudications without an inquiry into their soundness.

§ 1172. *A legislature has no power to authorize the issue of municipal bonds in aid of private enterprises or objects, and such bonds are void, even in the hands of bona fide holders.*

But suppose the enactment under which the bonds in question were issued is not "a special act conferring corporate powers" within the meaning of the constitutional prohibition, the other objections made to the validity of the bonds remain to be considered. The act authorizes the creation of a debt by the municipality to raise money by the issue of bonds to be given as a donation or bonus "to aid in the erection or completion of buildings at or near the city of Iola to be used for the purpose of manufacturing Z. King's patent bridges, and as a foundry and iron works," and the act also authorizes and requires the levy and collection of such taxes as may be necessary to pay the interest and principal of these bonds. It is important to be observed that this is undeniably a private enterprise. These buildings and works are the private property of the owners. No public or municipal control over this property or the enterprise aided is specially reserved or provided for, and none exists different from that which exists as to all other property owned by private persons and devoted to private uses. The proprietors of these works are under no obligations, by reason of the aid extended and the burden of taxation thereby imposed upon the municipality, to render it or the state any duty or service whatever — not even to repay the loan, or to maintain for any specified time the contemplated manufacturing enterprise. The state or city could not compel them to complete or operate the works or prevent their removal at pleasure to some other locality. And thus we have presented the inquiry, than which no question concerning the property rights of the citizen is of more transcendent moment, viz.: Whether the legislature may thus compel or coerce the citizen to aid in the establishment of purely private enterprises or objects *because* these will or may incidentally promote the general good of the community or locality. I think it safe to affirm that no such principle has yet received judicial sanction. On the contrary, the principle has been declared unsound by courts of the highest respectability.

§ 1173. *Extent of the taxing power.*

The general subject of the extent of the taxing power in connection with municipal aid to railways has been thoroughly discussed in a majority of the states of the Union, and recently by the supreme court of the United States. *Olcott v. Supervisors*, reported 5 Ch. Leg. N., 397 (16 Wall., 678); *Railroad Company v. Otoe County*, Dec. Term, 1872 (16 Wall., 667). The courts everywhere have agreed that taxes can lawfully be imposed for public purposes only; and therefore, in the language of Chief Justice Black, "The legislature has no constitutional right to create a public debt or authorize any municipal corporation to do it in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional, for all the reasons which forbid the legislature to usurp any other power not granted to them. . . . An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it

be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another. The power to make such order is not legislative, but judicial, and was not given to the assembly by the general grant of legislative authority." *Sharpless v. Philadelphia*, 21 Penn. St., 147. Similar language is held by Mr. Justice Strong in delivering the opinion of the supreme court of the United States in the recent case of *Olcott v. Supervisors of Fond du Lac County*, Dec. Term, 1872, reported 5 Ch. Leg. N., 397 (16 Wall., 678). The learned justice says "that the taxing power of the state extends no further than to raise money for a public use, as distinguished from private, or to accomplish some end public in its nature." Again he says: "No one contends that the power of a state to tax, or to authorize taxation, is not limited to the uses to which the proceeds may be devoted. Undoubtedly taxes may not be laid to a private use." See *Freeland v. Hastings*, 10 Allen, 570; *Tyson v. School Directors*, 51 Penn. St., 9.

§ 1174. *What are public and what are private works and enterprises.*

The only question, therefore, is whether the use for which taxation in the present case is authorized is a public or a private use. The supreme court of the United States, in sustaining the validity of legislative acts authorizing municipal aid to railways, place it upon the distinct ground that highways, turnpikes, canals and railways, although owned by individuals under public grants or by private corporations, are *publici juris*; that they have always been regarded as governmental affairs, and their establishment and maintenance recognized as among the most important duties of the state, in order to facilitate transportation and easy communication among its different parts. *Rogers v. Burlington*, 3 Wall., 654 (§§ 837-841, *supra*); *Mitchell v. Burlington*, 4 Wall., 270 (§§ 1151-53, *supra*); *Railroad Co. v. Otoe County*, *supra*. Therefore it is that in favor of such improvements the state may put forth its right of eminent domain, and also, as now established by judicial decisions, unless the right be denied it in the constitution, its power to tax. That these acts may lawfully be done is because, and only because, the use is a public one, public in its nature, and hence these works are subject to public control and regulation, notwithstanding they may be constructed under legislative authority and be exclusively owned by private persons or corporations. Compulsory taxation in favor of railways and like public improvements owned by individuals or companies is an exercise of power going quite to the verge of legislative authority. Although it is a doctrine that must now be considered as judicially settled, still it is one which has encountered a vigorous opposition, both on the ground of expediency and of power, and the exercise of the authority has been so disastrous as already in some of the states to have led to constitutional provisions for the protection of the citizen. But it is obvious from the statement of the grounds upon which such legislation rests that it furnishes no support for the validity of taxation in favor of enterprises and objects essentially private; and such I consider to be the establishment of a bridge, manufactory or foundry owned by private individuals. Cases may be imagined giving rise to doubts whether the use be public or private, but the one in hand does not seem to be difficult to class. It is certainly not usual for the legislature to undertake to exercise the right of eminent domain to procure sites for hotels, banks, manufactories, stores and the like, and it may be safely said, unless extraordinary circumstances may occasionally furnish an exception, that private property cannot lawfully be condemned for such purposes; and the reason is that it

would not be a taking for public use, nor justified by any reasonable necessity.

§ 1175. *Incidental benefits to the public do not constitute an enterprise a public one.*

So taxation to aid ordinary manufactories or the establishment of private enterprises is a device until recently quite unheard of; and the power must be denied to exist unless all limits to the appropriation of private property and to the power to tax be disregarded. The question under discussion must be determined upon some principle, and I hold it to be sound doctrine that the mere incidental benefits to the public or the state which result from the pursuit by individuals of ordinary branches of business or industry do not constitute a public use in a sense which justifies the exercise of either the power of eminent domain or of taxation.

§ 1176. *Boston "fire bonds" of 1872. Rule laid down in that case.*

If this salutary principle be abandoned, we unsettle the foundations of private property, and unwisely open the door for frauds and abuses of the most alarming character. That these views are sound I entertain no doubt, but my conviction of their soundness has been much strengthened by the decision of the supreme judicial court of Massachusetts, declaring unconstitutional the act authorizing the issue of what is known as the "Summer street fire bonds." In November, 1872, a considerable portion of the city of Boston was destroyed by fire. In December following, the legislature empowered the city to issue bonds to the amount of \$25,000,000, the proceeds of which three commissioners, appointed by the mayor, were authorized to loan in a safe and judicious manner, "in such sums as they shall determine, to the owners of land, the buildings upon which were burned by the fire in said Boston on the 9th and 10th days of November, 1872, upon the notes or bonds of said owners secured by first mortgages of said land; said mortgages to be conditioned that the rebuilding shall be commenced within one year from the 1st day of January, 1873; and said commissioners to have full power to apply the proceeds of said bonds in making said loans in such manner, and to make such further provisions, conditions and limitations in reference to said loans and securing the same as shall be best calculated, in their judgment, to insure the employment of the same in rebuilding upon said land burned over, and the payment thereof to the said city."

In the late case of *Lowell v. Boston*, the constitutionality of this act was the question to be decided. It will be seen that the object of the act, as shown by its provisions, was "to insure the speedy rebuilding on land the buildings upon which were burned" by the great fire; and the question was as to the right of the state to impose any taxes for this object, and this depended upon the further question whether this object was, in a legal sense, a public object. The court distinctly held, to use the language of the rescript sent down in the case, that taxes can only be laid "for some public service or some object which concerns the public welfare;" that "the preservation of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object." "That the incidental advantages to the public or to the state which result from the promotion of private interests, or the prosperity of private enterprises or business, do not justify their aid by taxation." "That as a judicial question the case is not changed by the magnitude of the calamity which has created the emergency." And, finally, *the*

court say: "The expenditure authorized by this statute being for private and not for public objects, in a legal sense it exceeds the constitutional power of the legislature, and the city cannot legally issue the bonds for the purposes named in the act." See, also, as to distinction between public and private use, *Bloodgood v. Railroad Co.*, 18 Wend., 65; *Jenkins v. Andover*, 103 Mass., 94, holding invalid a statute authorizing taxation in favor of a private incorporated academy. Same principle, *Curtis v. Whipple*, 24 Wis., 350; *People v. Salem*, 20 Mich., 452.

§ 1177. *Purchaser of bonds must take notice of power to issue.*

As the only authority for the issue of the bonds in question was an unconstitutional act of the legislature, they are void — void from the beginning, and void into whosoever hands they may come. All persons must, at their peril, take notice of the *power* of municipal corporations or officers to issue securities, and especially is this so where the want of power results from constitutional prohibitions or provisions. The *Floyd Acceptances*, 7 Wall., 676 (*BILLS AND NOTES*, §§ 15-23); *Marsh v. Fulton Co.*, 10 Wall., 676 (§§ 1186-89, *infra*); *Clark v. Des Moines*, 19 Ia., 199; *Steines v. Franklin Co.*, 48 Mo., 167.

The demurrer to the declaration is sustained, and, unless the plaintiff desires to amend, judgment will be entered for the defendant.

Judgment for defendant.

§ 1178. *Donating land.*— A power given to a city to issue bonds to provide for the construction of a city hall, markets and other structures of public necessity and utility, does not authorize it to issue bonds to purchase land to be given to a railroad company. *Lewis v. City of Shreveport*,* 8 Woods, 205. See § 1142.

§ 1179. Bonds issued by a town, for the purchase of land, for the purpose of inducing a railroad company to build its machine shops there, are held to be issued for a public purpose, and therefore valid, in Missouri, where it is settled law that this kind of aid may be lawfully given to railroad companies. *Jarrott v. Moberly*,* 5 Dill., 253.

§ 1180. *Manufacturing.*— Bonds issued under the act of December 15, 1868, of West Virginia, authorizing the city of Parkersburg to issue bonds in aid of a private manufacturing interest, are void, inasmuch as the power to issue the bonds, no other means being provided, implies that they are to be paid by taxation, and such taxation is not taxation for a public object; and inasmuch as there is no authority in the constitution of Virginia for levying taxes to be used in private enterprises. *Parkersburg v. Brown*,* 16 Otto, 487. See §§ 896, 1145-1150.

V. WHETHER BONDS ISSUED TO PROPER COMPANY.

SUMMARY — *Company divided into three, and bonds issued to one division*, § 1181.— *Subscription transferred to another company*, § 1182.— *Bonds issued to consolidated company*, § 1183.— *Authority to subscribe to any road running to the city*, § 1184.— *Law applies to railroads constructed after its passage*, § 1185.

§ 1181. A statute of Illinois authorizing the issue of county bonds in aid of railroads provided that no subscription should be made and no bonds issued without the consent of a majority of the voters of the county, and that the notices of election should specify the company in which stock is proposed to be subscribed. Under this law stock was voted to the *Mississippi & Wabash Railroad*, proposed to be built across the state of Illinois from east to west. After the commissioners had ordered the clerk to make the subscription on the books of this company, it was divided by act of the legislature into three companies, each becoming a distinct corporation. The clerk made the subscription on the books of the central division and issued the bonds to that company, which owned about one-fourth of the original road. The bonds were held invalid, even in the hands of holders in good faith. No acts of the supervisors could ratify the issue of the bonds, as they were the agents and not the principals with reference to that act. *Marsh v. Fulton County*, §§ 1186-1189.

§ 1182. Ray county, in Missouri, voted subscription to railroad company A., to be paid in bonds. Company A. was bought by company B., under authority of the legislature and the

consent of the stockholders, including Ray county. The county court, under express authority to take proper steps to protect the interest of the county, made a subscription in company B. The latter company failing to build a road through the county, under an agreement between the county court and company B., and company C., the stock was transferred to C., and county bonds issued to that company, since it proposed to construct a road along the same line intended by the original companies. It did construct such a road, and received the bonds at different stages of completion of the road, according to agreement. The bonds being in the hands of holders in good faith, the road being in operation, the county having paid interest on the bonds and now holding the stock, repudiates the bonds. It is held that on the above facts the county must pay the bonds, and that the constitution of Missouri of 1865, passed after the vote and before the subscription to B., or the transfer of stock, requiring the consent of voters to subscriptions to any railroad company, does not affect the transfer to C. nor the subscription to B. *County of Ray v. Vansycle*, §§ 1190-1193.

§ 1183. The county court of the county of Bates, in pursuance of a petition from certain tax-payers, ordered an election in one of its townships to determine whether they would subscribe stock to a certain railroad company to be paid in bonds. The vote being favorable, the county court passed a resolution that a certain sum be, and is hereby, subscribed to the stock of the company, and that the agent be authorized to make the subscription on the books of the company. The agent being dissatisfied with the condition of the company reported to the court that "the bonds of the township are not subscribed," and the court approved of his acts. Some time afterwards the county court made another order reciting that the subscription had been made to the company intended, and, this company having become consolidated with another, forming a new company, directed that the bonds be issued to the new company in payment of the original subscription. The bonds were accordingly issued. The court held, in an action on the bonds, that there had been no subscription to the stock of the old company, and, as the bonds were issued and subscription made to a company other than the one for which the vote was cast, the bonds were void. *County of Bates v. Winters*, §§ 1194, 1195.

§ 1184. The city of Madison had authority "to take stock in any chartered company for making a road or roads to said city." A railroad was in existence from Madison to Indianapolis through Columbus. *Held*, that it had the power under such law to subscribe and issue bonds for the capital stock of a railroad from Shelbyville to Columbus. *Van Hostrup v. Madison City*, §§ 1196, 1197.

§ 1185. A statute authorized a city to lend its credit to certain railways named and to "any other railroad company duly incorporated and organized for the purpose of constructing a road leading from the city," etc. *Held*, that this act applied to any railroad which might be incorporated and organized after its passage, and was not limited to railroads then in existence, and that an issue of bonds, in aid of such a company subsequently organized, was valid. *James v. Milwaukee*, § 1198.

[NOTES.—See §§ 1199-1203.]

MARSH v. FULTON COUNTY.

(10 Wallace, 676-684. 1870.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—The law of Illinois authorized counties to subscribe for railroad stock upon a vote of the people, the notice of the election to specify the company to whose stock the subscription was to be made. The law also provided that the powers of a county could only be exercised by a board of supervisors. The people of Fulton county having authorized a subscription to the Mississippi & Wabash R. R. Co., whose road was to run from the Mississippi river to the east line of the state, the board of the county ordered its clerk to enter its subscription on the books of the company. Before the subscription was made the act incorporating the road was amended so as to divide the road into three divisions, and the clerk subscribed in the name of the county on the books of one of the divisions and issued therefor the bonds here sued on. The board of supervisors paid some of the interest coupons and did other acts recognizing the bonds as county obligations.

Opinion by MR. JUSTICE FIELD.

The questions presented for our consideration are, *first*, whether the bonds issued by the clerk of the county court of Fulton county to the Central Division of the Mississippi & Wabash Railroad Company were, at the time of their issue, valid obligations of the county of Fulton; and *second*, if not thus valid, whether they have become obligatory upon the county by any subsequent ratification. Were they valid when issued? The answer depends upon the law of Illinois then in force. The clerk of the county court possessed no general authority to bind the county. He was a mere ministerial officer of the board of supervisors; and that body was equally destitute of authority in this particular, except as the law of Illinois gave it. That law authorized any county of the state, and, of course, its supervisors, who exercised the powers of the county, to subscribe stock to any railroad company in a sum not exceeding \$100,000, and to pay for such subscription in its bonds, provided such subscription was previously sanctioned by a majority of the qualified voters of the county at an election called for the expression of their wishes on the subject, and it prohibited any subscription or the issue of any bonds for such subscription without such previous sanction. "No subscription shall be made or purchase bond issued by any county," says the law, "unless a majority of the qualified voters of such county . . . shall vote for the same." And the law further requires that the notices calling for the election "shall specify the company in which stock is proposed to be subscribed."

§ 1186. *Authority to subscribe to stock in a certain railroad company does not authorize a county to issue bonds to one of the three companies into which the said company is subsequently divided.*

These provisions furnish the answer to the first question presented. The only subscription authorized by the voters of Fulton county was that to the Mississippi & Wabash Railroad Company, and one to the Petersburg & Springfield Company. The Central Division of the Mississippi & Wabash Railroad Company was a different corporation from the original company. It has been so held by the supreme court of Illinois in a case involving the consideration of a portion of the bonds in suit and the remaining \$60,000 of bonds of the original subscription. The amendatory act of 1857, dividing the road into three divisions, and subjecting each division to the control and management of a different board, clothed with all the powers of the original board, so far as the division was concerned, worked a fundamental change in the character of the original corporation, and created three distinct corporations in its place. A subscription to a company whose charter provided for a continuous line of railroad of two hundred and thirty miles, across the entire state, was voted by the electors of Fulton county; not a subscription to a company whose line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value.

§ 1187. *County bonds issued pursuant to a subscription to a railroad company, without authority of law, are invalid though held by an innocent purchaser.*

But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might, for such reason, be taken without special inquiry into their validity. It is a case where the power to contract

never existed — where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Acceptances*, 7 Wall., 676 (BILLS AND NOTES, §§ 15-23). In speaking of notes and bills issued or accepted by an agent acting under a general or special power, the court says: "In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

§ 1188. *Ratification can only be made where the party ratifying was competent to authorize in the first instance.*

It is also contended that if the bonds in suit were issued without authority their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts when they were directly in terms prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition. *McCracken v. City of San Francisco*, 16 Cal., 624.

§ 1189. *Obligations of counties incurred independent of statute.*

We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way. We perceive no error in the record, and the judgment of the circuit court must therefore be affirmed.

COUNTY OF RAY v. VANSYCLE

(8 Otto, 675-688. 1877.)

ERROR to U. S. Circuit Court, Western District of Missouri.

STATEMENT OF FACTS.—Ray county, Missouri, pursuant to an order of the county court, of date July 2, 1860, and a vote of the people, made a subscription of \$200,000 to the stock of the Missouri River Valley Railroad Company, to be paid by an issue of bonds. Under an act of February 10, 1864, the said company and the Chariton & Randolph Railroad Company had power, by a vote of the stockholders, to transfer all their effects, privileges, etc., to the North Missouri Railroad Company, and after the transfer was made the companies should cease to have any corporate existence and should be known as the West Branch of the North Missouri Railroad; the county of Ray voted its stock in favor of the transfer of the privileges of the Missouri River Valley Railroad Company pursuant to the provisions of said act. By subsequent negotiations, coming down to 1868, the subscription as originally made and transferred to the North Missouri Railroad Company was canceled, and a subscription was made to the stock of the St. Louis & St. Joseph Railroad Company. This subscription was made without a vote of the people, but before the order was made a petition of a large number of the citizens of the county was presented in favor of the transfer. The constitution of 1865, and the laws made pursuant thereto, authorized municipal aid on a vote of two-thirds of the qualified voters. By the law in force in 1860, the county court of a county could subscribe, and, for information, could cause an election to be held to ascertain the sense of the tax-payers. This action is on coupons attached to the bonds issued to the St. Louis & St. Joseph Railroad Company.

Opinion by MR. JUSTICE HARLAN.

The first inquiry suggested by the facts set forth in the special finding is as to the validity of the agreement of 1868, whereby the county of Ray secured exemption from liability to the North Missouri Railroad Company, on its original subscription of \$200,000, and the St. Louis & St. Joseph Railroad Company obtained the bonds of the county for that amount. This question must be determined in the light of all that occurred in connection with the efforts made to secure a railroad through that county. It appears that, at the election held in the year 1860, more than two-thirds of the votes cast in the county were in favor of a subscription of \$200,000 to the capital stock of the Missouri River Valley Railroad Company, which proposed to construct a railroad through the county. The only condition which the voters imposed was, that the stock subscribed under the authority of that election "should be expended on that part of the railroad in the county of Ray." In obedience to the popular will, the subscription was made in that year. When, however, in 1864, that company transferred all its effects, assets, rights and privileges to the North Missouri Railroad Company, the latter became entitled to the benefit of that subscription, and, in satisfaction thereof, to the bonds of the county, to the amount of \$200,000. Of the validity of that transfer we have no doubt. It was authorized by an act of the general assembly of Missouri, and made with the sanction of the stockholders of the companies interested, including the county. At the meeting of stockholders called to consider the question of transfer, the county was represented by an agent, designated by the county court, with specific instructions to vote the stock of the county in favor of such

transfer. In appointing that agent, with such instructions, the court did not exceed its powers; since, by the terms of the act of December 5, 1859, under the provisions of which the original subscription was made, the court was authorized "to take proper steps to protect the interests" of the county, and also "to appoint an agent to represent the county, to vote for it, and to receive its dividends."

§ 1190. *The provision of the Missouri constitution touching municipal subscriptions was prospective.*

It seems, therefore, entirely clear that the North Missouri Railroad Company acquired, prior to the adoption of the state constitution of 1865, a vested right to demand and receive the bonds of the county in payment of its original subscription. This right was not destroyed or impaired by that constitution. It has been decided by the supreme court of Missouri that the section of the constitution of that state relating to municipal subscriptions was "a limitation upon the future power of the legislature, and was not intended to retroact so as to have any controlling application to laws in existence when the constitution was adopted." *State v. Macon County Court*, 41 Mo., 453; *State v. Greene County*, 54 id., 540; *State v. County Court of Sullivan County*, 51 id., 522; *County of Callaway v. Foster*, 93 U. S., 570 (§§ 876-878, *supra*); *County of Scotland v. Thomas*, 94 id., 688 (§§ 1210-14, *infra*); *County of Henry v. Nicolay*, 95 id., 619 (§§ 889-892, *supra*).

But the North Missouri Railroad Company, for some unexplained reason, did not proceed in the construction of the contemplated road. Counsel do not, however, claim that its delay in that regard worked a forfeiture of its right to the bonds of Ray county, at the time of the organization, in the year 1868, of the St. Louis & St. Joseph Railroad Company. The latter had in view the construction of a road from some point on the west branch of the North Missouri Railroad, at Richmond, the county seat of Ray, to the city of St. Joseph—in all material respects the same road for the construction of which the county had previously contracted with the North Missouri Railroad Company. At this crisis, the latter company, having perhaps a pecuniary interest in establishing a connection between its west branch and the city of St. Joseph, proposed to release the county from its subscription of \$200,000, if it would subscribe \$250,000 to the capital stock of the St. Louis & St. Joseph Railroad Company. Declining to assent to that arrangement, the court, on behalf of the county, made a counter-proposition, to wit, that, for the purpose of constructing a railroad from the west branch of the North Missouri Railroad, through Richmond to St. Joseph, it would transfer the \$200,000 subscription to the St. Louis & St. Joseph Railroad Company, by making a similar subscription to that company, to be applied in building, constructing and operating such road, provided the county was released, in writing and of record, from all liability upon its original subscription to the North Missouri Railroad Company. This proposition was promptly acceded to by both companies. The required release was executed and put upon record; and the St. Louis & St. Joseph Railroad Company entered upon the construction of, and did construct, the proposed road; receiving the bonds of Ray county in sums of \$50,000, as each five miles of road was completed, and faithfully applying the proceeds to that portion of the road which was in that county. We are now asked to declare that the county is under no legal obligation to pay its bonds, issued and put upon the market under the circumstances we have detailed.

§ 1191. *A county bound by a subscription of stock to a railroad company can change such subscription from one company to another. Such change is not a new subscription.*

The fundamental proposition underlying the defense is, that, after the adoption of the constitution of 1865, no subscription of stock could be lawfully made by the county until after an election; and that, no election having been held at which the people voted specifically in favor of a subscription to the stock of the St. Louis & St. Joseph Railroad Company, the action of the court was a nullity, creating no liability whatever upon the bonds issued in pursuance of the agreement of 1868. Whatever weight that proposition might have in some cases, it does not meet the precise issues here presented. It ignores altogether the direct connection which existed between the agreement of 1868 and the action taken by the county and its court prior to the year 1865, whereby the county assumed the obligation to issue its bonds to the amount of \$200,000, in discharge of a completed subscription to the stock of a corporation which came into existence and was fully organized before that constitution went into operation, and which could, notwithstanding the adoption of that instrument, compel the county to comply with its contract. It is the case of a transfer of such stock by exchange, in order that the county might obtain the desired road, and be discharged from legal obligations from which it could not justly or rightfully escape. It is not the case of an entirely new subscription made under the constitution of 1865, in disregard of its provisions and of the general statutes passed in pursuance thereof. When the arrangement of 1868 was first suggested, the court saw that the desire of its constituents for the construction of a railroad through the county was not likely to be fulfilled through the agency of, or under the contracts previously made with, the North Missouri Railroad Company. Its members became convinced that the only effectual or practicable mode to accomplish that end was to make such an arrangement or combination as that made with the new company. The court was given by the statute under which the original subscription was made, the power to "take proper steps to protect the interests of the county;" to which end it was authorized to appoint an agent "to represent the county, to vote for it," etc.; and, in exercising this power, it was necessarily invested with very broad discretion. It is not an unreasonable construction of the statute to say that, in determining what steps were proper for the protection of the interests of the tax-payers, the court had authority to adopt such measures as prudent men managing the affairs of others ought to have adopted. It evidently regarded the arrangement made in 1868 as essential to the protection of the county's interests, so far as they were involved in the subscription of stock previously made, and in the obligations thereby assumed. There is nothing in the record upon which to base any imputation of collusion or bad faith. The action was taken under such circumstances of publicity as to notify the tax-payers generally of all that was doing; and we are not prepared to say that the court had not the power to transfer the subscription from the North Missouri Railroad Company to the St. Louis & St. Joseph Railroad Company, and deliver the county bonds to the latter, upon its agreement to build substantially the same road for the construction of which the original subscription had been made.

§ 1192. *A county having issued its bonds in payment of a subscription to railroad stock, and for years paid interest, cannot as against bona fide holders allege that its agents exceeded their powers.*

But whatever doubt exists upon this point should be resolved in favor of the

bona fide holders of the bonds. The tax-payers of the county should not, under the peculiar circumstances of this case, be now heard to allege that their agents, invested by statute with the authority and charged with the duty of protecting their interests, had exceeded their powers. The court levied and collected a tax to pay interest due on the bonds delivered to the St. Louis & St. Joseph Railroad Company for the years 1869, 1870, 1871, 1872 and 1873. The coupons were annually paid for the first four years named. It is true that, at a term of the court held in August, 1871, an order was entered of record, stating that the bonds had been issued illegally and were void, and upon that ground the order recited that neither the bonds nor the coupons would be paid by the county. But in March, 1872, that order was rescinded, and the county treasurer directed to proceed with the payment of the interest. It was not until August, 1873, that the court finally determined to repudiate all obligations to pay the bonds; and under its orders the interest collected for 1873 has been retained. It further appears from the special finding that the North Missouri Railroad Company constructed its western branch from Moberly to Kansas City, running through the county for a distance of between twenty-six and twenty-eight miles; that the St. Louis & St. Joseph Railroad Company constructed its road from opposite Lexington through Richmond, locating a depot in Richmond, and continuing to the northwest boundary of said county, a distance of twenty-eight miles; that said road is completed and operated to the city of St. Joseph, Missouri; that on the first-named road there are four depots located in Ray county, and on the latter five depots; that the money realized from the sale of the bonds issued was expended in the construction of the St. Louis & St. Joseph Railroad, in the county of Ray, and, in consequence of this arrangement, the county secured the construction and operation, within its limits, of about twenty-four miles of railroad more than would have been built under the previous contract or arrangement with the North Missouri Railroad Company.

§ 1193. *Tax-payers of a county are concluded by the acts of its agents involving the interests of third persons.*

But this is not all. In payment of the county subscription and bonds, certificates of stock in the St. Louis & St. Joseph Railroad Company were issued to the county, and are still held by it. They have never been tendered for cancellation. When the court declared, in 1873, that the county would pay neither the principal nor the interest due on the bonds, no intimation was given of even its willingness to surrender the certificates. Upon the clearest principles of justice, the tax-payers of Ray county are concluded by the acts of their official agents, and by their own failure, either intentionally or from neglect, to assert, by appropriate proceedings, their legal right (if any they ever had) to prevent the transfer of their original subscription to the company, which, by the construction of its road, gave them greater railroad facilities, and at no greater cost, than they could have obtained under the contract with the North Missouri Railroad Company. Although this case has many features peculiar to it, the conclusion we have reached is in harmony with settled principles heretofore announced by this court in numerous cases. It seems unnecessary to consider other points suggested in argument, as the views here expressed are sufficient to dispose of the case.

Judgment affirmed.

COUNTY OF BATES v. WINTERS.

(7 Otto, 88-92. 1877.)

ERROR to U. S. Circuit Court, Western District of Missouri.

STATEMENT OF FACTS.—In April, 1870, Bates county, Missouri, pursuant to a petition by the tax-payers and an order of the county court, voted a subscription to the stock of the Lexington, Chillicothe & Gulf Railroad Company, the bonds to be issued when the road south of Lexington to the north line of Mount Pleasant township should have been located and put under contract. On the 14th of June, 1870, the county court made an order “that the sum of \$90,000 be, and is hereby, subscribed” to the stock of the above company, and that the agent be authorized to make the subscription on the books of the company. The agent appointed to make the subscription reported, after unsuccessful negotiations, that the bonds are not subscribed. This report was approved by the county court. Subsequently, on January 18, 1871, the court made an order to the effect that the subscription had been made to the above company, that the said company had consolidated with another company, forming the Lexington, Lake & Gulf Railroad Company, and directed the issue of \$90,000 in bonds in satisfaction of the subscription. Pursuant to this order the agent made the subscription to the latter company.

Opinion by MR. JUSTICE HUNT.

If we hold that there was no valid subscription until that made on the 18th of January, 1871, which was to the Lexington, Lake & Gulf Road Company, it is open to the objection that the township voted an authority to subscribe to the stock of one company, and the county court subscribed to the stock of a different company. This was condemned in *Harshman v. Bates County*, 92 U. S., 569 (§§ 899, 900, *supra*), which arose upon the same issue of bonds and in relation to the same roads as the case before us. That case has since been modified as to the first point decided in it, in relation to the number of votes required to authorize the subscription, but remains unimpaired as to the point we are considering. It is said that the subscription was, in law, made on the 14th of June, 1870, to the Lexington, Chillicothe & Gulf Railroad Company; and that, having been made by the authority of the popular vote, it could be transferred to the consolidated organization. *Nugent v. Supervisors*, 19 Wall., 241 (§§ 1215-17, *infra*), is cited to sustain this proposition.

§ 1194. *What constitutes a subscription to stock by a county.*

It is decided, in that case, that an actual manual subscription on the books of a company is not indispensable; that where an order was made by a county court, which said that it subscribed for a specified number of shares of railroad stock, which was accepted by the company, and notice of such acceptance given to the county court, when the minds of the parties met, and both understood that a contract had been made, and where the county court had accepted the position of a stockholder, received certificates for the stock subscribed, and voted as a stockholder, that these facts constituted a valid subscription. In *County of Moultrie v. Savings Bank*, 92 U. S., 631 (§§ 872-875, *supra*), a like decision was had, and upon like facts. In declaring the resolution of the corporation to have been an executed subscription, the court use this language: “The authorized body of a municipal corporation may bind it by an ordinance which, in favor of private persons interested therein, may, if so intended, operate as a contract; or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this

case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act, its immediate subscription." A similar case is that of *Justices of Clarke County v. Paris, etc., R. Co.*, 11 B. Mon., 143, where the order was entered in these words (in part): "With the concurrence of all the magistrates of the county, ordered, that the county court of Clarke county subscribe, as they hereby do, for fifty shares of stock in the Paris" Company, etc. The court say (at p. 146): "It is manifest on the face of the order that it was made as a subscription. The suspending order of October calls it a subscription, and the evidence shows that it was so intended and understood when made, both by the court which made it and by the company which solicited and accepted it."

The present case is quite a different one. The order of the county court was not intended, as in the cases referred to, to be final and self-executing. While it recited that the sum named should be, and was thereby, subscribed, it "authorized and directed" the agent "to make said subscription on the stock-books of the said company," upon the conditions specified, and to report to the court thereon. Having failed, for the reasons given by him, to make the subscription, the agent reported to the county court his doings, and "that the bonds of the township are not, therefore, subscribed;" and the county court approved his report. A subscription to the amount of \$90,000 was made in January, 1871, by color of said authority, on the books of the Lexington, Lake & Gulf Railroad Company. This subscription was accepted by that company, and a certificate of stock to the amount of such subscription was then, for the first time, issued to the county. The company whose stock was thus received has graded in part the road, but never completed it. The county of Bates or the town of Mount Pleasant has never, in fact, received any benefit from this issue of its bonds. The county court did not intend their action in June, 1870, to be final, and did not understand that a subscription was thereby completed. Their vote was a declaration that the power to subscribe should be exercised, and was an authority to their agent to perfect a contract with the railroad company, on the conditions set forth. No acceptance was made by the railroad company, no notice of acceptance was given, nor was there any act or fact which afforded a pretext for saying that the railroad company was bound by the contract of subscription. While it refused to allow the agent to withdraw his evidence of authority, it said nothing and did nothing to indicate that the minds of the parties had met upon the terms of a subscription. The county court was precise and particular in requiring those conditions to be copied in full on the books of the company, as the conditions on which the subscription was made; and there could be no mutual contract until the railroad company assented, on its part, to those conditions. At a subsequent time, January 18, 1871, when it had determined to issue bonds to a different company, and apparently as its justification for so doing, the county court recited that a subscription had been made to the Chillicothe road. It at once, and in the same order, contradicted and repudiated this recital, by directing a subscription for \$90,000 of bonds in the Lexington & Lake Railroad Company. If the subscription had been made before to one company, there was no occasion or authority for a subscription to another. This historical statement furnishes no satisfactory evidence of an actual or legal subscription in June, 1870. We are of the opinion that the action of the county court, on the 14th of June, 1870, did not constitute a subscription to the stock of the Lexington, Chillicothe & Lake Railroad Company, and that

the case of the defendants in error is fatally defective, under the ruling of *Harshman v. Bates County*, in this: that the popular vote gave authority to subscribe to the Lexington, Chillicothe & Gulf Railroad Company, while the subscription was made and the bonds issued to a different company, to wit, the Lexington, Lake & Gulf Railroad Company.

§ 1195. *Where recitals of bonds show that there was no due authority for their issuance, there can be no recovery upon them.*

The same decision holds that the recitals in the bonds are such that there can be no *bona fide* holders of them; and to the like effect in principle is *McClure v. Township of Oxford*, 94 U. S., 429 (§§ 1398-1401, *infra*). The judgment must be reversed, and the case remanded to the circuit court, with directions to proceed to a new trial, according to the views above expressed; and it is so ordered.

JUSTICES CLIFFORD, SWAYNE and STRONG dissent.

VAN HOSTRUP v. MADISON CITY.

(1 Wallace, 291-297. 1868.)

ERROR to U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—By the terms of its charter, the city of Madison was authorized to take stock “in any chartered company for making a road or roads to said city,” on the petition of two-thirds of the citizens, freeholders. The subscription was made to the Columbus & Shelby Railroad Company. At the time there was a road in operation, known as the Madison & Indianapolis Railroad, running from Indianapolis, in a southeasterly direction, through Columbus to Madison. The road to which the subscription was made started at Columbus, about forty-six miles northwest of Madison, and ran north to Shelbyville. It did not run to Madison, but had connection with that place through the Madison & Indianapolis road at Columbus.

Opinion by MR. JUSTICE NELSON.

One point of objection to the bonds is that the Columbus & Shelby Railroad does not, by the terms of its charter or in fact, terminate at the city of Madison; and hence, that the road is not within the description of one in which the city was authorized to take stock.

§ 1196. *A charter authorizing the issue of bonds for building a road or roads to the city will authorize bonds for prolongation of a road already built.*

The words are, “to take stock in any chartered company for making a road or roads to the said city.” It is supposed that the authority to subscribe is tied down to a chartered road, the line of which comes within the limits of the city; and that the words are to be taken in the most literal and restrictive sense. But this, we think, would be not only a very narrow and strained construction of the terms of the clause, but would defeat the manifest object and purpose of it. The power was sought and granted with the obvious idea of enabling the city to promote its commercial and business interests by affording a ready and convenient access to it from different parts of the interior of the state, and thus to compete with other cities on the Ohio river and in the interior which were or might be in the enjoyment of railroad facilities. This object and purpose, we think, should be kept constantly in view in giving a construction to the clause in the charter. For, while it will operate to prevent a narrow and fruitless interpretation, it will have the effect of guarding against

any abuse or unreasonable extension of the power. We think it quite clear a subscription to a road wholly unconnected with roads leading to the city would not be within its fair meaning and intent, but are equally satisfied that a subscription to a road in extension and prolongation of one leading into the city is within it. It will be admitted, if a railroad had been chartered originally from the city of Madison to Shelbyville by the way of Columbus, a subscription to the stock would have come within the very words of the charter; and what difference, in good sense or principle, or with reference to the object and purpose of the clause, is there between that case and the one before us? The object of the subscription in the first was to extend the facilities of railroad communication through the interior between the two towns, the termini of the road. In the second, as a road had already been made to Columbus, and in operation, the intercommunication is accomplished by a subscription to a line from Columbus to Shelby. The difference between the two cases is simply a dispute upon words. The terms of the clause do not limit the subscription to one road or to one company, "road or roads in any chartered company." The argument, therefore, against the power rests exclusively upon the effect to be given to the concluding words, "to said city." We have already considered and given our construction of them. It was strongly argued that, upon this construction, great abuses may be committed by the city corporation in subscriptions of stock to remote companies, in which it would have but little, if any, interest or advantage. In the construction of the grant of powers extreme cases may be suggested against it which it is difficult to answer. But, in the present and kindred cases, something may be trusted to the wisdom and integrity, as well as the interest, of the body appointed to execute the power.

§ 1197. *Bonds importing on their face compliance with law are valid in the hands of innocent holders, whether the requisite two-thirds of the citizens voted for their issue or not.*

Another objection taken is that the proviso requiring a petition of two-thirds of the citizens who were freeholders of the city was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the common council of the city passed September 2, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this court. Our conclusion, upon the whole case, is that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of *bona fide* purchasers for value, we should have felt bound to acquiesce in it.

Judgment reversed, with costs, and cause remanded, etc.

JAMES v. MILWAUKEE.

(16 Wallace, 159-163. 1872.)

ERROR to U. S. Circuit Court, Eastern District of Wisconsin.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This action was brought by the plaintiffs in error to recover the amount of certain overdue interest coupons attached to twelve

bonds issued by the city of Milwaukee to the Milwaukee & Superior Railroad Company, and the amount of like coupons attached to a like bond issued by the city to the Milwaukee & Beloit Railroad Company. The pleadings upon both sides are voluminous, but a short statement of the case will be sufficient for the purposes of this opinion.

The act of the legislature of Wisconsin of the 2d of April, 1853, authorized the city of Milwaukee to lend its credit to certain specified railroad companies upon the terms and conditions prescribed. The act of the 12th of July, 1853, declared that the provisions of the preceding act "are extended, and shall include the Milwaukee & Watertown Railroad Company, *and any other railroad company duly incorporated and organized* for the purpose of constructing railroads leading from the city of Milwaukee into the interior of the state, which, in the opinion of the common council, are entitled to aid from the city." The act of the 31st of March, 1854, extended the original act "to the South Wisconsin Railroad Company, or to any other railroad company duly incorporated and organized for the purpose of constructing railroads" to connect with "any other railroad having its terminus in said city, which, in the opinion of the common council, are entitled to aid from said city." The act of March 18, 1856, limited the amount of bonds to be issued to an aggregate of \$2,000,000. The Milwaukee & Superior Railroad Company was incorporated by an act approved March 4, 1856, and the Milwaukee & Beloit Railroad Company by another act approved on the same day. On the 11th of June, 1856, the common council passed an ordinance authorizing the issue of bonds to the first named company to an amount not exceeding \$100,000, and, on the same day, another ordinance, authorizing the issue of like bonds, not exceeding the same amount, to the latter company. Both ordinances were approved and ratified by a popular vote in the manner prescribed by the statutes. The bonds and coupons in question in this case were thereupon executed and delivered. They purport on their face to be issued in pursuance of the act of "April 2, 1853, and of the several acts amendatory thereto." Upon the trial in the circuit court, the learned judge instructed the jury that the acts referred to had no application to railroad companies not in existence when they took effect, and that "there was no authority for the city to issue these bonds, and they are void, and the plaintiffs cannot recover." The plaintiffs in error excepted.

§ 1198. *Act of Wisconsin of July 12, 1853, held to apply to railroads incorporated and organized after its passage.*

The only question which we have found it necessary to consider is the correctness of this ruling, and that depends upon the construction to be given to the language of the act of July 12, 1853, whereby it is declared that the provisions of the prior act "are extended and shall include" the railroad specially named, "*and any other railroad company duly incorporated and organized*" for the purpose of constructing railroads leading from the city of Milwaukee," etc. The defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion. In this inquiry the intention of the legislature is to be sought for. That, whatever it may be, constitutes the law. If it had been intended to limit the scope of the act to pre-existing corporations, we cannot doubt that the term *heretofore*, or some equivalent phrase, would have been employed in the proper place. This would have made the effect of the act what is contended for by the defendant in error. If the word *hereafter* had been used, that would have produced the opposite re-

sult. In either case the effect of the term employed would have been exclusive. In the former, the act would have applied only to companies already existing, and, in the latter, only to those of later creation. The language is, "any other railroad company duly incorporated and organized." No tense is expressed and no particular time is indicated. There is nothing which limits and points its meaning any more to companies then, than to those thereafter, organized. It is applicable, and in all respects alike applicable, to both, and we think both were intended to be included.

This view of the subject derives support from the plain reason and object not only of this act, but of the entire series of acts upon the subject. They are all *in pari materia*, constitute a common context, and are to be regarded as if embraced in the same statute. Smith's Com., 758. The presence of railroads, and especially of their *termini*, are beneficial to cities by increasing their business and promoting their growth. Such works animate all the sources of local prosperity. In the case before us, doubtless quite as much was anticipated as could, under any circumstances, have been realized. The legislature intended to give the city the full benefit of this policy. Companies organized and those to be organized were alike important. The restrictions and safeguards provided are applicable to both. They are found in the required sanction of the common council, the approval of the voters, the limitation of the maximum of credit to be given to each company selected, and the limitation of the maximum of the aggregate of such credits. No reason can be imagined why one class should be embraced and the other excluded. There is no consideration, affirmative or negative, which does not apply alike to both. No discrimination is made in any of the acts, and both classes are within the language employed. The construction practically given by the parties interested, as evinced by their conduct, is in harmony with the views we have expressed, and is not without weight. *Meyer v. Muscatine*, 1 Wall., 384 (§§ 921-925, *supra*). The common council deliberately passed the ordinances, the electors approved them, the mayor subscribed and issued the bonds, and the companies received them as valid. We do not learn that there was any doubt or dissent as to the question of legal authority until after both companies had become hopelessly bankrupt. Our attention has been called to numerous parallelisms of language in other statutes of Wisconsin, where there is, as in this case, clearly a prospective meaning. Doubtless such analogies might be found in abundance elsewhere. But we deem it unnecessary to pursue the subject further. Judgment reversed, and the cause remanded with directions to proceed in conformity to this opinion.

§ 1199. *Branch road.*—An election was held for the purpose of aiding in the construction of a branch road. On a proposition from the company, and in compliance with a petition of two-thirds of the voters voting at the election, the county court agreed that the stock to be issued should be stock in the branch, and none other. The bonds were issued and the stock in the branch delivered. *Held*, that the bonds were valid. *County of Cass v. Jordan*, * 5 Otto, 373.

§ 1200. Where a county has authority to issue bonds in aid of the construction of a branch road, it is no objection to the validity of bonds so issued to the parent company, that, before application for aid was made to the county and before the bonds were issued, the parent company made a partial assignment of its franchises to another company, which assignment included the branch in question, the work on this branch having been at the time partly constructed. *County of Cass v. Gillett*, * 10 Otto, 585.

§ 1201. *Misnomer.*—The statutes of a state authorized a county to make a donation to a railway provided it should be sanctioned by a popular vote. The petition and notice of the election misnamed the company in aid of which the donation was intended, but there could be no

doubt what company was meant. *Held*, that the donation and bonds issued therefor were not vitiated by such misnomer. *County of Moultrie v. Fairfield*, 15 Otto, 870 (§§ 893-896).

§ 1202. A change in the name of a railroad company to whose stock municipal bonds have been voted will not affect the validity of the bonds issued to the company in its new name, where such bonds recite a compliance with the provisions of the statute authorizing their issue. *Smith v. Fond du Lac*,* 8 Fed. R., 289.

§ 1203. Transfer of franchise.—It does not invalidate county bonds that, after their issue, but before the subscription to the railroad company to which they were issued, that company transferred to another company a part of its route, and all franchises connected therewith; the subscription having been ordered at the time. *County of Henry v. Nicolay*, 5 Otto, 619 (§§ 889-892). See §§ 1190-1193.

VI. CONSOLIDATION OF COMPANIES.

SUMMARY — *Under laws in force at the time of the vote*, §§ 1204-1207.

§ 1204. It is no objection to the validity of municipal bonds issued in pursuance of a sufficient vote, that they were delivered to a company formed by the consolidation of the railroad company intended to be aided with other companies, under authority of laws in force when the vote was taken and certificates of stock in the new company were received, where the consolidated company lawfully succeeded to all the privileges and rights, and completed the object and enterprise of the intended company. *East Lincoln v. Davenport*, §§ 1208, 1209. See § 1221.

§ 1205. The act under which a certain railway company was incorporated provided that the county court of any county through which it might run should have the right to subscribe to its stock and issue the bonds of the county therefor. In pursuance of the laws of the state the company in question was lawfully consolidated with another, and a new company created, with the same liabilities and privileges as if the consolidation had not taken place. The new road running through the county, and answering in all respects the purposes for which the original road was incorporated, it was held that the subscription might be made by the county court to it as well as to the original road, and that bonds issued for that purpose were valid, and that in the issue of such bonds the county court acted as the county itself. (*Harsham v. Bates County*, 2 Otto, 569, distinguished.) *County of Scotland v. Thomas*, §§ 1210-1214.

§ 1206. The people of Putnam county, in pursuance of law, voted a subscription to the stock of a railroad company, to be paid for with county bonds. The financial agents of the county agreed to make the subscription and the company accepted it. The bonds were made payable to the company or bearer, but before they were delivered the company became consolidated with another, in pursuance of a law in force when the subscription was voted, and at the instance of the supervisors of the county. All the requirements of the law having been complied with to the satisfaction of the supervisors, the bonds were delivered and a corresponding amount of stock taken in the new company. A tax was subsequently levied for the payment of interest then due, and the county voted as a stockholder in the corporation. The bonds being in the hands of a *bona fide* holder, it is held that he may recover. *Nugent v. The Supervisors*, §§ 1215-1217.

§ 1207. By the charter of a railway company certain municipalities had the power to subscribe to its stock. A general law provided that any railroad might be lawfully consolidated with certain classes of roads described, and that the new company should have all the powers and privileges of both of the old companies. *Held*, that the right of one of the described municipalities to subscribe to its capital stock passed to a new company formed by the consolidation of the road in question with another, and that bonds issued in payment of subscription to the new road are valid. *Empire v. Darlington*, §§ 1218-1220.

[NOTES.—See §§ 1221-1228.]

TOWN OF EAST LINCOLN v. DAVENPORT.

(4 Otto, 801-806. 1876.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The question is as to the legality of certain bonds issued by the town of East Lincoln, bearing date of the 2d day of April, 1873. The case shows that the plaintiff below was the *bona fide* owner of the coupons

sued upon. Questions of form merely, or irregularity, or fraud or misconduct on the part of the agents of the town, cannot, therefore, be considered. Whether the supervisor of the town signed the bonds during the midnight hours, whether he delivered them at about daylight on the morning of April 2, 1873, and whether he immediately left the town to avoid the service of an injunction, are matters not chargeable to the owner of the bonds. The supervisor was not his agent, but the agent of the town, and if there has been misconduct on his part, the town rather than a stranger must bear the consequences. There must be authority in the town to issue the bonds by the statutes of the state. If this cannot be found, the holder must fail; if it exists, he is entitled to recover.

§ 1208. *When the vote of electors in favor of bonds amounts to a subscription to stock.*

It is denied that a subscription was made by the town to the stock of the Havana, Mason City, Lincoln & Eastern Railway Company, and it is found as a fact by the judge who tried the action that "no subscription was ever made by the town of East Lincoln on the books of" the railway company. The bonds recite that they are issued in pursuance of the authority given at an election by the voters of said town, held on the 31st day of May, 1870, in pursuance of the authority of two several statutes referred to in said bonds. The fifth section of the act of March 27, 1869, amendatory of the act of March 9, 1867 (both statutes are referred to in the bonds), prescribes the manner in which the election shall be held, and the record shows that on the 31st day of May, 1870, an election was held under said act, and that a majority of the legal voters attending and voting at said election voted in favor of a subscription of \$60,000 to the capital stock of the said company. That section provides "that if a majority of the legal voters of such town, . . . voting at such election, shall be in favor of such subscription, then it shall be deemed and held that said town . . . has taken stock in said railroad company according to the proposals made in said petition to said clerk." We are aware of no legal restriction upon the power of the legislature to declare what shall amount to a subscription to stock in an incorporated company, or what shall be the evidence that the party proposing to take the stock has completed the contract on its part. It may require such evidence to be in writing upon the books of the company, under the authority of the officers of the town, or it may authorize it to be done by an order or resolution of the county court, or it may authorize an engagement to take stock to be made by parol, or, as in the case before us, it may provide that the expressed wish of the voting majority of its inhabitants, at a legally convened town meeting, shall amount to a subscription, or shall be deemed and held to be a taking of the stock of the company. *Nugent v. Supervisors*, 19 Wall., 241 (§§ 1215-17, *infra*). We think the statute intended to make a majority vote of the legal voters of the town who voted at such an election an equivalent to and substitute for a subscription upon the books of the company. The subscription thus authorized has been accepted by the successors of the said corporation, and, so far as the record shows, by the original corporation.

§ 1209. *A delivery by a municipal corporation of its bonds to a company formed by consolidation with or transfer from the company in which stock was subscribed is valid.*

In our opinion, the subscription thus made was valid. If valid as a subscription to the original incorporation, has it lost its force and vitality in

consequence of the changes which have taken place in the organizations concerned in this transaction? The corporation known as the Havana, Lincoln & Champaign Railroad Company was organized under the act of March 9, 1867, creating a company to construct a railroad from Ipava, in Fulton county, to Havana, Lincoln, Clinton and Champaign, and from the latter place to some point on the Toledo, Wabash & Western Railway. The corporation was authorized to unite or connect with any other railroad then or thereafter running east and west, and full power was given to lease, purchase and make all such contracts as would secure the object of such connection. The act of March 27, 1869, amended that act by changing the name of the company to Havana, Mason City, Lincoln & Eastern Railway Company. By the acts of February 21, 1861, and February 16, 1865, the Monticello Railroad Company was chartered, with power to build a road from Champaign, by the way of Monticello, to Decatur, all in the state of Illinois. It was authorized to transfer all its stock, property, immunities and franchises to any other corporation whose line intersected its road, and who would complete the same. On the 28th day of June, 1872, this company and the other above mentioned entered into articles of consolidation, merging the two companies into one, which was invested with all the powers, franchises, rights, immunities, property and privileges of either or both of the former companies, and transferring all contracts and obligations, certificates, bonds, etc. The consolidation was made with all the forms and solemnities required by law. The consolidated company assumed the name of one of the companies,—the Havana, Mason City, Lincoln & Eastern Railway Company. On the 20th of July, 1869, still another corporation, chartered to construct a railroad from Danville to Pekin, was consolidated with the Indianapolis, Crawfordsville & Danville Railroad Company, under the name of the Indianapolis, Bloomington & Western Railway Company. In its course to the eastern boundary of the state of Illinois, this road passed through Urbana and Champaign City, two places mentioned in the former charters named. By the seventh section of its charter, this corporation was given power to unite or connect itself with any other railroad company in the state, and to lease or purchase such other roads, and to “become vested with all the rights and franchises of such road so leased or purchased, in the right of way, maintenance and construction thereof.”

On the 28th day of June, 1872, the consolidated company known as the Havana, Mason City, Lincoln & Eastern Railway Company entered into an arrangement with the Indianapolis, Bloomington & Western Railway Company, by which there was transferred to the latter the railroad rights of way of said consolidated company, together with all demands, moneys, subscriptions, things in action, privileges, immunities, credits, rights, choses in action, especially naming the subscriptions, of which the one in question is a part. Certain covenants and agreements on the part of the grantee are set forth, of which the completion of the road from Havana to White Heath within two years was one; and, upon failure so to complete, it was agreed that the road should revert to its former owners. The stockholders of each company were made stockholders in the new, to the same amount as in the old, company. This contract was carried into effect without delay, the roads were consolidated and completed as therein provided for; and assuming that, as the successor and assignee of the Havana & Mason City Company, the Indianapolis, Bloomington & Western Railway Company was entitled to the completion of the contract of subscription made by the election before described, the supervisor of the

town of East Lincoln did, on the 2d of April, 1873, deliver the town bonds for the amount of such subscription, and receive a certificate of stock in the latter company to the same amount. We hold this action to have been warranted both by a fair construction of the statutes and by the decisions of this court. Every substantial result contemplated for the benefit of the towns by the subscription made has been accomplished. A continuous line of railway, crossing the state of Illinois from east to west, beginning at Havana, on the Illinois river, and reaching Danville, on its eastern border, has been completed and is in operation. This part of the road is as nearly in a direct course to the east as it could well have been made; and, commencing at Havana, running easterly, terminates at a point originally contemplated, and then connects with roads leading to the east and to the north and south.

The statutes we have referred to indicate that the legislature supposed that such consolidation and agreements as were here made might be necessary. If the company first organized could not of itself build the road, it might combine with any intersecting or connecting road from which it could hope for aid. The arrangement with the Monticello road promised fairly, and, so far as we can discover, was of service in obtaining the completion of the road. If the first arrangement did not effect the purpose of finishing the road, an arrangement, by way of sale or otherwise, to still another company was authorized. Thus the transfer to the Bloomington, Indianapolis & Western Railway Company was made, and by means of it the great object — the building of a connecting and operating railroad from Havana to the eastern boundary of the state — was attained. All this was provided for in the charter of the original company, to which the town subscription was made, and the subscription was made with the knowledge of the town that new organizations might be made, and that the subscription was liable to be transferred to and its stock to become that of another company. The statutes were no doubt in accordance with the public wish at the time of their passage, the evident principle being to give every facility and aid, by the means suggested, to obtain a line of completed railroad to the eastern boundary of the state. Subsequent events have given more prominence to the question of paying the bonds than it then had. The case falls directly within *Nugent v. Supervisors*, *supra*, which holds that a subscriber is released from his subscription by a subsequent alteration of the organization and purposes of the company only when the alteration is a fundamental one, not contemplated either by the charter of the company or the general statutes of the state. The statute authorizing the alteration of the charter in that case closely resembled the statute we have above quoted in relation to the roads in question. To the same general effect are *County of Callaway v. Foster*, 93 U. S., 567 (§§ 876–878, *supra*), and *County of Scotland v. Thomas*, 4 Otto, 682 (§§ 1210–14, *infra*). The decision in *Harshman v. Bates County*, 92 U. S., 569 (§§ 899, 900, *supra*), does not interfere with this principle. The distinction is clearly shown by Mr. Justice Bradley, who pronounced the opinion in each of the last two cases. The like remarks are applicable to *Marsh v. Fulton*, 10 Wall., 677 (§§ 1186–89, *supra*), and they show that that decision does not affect the questions here discussed.

Judgment affirmed.

COUNTY OF SCOTLAND v. THOMAS.

(4 Otto, 682-694. 1876.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This action was brought by plaintiff below (the defendant in error) to recover the amount of certain interest coupons attached to certain bonds issued by order of the county court of Scotland county, Mo. (the defendant below), on behalf of the county, to pay for a subscription of stock to the Missouri, Iowa & Nebraska Railway Company. The county contests the validity of the bonds on the ground that the question of subscribing to the stock was never submitted to a vote of the qualified voters of the county, as required by the constitution of the state adopted in 1865, the subscription being voted and the bonds being issued in 1870. The plaintiff answers this objection by showing that the power to make the subscription was conferred in 1857, in the charter of a company called the Alexandria & Bloomfield Railroad Company, before the constitution was adopted, and that this company, by consolidation with other companies, formed the Missouri, Iowa & Nebraska Railway Company, and brought to it all its own privileges and powers, and, amongst others, that of receiving county subscriptions to its capital stock. The county replies to this argument that, however valid it may be to sustain subscriptions made to the Alexandria & Bloomfield Railroad Company itself, had that company remained distinct, as originally chartered, it cannot avail to support a subscription to the stock of a new and different company, having a much greater amount of capital stock, and a much longer and different route of railroad, running into another state. The question was raised in the court below by demurrer to the petition, and judgment was given for the plaintiff.

§ 1210. *The Missouri constitution did not take away power previously conferred on counties to subscribe stock in railroads, etc., without a submission to a vote.*

The clause of the constitution on which the defendant relies is the fourteenth section of article 11, and is as follows: "The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations; it does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come. This has been settled by the supreme court of Missouri in several well-considered decisions. See *State v. Sullivan County*, 51 Mo., 522; *State v. Greene County*, 54 id., 540. In the former case the court say: "Power conferred on counties to take and subscribe stock without a submission to a vote of the people, before the constitution went into operation, remained unaffected by that instrument." The same view was taken by this court in the recent case of *County of Callaway v. Foster*, 93 U. S., 567 (§§ 876-878, *supra*). See, also, *State v. Maysville & Lexington R. Co.*, 13 B. Mon., 1. The specific question in the present case therefore is, whether the authority given to counties and towns in 1857 to subscribe to the capital stock of the Alexandria & Bloomfield Railroad Company has become extinguished by the

subsequent consolidation of that company with other companies, irrespective of the constitutional provision referred to. The constitution does not itself, as we have seen, interfere with authority given previous to its adoption.

§ 1211. *Consolidation with another company does not of itself extinguish the power of counties to subscribe, or the privilege of the company to receive subscriptions. (a)*

That simple consolidation with another company does not extinguish the power of the counties to subscribe, or the privilege of the company to receive subscriptions, was decided in the case of *State v. Greene County*, 54 Mo., 540. In that case, the Kansas City, Galveston & Lake Superior Railroad Company was chartered in 1857, with power to construct a branch road from Kansas City to the southern boundary of the state; and power was given to the county courts of any county through which the road or any of its branches might run, to subscribe to the stock of the company, and issue its bonds therefor. The company afterwards changed its name, and, in 1870, consolidated with the Hannibal & St. Joseph Railroad Company; and the latter company continued the work of constructing the branch road referred to, which had been begun by the Kansas City company. The branch was built under a separate organization created by the parent company, called the Kansas City & Memphis Railroad Company, but under the control and with the aid of the parent company. The county court of Greene county, in 1870, subscribed to the capital stock of the Hannibal & St. Joseph Railroad Company, issued to aid in building and equipping the branch road, which ran through the county. The supreme court of Missouri decided that the subscription was valid, and that the power to subscribe, originally given, still subsisted, unaffected by the consolidation. The cases decided by this court of *Philadelphia & Wilmington R. Co. v. Maryland*, 10 How., 376, and *Tomlinson v. Branch*, 15 Wall., 460, were cited and relied on, for the purpose of showing that where a consolidation is effected between two railroad companies, and nothing to the contrary is indicated, the rights and privileges, as well as the duties and liabilities, of each continue to exist as before in the hands of the new organization. It seems to us that this decision in the Greene county case governs the present case. It is true the court laid considerable stress on the fact that the branch road in that case was a distinct interest from that of the main line, and was not liable for its obligations or liabilities, and the holders of the stock in the branch road had the right to control its affairs; and this feature was not changed by the consolidation. This fact, undoubtedly, prevents the case from being an exact precedent for the present one. But the close and intimate relations which in other respects connected the branch with the main line in that case give to the decision a good deal of importance. The principles adopted were substantially the same as those involved in the present case. The facts are not very fully stated in the report; but it would appear from the statement of the dissenting judge, p. 557, that the stock subscribed for in that case was the stock of the Hannibal & St. Joseph Railroad Company. As such, though it may have been special stock applicable to the branch road, it made the holder a member of the parent company, entitled to vote for its directors, and no doubt in other ways connected with its fortunes. In that case, as in this, the power to consolidate was given after the original charter was granted, and after the constitution went into effect. But that was not regarded as affecting the power. By general laws of the state, in force when the original charter was granted, the legislature had reserved the

(a) Affirming the ruling in *Thomas v. Scotland County*, * 3 Dill., 7.

power to alter, suspend and repeal all charters of incorporation, and had specially reserved this power in the general railroad act. See Rev. Stat. of Mo., 1855, pp. 371, 438. It would seem clear, therefore, that alterations of the charter were admissible, and would not affect rights of the company untouched thereby, nor a power to subscribe to its stock previously existing. See *County of Callaway v. Foster*, 93 U. S., 567.

The power to amend thus existing, the amending acts in this case do not subvert the original purposes of the charter, but rather carry them out and perfect them. The railroad authorized by it was "a railroad from the city of Alexandria, in the county of Clark, in the direction of Bloomfield, in the state of Iowa, to such point on the northern boundary line of the state of Missouri as shall be agreed upon by said company, and a company authorized on the part of the state of Iowa to construct a railroad to intersect the road authorized to be constructed by the provisions of this act, at the most practicable point on said state line." Bloomfield was a small town in Iowa, evidently not intended as the final objective point of the proposed line, which is only required to be "in the direction of Bloomfield." A connection with a continuous road in Iowa was the declared object of the road proposed. It was evidently the purpose to bring Alexandria, a port of Missouri on the Mississippi river, in connection with the rich region of southern and western Iowa, by means of the road then being chartered, and a road to connect therewith, running into the state of Iowa. This purpose will be most effectually attained by the construction of the continuous line contemplated by the consolidated companies. The general direction of the road is not changed. It does not pass through Bloomfield, it is true; but it does not pass it by so far as to be a substantial departure from the route originally indicated. The amending act, therefore, which authorized a consolidation with the Iowa Southern Railway Company, and thereby constituted the Missouri, Iowa & Nebraska Railway Company, was in perfect accord with the general purpose of the original charter of the Alexandria & Bloomfield Railroad Company; and, if the other rights and privileges of the latter company passed over to the consolidated company, we do not see why the privilege in question should not do so, nor why the power given to the county to subscribe to the stock should not continue in force.

§ 1212. *Harshman v. Bates County*, 92 U. S., 569, distinguished.

The decision of this court in the case of *Harshman v. Bates County*, 92 U. S., 569 (§§ 899, 900, *supra*), is urged against this view of the case; but we do not think it applicable. In that case, the question was, whether authority given to the county court by the electors of a township to subscribe in its behalf for stock in a certain railroad company, continued to exist after the company had ceased to exist, by being absorbed in another company by consolidation? We held that it did not. The county court was regarded as being the mere agent of the township, having no discretion to act beyond the precise terms of the power given. The powers of an agent or attorney, authorized to act for another, are very different from those possessed by a person acting in his own behalf. Had the charter of the Alexandria & Bloomfield Railroad Company authorized foreign corporations to subscribe to its stock (supposing that by the general law of Missouri they had no such power), they would undoubtedly have retained that power after the consolidation; it being in their discretion to exercise it or not. But if any such foreign corporation had, before the consolidation, sent an order to a firm in St. Louis to subscribe stock for it in the original company, the firm could not have made the subscription after the consolidation, without con-

sulting their principals. Such a material change of circumstances would have rendered the subscription an excess of the power given to them. Authority given to a person to be exercised for his own benefit and at his own discretion, may be exercised by him under changes of circumstances that would amount to a revocation of a power given to an attorney, unless it expressly conferred discretion. A recurrence to the opinion in the Harshman case will show that this distinction underlies the reasons given for the judgment in that case. The county court of Scotland county, in the present case, acted as the representative authority of the county itself, officially invested with all the discretion necessary to be exercised under the change of circumstances brought about by the consolidation in question. For, as before remarked, the county courts, in reference to the subscription in question, represented the counties themselves, as their officially constituted authorities. This is distinctly stated by the supreme court of Missouri in the case of Hannibal & St. Jo. R. Co. v. Marion County, 36 Mo., 303. The power given to the county courts intersected by the Alexandria & Bloomfield Railroad, to subscribe to its stock, was given to them as representing the counties. When they subscribed for the stock, it was the county that subscribed. It was discretionary with them whether to subscribe or not, and (within the limits imposed by the act) how much they should subscribe.

§ 1218. *The intent considered.*

But the case has other aspects, which it is necessary to take into consideration. If we look at the subject in a broad and general view, it will be still more manifest that the power in question was intended to exist, notwithstanding the consolidation. The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. Its construction, however, would greatly depend upon the local aid and encouragement it might receive. The interests of its projectors and of the country it was to traverse were regarded as mutual. The power of the adjacent counties and towns to subscribe to its stock, as a means of securing its construction, was desired not only by the company, but by the inhabitants. Whether the policy was a wise one or not, is not now the question. It was in accordance with the public sentiment of that period. The power was sought at the hands of the legislature, and was given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls. Why it should not still attach to this portion of the road, as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see. The principles laid down in the case of The Philadelphia, Wilmington & Baltimore R. Co. v. Maryland, 10 How., 376, and Tomlinson v. Branch, 15 Wall., 460, and recently reaffirmed in Branch v. City of Charleston, 92 U. S., 677, seem to us directly applicable. Subscription to the stock was not only a power of the county, but a privilege of the company,—being a portion of the rights and privileges which it obtained by translation from the charter of the North Missouri Railroad Company. It was expressly so held by the supreme court of Missouri in the case of Smith v. County of Clark, 54 Mo., 58; and the same principle had been adopted in the earlier case of Hannibal & St. Jo. R. Co. v. Marion County, 36 id., 294, 304. The latter company was, by its charter, “entitled to all the privileges, rights and immunities which were granted to the Louisiana & Columbia Railroad Company, so far as appli-

cable," etc. The right to receive county subscriptions was held to be one of these privileges, rights and immunities. The court said: "It was under this section that the [county] court proceeded when the stock was first taken and the notes issued. The legislature gives the company all the rights, privileges and immunities contained therein, the same as if it had been re-enacted. The language seems broad enough, by reasonable construction, to fully sustain the acts of the county court." 36 id., 304.

In *Smith v. County of Clark*, the same views were held with regard to the charter now in question. The court say: "The power thus conceded to the courts or other municipal bodies may well be termed a privilege to the corporations, and we see no substantial objection to a transfer of such a privilege by simply, in general terms, embodying the section of the original act which granted it into the new law. That such was the intention of the legislature and of the railroad company is clear; and, if the word 'privilege' admits of the narrow construction claimed, the practical construction it has received in this state, as may be seen by reference to the decisions of our courts, would preclude any inquiry into the subject now. These provisions were the principal means by which this and other roads were built, and without them the charters would have been of no value." 54 id., 67. The power of the counties to subscribe being thus held to be a right and privilege of the company, in our opinion, passed with its other rights and privileges into the new conditions of existence which the company assumed under the consolidation.

§ 1214. *It can make no difference that the company with which the consolidation was effected belonged to another state.*

The argument sought to be drawn from the distinction that the company with which the consolidation was effected belonged to another state, we fail to appreciate. If the legislature of Missouri authorized it, what difference can it make whether the connecting company belongs to Missouri or to Iowa? There is no difference in principle. The Philadelphia, Wilmington & Baltimore Railroad Company, in its consolidated form, combined the roads and charters of three different states; and yet it was held to be invested with the rights and privileges of each, as applicable to the several parts of the line. See, also, to the same purport, the case of *Hanna v. Cincinnati, Fort Wayne & Chicago R. Co.*, 20 Ind., 39.

Other points were raised on the argument, which it is unnecessary to discuss, as this was the principal one relied on, and presented the only serious difficulty in the case.

Judgment affirmed.

MILLER, J., dissented. FIELD, J., did not sit.

NUGENT v. THE SUPERVISORS.

(19 Wallace, 241-253. 1873.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

The facts are stated in the opinion.

Opinion by MR. JUSTICE STRONG.

We think the circuit court erred in sustaining the demurrer to the plaintiff's replication. The bonds to which the coupons in suit were attached purport to have been made and issued by the order of the board of supervisors of Putnam county in payment of the county's subscription to the capital stock of the Kankakee & Illinois River Railroad Company. They are made payable to that

company or bearer, and the plaintiff is a *bona fide* holder of the coupons, having paid value for them without notice of any defense. If, then, the bonds are valid obligations, if they were rightfully issued, the right of the plaintiff to a judgment against the county is plain.

§ 1215. *County bonds are valid in the hands of a bona fide holder, where the county has received railroad stock agreed to be given therefor, exercised the rights of a stockholder and levied taxes to pay interest on the bonds.*

That by what it did in the matter the county became in effect a subscriber to the capital stock of the railroad company, and liable for the sums designated, admits of no serious question. The fact that no subscription was formally made upon the books of the company is quite immaterial. In *Justices of Clarke County v. Paris, Winchester & Kentucky River Turnpike Co.*, 11 B., Mon., 143, it was ruled that an order of the county court by which it was said that it subscribed for a specified number of shares of road stock was binding, the court having authority to make a subscription. In this case there was more. There was not only the resolution declaring the subscription made, but there was an acceptance by the railroad company and notice of the acceptance. The minds of the parties came together. Both understood that a contract was made, and had nothing subsequently occurred to change their relations the county could have enforced the delivery of the stock and the company could have compelled the delivery to itself of the bonds on performance of the conditions stipulated. So the parties regarded their relations to each other. The bonds were delivered. The committee appointed by the board of supervisors to protect the interests of the county, under whose direction the bonds were ordered to be issued, were satisfied that all the prescribed conditions precedent to their delivery had been complied with, and they so decided. The county accepted the position of a stockholder, received certificates for the stock subscribed, voted as a stockholder, and proceeded to levy a tax to pay the interest falling due on the bonds. Were this all of the case, the validity of the bonds and of their accompanying coupons in the hands of a *bona fide* holder for value would be beyond doubt. The circuit court, however, was of opinion, and so decided, that the bonds are invalid, because before their delivery the Kankakee & Illinois River Railroad Company had become consolidated with the Plymouth, Kankakee & Pacific Railroad Company, another corporation. This consolidation was authorized by the general laws of the two states, and by a section in the special charter of the latter company. No claim is made that it was not legally effected. The result necessarily was that the consolidated company succeeded to all the rights, property and privileges which belonged to each of the two companies out of which it was formed before their consolidation. It was not until after this had taken place that the county bonds were handed over and sold, and it was certificates of the stock of the consolidated company which the county received.

§ 1216. *Effect of consolidation of railroads upon subscriptions to their stock.*

What, then, was the legal effect of the consolidation? Did it release the county from its prior assumption to take stock in the Kankakee & Illinois River Railroad Company and give its bonds in payment? Or, did it render unauthorized the subsequent delivery of the bonds and make them invalid even in the hands of a *bona fide* purchaser? These are the only questions presented by the record that need discussion. It must be conceded, as a general rule, that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of the charter. The reason of the rule is

evident. A subscription is always presumed to have been made in view of the main design of the corporation and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to any project not contemplated by it. But while this is true as a general rule it has no applicability to a case like the present. The consolidation of the Kankakee & Illinois River Railroad Company with another company was no departure from its original design. The general statute of the state, approved February 28, 1854, authorized all railroad companies then organized, or thereafter to be organized, to consolidate their property and stock with each other, and with companies out of the state, whenever their lines connect with the lines of such companies out of the state. The act further declared that the consolidated company should have all the powers, franchises and immunities which the consolidating companies respectively had before their consolidation. Nor is this all. The special charter of the Kankakee & Illinois River Railroad Company contained, in its eleventh section, an express grant to the company of authority to unite or consolidate its railroad with any other railroad or railroads then constructed or that might thereafter be constructed within the state or any other state, which might cross or intersect the same, or be built along the line thereof, upon such terms as might be mutually agreed upon between said company and any other company. It was therefore contemplated by the legislature, as it must have been by all the subscribers to the stock of the company, that precisely what has occurred might occur. Subscribers must be presumed to have known the law of the state and to have contracted in view of it. When the voters of the county of Putnam sanctioned a county subscription by their vote, and when the board of supervisors, in pursuance of that sanction, resolved to make the subscription, they were informed by the law of the state that a consolidation with another company might be made, that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge and in view of such contingencies they made the contract. The consolidation, therefore, wrought no change in the organization or design of the company to which they subscribed other than they contemplated at the time as possible and legitimate. It cannot be said that any motive for their subscription has been taken away, or that the consideration for it has failed. Hence the reason of the general rule we have conceded does not exist in this case, and consequently the rule is inapplicable.

In a multitude of cases decided in England and in this country, it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay for it by any alteration of the organization or purposes of the company which, at the time the subscription was made, were authorized either by the general law or by the special charter, and a clear distinction is recognized between the effect of such alterations and the effect of those made under legislation subsequent to the contract of subscription. In *Cork & Youghal R'y Co. v. Paterson*, 37 Eng. L. & Eq., 398, which was an action to recover a call of one pound per share on one hundred shares sub-

scribed, it appeared that the defendant was one of the subscribers to the agreement for the Cork, Middleton & Youghal Railroad Company. That agreement authorized the provisional directors to extend the purposes of the organization, to change the termini of the road, and to amalgamate with other companies. The subscriber's agreement for the Cork & Waterford Railroad Company contained similar provisions. After the defendant's subscription was made the two companies executed a deed of amalgamation, without any other assent of the defendant than his signature to the subscriber's agreement for the first-named company. Upon this state of facts all the judges held that he remained liable on his subscription. Its effect was said, by Chief Justice Jervis, to be an authority to the company to tack his subscription to anything else they might see fit, and thus make him a subscriber to that, and therefore, added the judge, by signing the Cork and Youghal he afforded an authority to the directors to apply his signature to the Cork and Waterford, and so make him a subscriber to that. To the same effect are the cases of *Nixon v. Brownlow* and *Nixon v. Green*, 3 Hurlst. & N., 686. The American authorities are equally explicit. They uniformly assert that the subscriber for stock is released from his subscription by a subsequent alteration of the organization or purposes of the company, only when such alteration is both fundamental *and not provided for or contemplated by either the charter itself or the general laws of the state*. In *Sparrow v. Evansville & C. R. Co.*, 7 Port. (Indiana), 369, where it appeared that after a public act had taken effect authorizing the consolidation of the charters of two railroad companies, the defendant had subscribed for shares in one of them, and a consolidation was afterwards made, he was held liable to the consolidated company for his subscription, and this though the consolidation took place without his knowledge or consent. The same doctrine was asserted in *Bish v. Johnson*, 21 Ind., 299 (see, also, *Hanna v. Cincinnati, etc., R. Co.*, 20 id., 30). The supreme court of Connecticut recognized the rule in *Bishop v. Brainerd*, 28 Conn., 289 (see, also, *Schenectady & Saratoga Plank-road Co. v. Thatcher*, 1 Kern., 102; *Buffalo & New York City R. Co. v. Dudley*, 4 id., 336; *Meadow Dam v. Gray*, 30 Me., 547; *Agricultural Branch R. Co. v. Winchester*, 13 Allen, 32; *Noyes v. Spaulding*, 27 Vt., 420; *Pacific R. Co. v. Renshaw*, 18 Mo., 210; *Fry v. Lexington, etc., R. Co.*, 2 Metc., 314; *Illinois River R. Co. v. Beers*, 27 Ill., 189; *Terre Haute & Alton R. Co. v. Earp*, 21 id., 292), and a subscriber to one company was held to be a debtor to the consolidated company in a case where there was no general authority to consolidate, but the charter of the company was subject to amendment by the legislature, and where the legislature, after the subscription, confirmed the consolidation.

Many other citations are at hand, but these are sufficient. No well-considered cases are in conflict with them. *Marsh v. Fulton County* (§§ 1186-89, *supra*) is altogether a different case. In that it appeared that the people of the county voted in November, 1853, in favor of a subscription for stock in the Mississippi & Wabash Railroad Company, and in April, 1854, the board of supervisors of the county ordered their clerk to make the subscription. It was not, however, then made. Subsequently, in 1857, the legislature made fundamental changes in the organization of the company, dividing it substantially into three companies, with a distinct governing body for each, and with three classes of stockholders. It was after this that the county subscription was made; and made not for the stock of the Mississippi & Wabash Railroad Company, but for the stock of one of the divisions. Necessarily, therefore, we held that there was no authority to make the subscription which was made, that it

had not been approved by a popular vote, and hence that the bonds issued in payment for it were invalid. The county had entered into no contract until after the radical changes had been made in the organization of the company. It never assented to such a change, and when the proposed subscription was approved by the popular vote, there was no reason to expect the change afterwards made. There was at that time nothing in the general law of the state, and nothing in the charter, which authorized the company to change its organization, or which looked to its division into several distinct corporations. It needs nothing more to show how unlike that case was to the present.

§ 1217. *A railroad company formed by the consolidation of two companies, to one of which a county was bound to issue its bonds, was held entitled to the bonds. (a)*

In the case in hand the county had, under lawful authority, undertaken to subscribe for stock before the consolidation was made and the undertaking had been accepted. A liability had been incurred, and the business agents of the county, to whom exclusively the law intrusted the management of its affairs, consented to and promoted the consolidation. And the subscription was made in full view of the law that allowed an amalgamation with another company. The contract was made with reference to that law. Nothing has taken place which the county was not bound to anticipate as likely to happen, and to which the people in voting for the subscription, and the board of supervisors in directing it, must not be considered as having consented. What was ruled in *Marsh v. Fulton County*, therefore, does not touch this case. Nor was there anything decided in *Clearwater v. Meredith* which sustains in any degree the defense set up on behalf of the defendants.

We have, then, in brief, this case: The people of Putnam county, in pursuance of law, voted a county subscription for stock in a railroad company, to be paid for with county bonds. The financial agents of the county agreed to make the subscription, and the company accepted it. The bonds were made payable to the company or bearer, but before they were delivered the company became consolidated with another in pursuance of authority conferred by the law in force when the subscription was voted, and at the instance of the board of supervisors of the county. All the conditions precedent to the delivery of the bonds were complied with to the satisfaction of the county agents, certificates for the stock were received, and the bonds were delivered and sold. The plaintiff is a *bona fide* holder of some of the coupons for value paid. It would, we think, be a reproach to the administration of justice if he cannot enforce the payment of those coupons, and we see no principle of law or equity that stands in the way of his action. He found the bonds and the coupons upon the market, payable to the Kankakee & Illinois River Railroad Company or bearer. Proposing to buy, he had only to inquire whether the county was, by law, authorized to issue them, and whether their issue had been approved by a popular vote. He was not bound to inquire farther, and had he inquired he would have found full authority for the issue, and if he had also known of the consolidation it would not have affected him. Judgment reversed, and the cause remitted with instructions to overrule the defendant's demurrer.

JUSTICES DAVIS and MILLER dissent.

(a) Reversing the ruling in *Nugent v. Putnam County*,* 3 Bias., 105.

EMPIRE v. DARLINGTON.

(11 Otto, 87-93. 1879.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—Empire township, in Illinois, by virtue of an act of the legislature and a popular election in 1867, subscribed \$50,000 in bonds to a railroad. In 1869 the railroad was consolidated with another railroad, and in the same year, by authority of another act of the legislature and another popular election, the township subscribed for \$25,000 more stock. Bonds were duly issued on this last subscription, and Darlington, being the holder of some of them, brought this suit upon them. There was judgment in his favor.

Opinion by MR. JUSTICE HARLAN.

The present action involves the validity of the bonds and the coupons thereto attached of the \$25,000 issue, some of which are held by the defendant in error. Their validity is assailed upon several grounds, each of which will be briefly examined.

§ 1218. *Where authority is given by the charter of a railroad company, for townships, etc., to subscribe for its stock to a limited amount, successive subscriptions by a township within that limit are valid.*

It is contended that the election held on the 3d of June, 1867, under the charter of the Danville, Urbana, Bloomington & Pekin Railroad Company, whereby the subscription of \$50,000 was made and bonds issued in payment thereof, exhausted the power of the township under that charter, and that any additional subscription was without authority of law. This position is clearly untenable. The twelfth section of the charter of the railroad company furnishes a conclusive answer to this proposition. That section declares that "to further aid in the construction of said road by said company, any incorporated town or townships in counties acting under the township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum, not exceeding \$250,000." That the plaintiff in error belongs to the class of townships described in that section is not disputed. Its right, consequently, to make subscriptions, from time to time, until they reached the prescribed limit, seems to be too clear to require argument in its support. The charter contains no word, clause or section indicating that the authority of the township to make subscriptions ceased after the first subscription. The legislature fixed a limit beyond which the township could not go in its subscriptions to the company in question, but left it free—the people consenting by popular vote—to make subscriptions in such sums and at such times as it deemed necessary or proper, within the aggregate amount named in the section which has been quoted. *People v. Town of Waynesville*, 88 Ill., 469.

§ 1219. *Where a railroad company is consolidated with another company the right of counties, etc., to subscribe to the stock of either passes in favor of the consolidated company.*

The next proposition urged upon our attention is that by the consolidation to which we have referred a new corporation was created by the name of the Indianapolis, Bloomington & Western Railway Company, and the original companies dissolved; that there was no power vested in the electors, the corporate authority of the township of Empire, under the charter of the Danville, Urbana, Bloomington & Pekin Railroad Company, to hold an election, to subscribe stock and issue bonds to that new company. This proposition is equally untenable with the first. By a general statute of Illinois, passed February 28,

1854, and in force as well at the date of the charter of the Danville, Urbana, Bloomington & Pekin Railroad Company as when it was consolidated with the Indianapolis, Crawfordsville & Danville Railroad Company, express authority was conferred upon all railroad companies then organized, or thereafter to be organized, which then had or might thereafter have their termini fixed by law, whenever their road or roads intersected by continuous lines, to "consolidate their property and stock with each other, and to consolidate with companies out of this [that] state, whenever their lines connect with the lines of such companies out of this [that] state." That statute further provided that the consolidated company, by the name agreed upon, should be a body corporate and politic, and "shall have all the powers, franchises and immunities which the said respective companies shall have by virtue of their respective charters, before such consolidation passed, within the state of Illinois." Ill. Rev. Stat., Gross (3d ed.), pp. 537; 538.

It thus appears that whatever powers, franchises and immunities were enjoyed by the Danville, Urbana, Bloomington & Pekin Railroad Company under its charter passed, upon the consolidation, to the consolidated company. The power of the township of Empire to make, as we have held it could, an additional subscription, beyond the original \$50,000, was, in its essence, a right and privilege of the railroad company which, under the general law of the state, passed to the consolidated company. *County of Scotland v. Thomas*, 94 U. S., 682 (§§ 1210-14, *supra*); *County of Henry v. Nicolay*, 95 id., 619 (§§ 889-892, *supra*). It was evidently so understood by the parties concerned; for while the bonds very properly refer to the act of February 28, 1867 (which is the charter of the Danville, Urbana, Bloomington & Pekin Railroad Company), as the statute which specifically authorized their issue, the petition of citizens asking an election, and the notice of the election of October 12, 1869, distinctly show that the additional subscription of \$25,000 to be voted on was for additional stock in aid of the construction and completion, not of the Danville, Urbana, Bloomington & Pekin Railroad, but "of the Indianapolis, Bloomington & Western Railroad." If the popular vote had been, in terms, in favor of a subscription to the capital stock of the Danville, Urbana, Bloomington & Pekin Railroad Company, and the subscription had been made in that form, there would be some reason to contend that the subscription would have been a nullity, since no such company then had a distinct separate existence. But when, as here, the vote was taken, and the subscription made, with direct reference to the construction and completion of the original line by the consolidated company, which had previously succeeded to all the powers, franchises and immunities of the Danville, Urbana, Bloomington & Pekin Railroad Company, there would seem to be no ground whatever to question the validity of the bonds issued and delivered to the company in payment of the subscription.

§ 1220. *A bondholder with only constructive notice is not bound by the judgment of a local court that such bonds are invalid.*

It is scarcely necessary to say that the decree in the circuit court of McLean county, Illinois, rendered in 1878, perpetually enjoining the assessment and collection of taxes for the purpose of paying the bonds and coupons in question, and declaring said bonds and coupons to be void, did not conclude the rights of the defendant in error. The bondholders were proceeded against by constructive service, as "unknown owners and holders." The defendant in error was not served with process, nor did he appear. If the decree was binding upon the citizens and courts of Illinois, as to which we express no opinion, it

was ineffectual as to bondholders residing in other states, who were proceeded against only by constructive service. *Brooklyn v. Insurance Co.*, 99 U. S., 362 (§§ 1402-1404, *infra*).

Judgment affirmed.

§ 1221. Under authority of law.—Municipal bonds are not invalid because delivered to a railroad company formed by the consolidation of the company to which they were voted with another company, under a law in force when the bonds are issued. *Chickaming v. Carpenter*,* 16 Otto, 663; *New Buffalo v. Iron Co.*,* 15 Otto, 73; *Lewis v. Clarendon*,* 5 Dill., 829.

§ 1222. Municipal bonds issued to a railroad company are not invalidated by the fact that, after the vote and before the issue, the name of the railroad company was changed by the legislature, and it had consolidated with it several other companies, under authority in its charter to consolidate with any other company. *Menasha v. Hazard*, 12 Otto, 81 (§§ 1027-1029).

§ 1223. Township bonds issued to a railroad company formed by the consolidation of the company to which they were donated with another, under authority of laws in force when the vote was taken, are not for that reason invalid when the donation is not applied by the new company to purposes essentially different from those intended by the voters, and the officers of the township assent to the receipt by the new company of the bonds, and holders of the bonds are holders in good faith. *Harter v. Kernochan*, 13 Otto, 563 (§§ 1421-1430).

§ 1224. In an action thereon by a *bona fide* holder of interest coupons, it is no defense that, after all necessary proceedings were had by the county to subscribe to the stock of a certain company and issue the bonds in payment therefor, the subscription was made, without any further proceedings, to the stock of a new company formed by the consolidation of the company intended to be subscribed to and another company, under authority of a law existing at the time the proceedings were had. (The subscription in this case was made by the legal representatives of the township, and its mere agents, as in the case of *Harshman v. Bates County*.) *Wilson v. Salamanca*,* 9 Otto, 499.

§ 1225. A county, under general authority to vote stock in railroad companies and issue bonds therefor, votes its subscription to the stock of a company, but before the bonds are issued this company consolidates with another, forming a new company, and the bonds are issued to the new company. The bonds are issued, negotiable in form, by the proper officers, and reciting that the consolidation was made according to law. *Held*, that *bona fide* holders of these bonds are entitled to recover thereon without regard to the validity of the consolidation. *Washburn v. Cass County*,* 3 Dill., 251.

§ 1226. Where a trustee, in violation of his trust, purchased with the trust funds stock in a railroad, which, pursuant to an act of the legislature, consolidated with another company, and the beneficiary, with knowledge of the facts, suffered the trustee to retain the stock, and afterwards became instrumental in the issue and sale of bonds by the consolidated company, *held*, that his equity against the property of the consolidated company was inferior to that of a holder of the bonds. *North Carolina R. Co. v. Drew*, 3 Woods, 691.

§ 1227. Ratification.—A town was authorized to issue bonds and take stock in a certain railroad company. At the time of subscribing the company had no authority to consolidate with any other company, but after the subscription and before the bonds were issued it consolidated with a new company, and the bonds were issued to the new company. After the consolidation, by a special act of the legislature, the general statutes as to consolidated companies were extended to the new companies, and afterwards, by another special act, the issuing of the bonds was ratified. In a suit on the coupons it was held that the bonds were valid and the town liable. *Gray v. Town of York*,* 15 Blatch., 335.

§ 1228. Subscription held void.—The "Township Aid Act" of Missouri provided that, if two-thirds of the voters at an election should vote to do so, the county court of the county should issue bonds in behalf of the township to the amount of the subscription. Under that law a township voted to issue bonds in a certain amount in aid of a certain railway. Between the time of the vote and the issue of the bonds by the county court, the railroad in question was consolidated and a new company formed, which, by the terms of the consolidation, became entitled to all the powers, rights and privileges of the original company. The bonds were issued by the county court to the new company by name. *Held*, that the act of the county court in issuing the bonds to the new company was void without a new vote of the township to aid that company, and that the authority of the county court to issue the bonds ceased on the extinction of the company in aid of which the town voted to issue them. *Harshman v. Bates County*, 2 Otto, 569 (§§ 899, 900); *S. C.*,* 3 Dill., 150.

VII. LIMITING INDEBTEDNESS.

SUMMARY—*Rights of bona fide holders; effect of recitals, § 1229.—Prohibited by charter; power of legislature, § 1230.—Restriction on villages in taxation, borrowing money, etc., § 1231.*

§ 1229. There is a provision in the constitution of the state of Illinois that no municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in an aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. The city of Litchfield, under authority of an act of the legislature, issued bonds to construct water-works, which raised its indebtedness beyond the constitutional limit. It is held that these bonds are void, as legislation could not confer on the city authority to contract indebtedness which the constitution prohibited it from incurring. It is held, also, that the last official assessment for state and county taxes previous to the issuing of the bonds is admissible as against a *bona fide* holder of the bonds, although this assessment embraced all the county of which the city formed a part, but from which could easily be ascertained the location and taxable value of all property within the limits of the city, there being no assessment for the city alone. It is further held, since there are no recitals in the bonds that the debts of the city were such as would allow the issue of the bonds, and none to that effect in the statute and ordinance referred to in the bonds, that no estoppel is created in favor of *bona fide* holders, from the acts of the city officers in issuing the bonds, that the debts of the city allow such issue. *Buchanan v. Litchfield*, §§ 1232-1236.

§ 1230. Though a city charter prohibits it to increase its indebtedness beyond a certain sum, yet an issue of bonds to an amount beyond that sum, authorized by the legislature, is valid. The limitation being in terms applicable only to the city, the legislature had full power to authorize the creation of indebtedness beyond the amount named. *Amey v. Mayor, etc., of Allegheny City*, §§ 1237-1239.

§ 1231. The provision in the act of 1867, of Wisconsin, providing that villages may issue bonds to a certain company named, "for such sum or sums, and at such rate of interest, and in such manner, as may be agreed upon by and between the directors of said railway company and the proper officers of such incorporated village," is so far sufficient to satisfy the provision in the state constitution requiring the legislature to restrict incorporated villages in their "power of taxation, assessment, borrowing money, contracting debts and loaning their credit," as to make it a valid law, since the constitution does not specify any particular mode in which the restriction is to be made. *Long v. New London*, §§ 1240-1242.

[NOTES.—See §§ 1243-1245.]

BUCHANAN v. LITCHFIELD.

(12 Otto, 278-293. 1890.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—The city of Litchfield issued bonds to pay for water-works, and, having failed to pay the interest coupons, suit was brought by Buchanan, claiming to be a *bona fide* holder of bonds for value. The city resisted on the ground that the bonds were void, having been issued in violation of the constitution of Illinois. That instrument prohibited municipal corporations from incurring debts in excess of a certain per cent. of the value of the taxable property within their limits. An act of 1873 authorized cities, etc., to erect and maintain a system of water-works, and to levy and collect taxes for such purposes. There was judgment for the defendant. Further facts appear in the opinion.

§ 1232. *Construction of the constitution of Illinois, article 9, section 12.*

Opinion by MR. JUSTICE HARLAN.

The first and most important of the certified questions involves the construction of the twelfth section of the ninth article of the constitution of Illinois. The words employed are too explicit to leave any doubt as to the object of the

constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. The authority, therefore, conferred by the act of April 15, 1873, to incur indebtedness in the construction and maintenance of a system of water-works, could have been lawfully exercised by a city, incorporated town, or village, only when its liabilities, increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur. *Law v. People*, 87 Ill., 385; *Fuller v. City of Chicago*, 89 id., 282. It was proved that the debt of the city of Litchfield on and before the 1st of January, 1874, exclusive of the water bonds, was \$70,000. If, therefore, it appears, by evidence, of which the city may rightfully avail itself, as against a *bona fide* holder for value of the coupons in suit, that the bonds, issued January 1, 1874, created an indebtedness in excess of the amount to which municipal indebtedness is restricted by the constitution, there would seem to be no escape from the conclusion that the bonds are void for the want of legal authority to issue them at the time they were issued. To the evidence upon which the city relied as showing such want of authority, objections were interposed by the plaintiff, who insisted that it was not admissible against him, as a *bona fide* holder of the coupons in suit. That evidence was made the basis of important findings of fact. Introduced for the purpose of showing the value of taxable property within the limits of the city, and the extent of her indebtedness, when these water bonds were issued, it is not, in our opinion, liable to any serious objection. It seemed to be the best proof upon those subjects that the law furnished.

§ 1233. *Of what a purchaser of municipal bonds is bound to take notice.*

In determining whether the constitutional limit of indebtedness has been exceeded by a municipal corporation, an inquiry would always be necessary as to the amount of taxable property within its boundaries. Such inquiry would be solved, not by information derived from individual officers of the municipality, but only in the mode prescribed in the constitution; that is, by reference to the last assessment for state and county taxes for the year preceding the issuing of the bonds. That test was applied in this case. Had there been, under or by competent legal authority, an assessment for that year of taxable property within the city separately from all other property in the county or township to which the city belonged, such assessment would undoubtedly have been controlling. But there was no such official assessment in fact or required by law. There were, however, official assessments for state and county taxes for 1873, embracing all taxable property within the county and townships of which the city formed a part, and from which, in connection with a map of the city, could be readily ascertained the location and taxable value of all property within the corporate limits of the city for that year. The purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873.

§ 1234. *Mode in which the indebtedness of a city can be ascertained.*

But in what way was the purchaser to ascertain the extent of the city's indebtedness existing at the time the bonds in question were issued? The extent of that

indebtedness was a fact peculiarly within the knowledge of the constituted authorities of the city. It was necessarily left, both by the constitution and the statute of 1873, to their examination and determination, under the constitutional injunction, however, that no municipal corporation should exceed the prescribed amount of indebtedness. It was, nevertheless, a fact which, so far as we are advised by the record, could not at all times and absolutely, or with reasonable certainty, be ascertained from any official documents to which the public had access. A like difficulty, perhaps, would arise in the case of any municipal corporation possessing the general power of raising money, by taxation and otherwise, to carry on local government. Its liabilities might frequently vary in their aggregate amount, and at particular periods might be of different kinds, some fixed and absolute, while others would be contingent upon events thereafter to happen. These considerations were, doubtless, present in the minds as well of those who framed the constitution as of those who passed the statute of 1873.

§ 1235. *Under what circumstances a city is bound in the way of estoppel by the recitals in its bonds.*

As, therefore, neither the constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their "existing indebtedness," it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the constitution were met — that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit — then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds. The case might then, perhaps, have been brought within the rule announced by this court in *Town of Coloma v. Eaves*, 92 U. S., 484 (§§ 1419–20, *infra*), in which case we said, and now repeat, that "where legislative authority has been given to a municipality or to its officers to subscribe for the stock of a railroad company and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, *their recital that it has been*, made on the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal." So, in the more recent case of *Orleans v. Pratt*, 99 id., 676 (§§ 1363–66, *infra*), it was said that "where the bonds on their face *recite the circumstances which bring them within the power*, the corporation is estopped to deny the truth of the recital." The cases cited by counsel for the plaintiff do not assert any different doctrines, as will be seen from an examination of those chiefly relied upon. In *Commissioners of Knox County v. Aspinwall*, 21 How., 539 (§§ 1413–18, *infra*), which was a case of municipal subscription of stock in a railroad company, the statute upon which the subscription there purported to rest made the existence of certain facts essential to the exercise of authority to make the subscription and issue bonds therefor. The bonds, upon their face, however, recited that they were issued *in pursuance of* the statute, which prescribed the conditions precedent to any subscription, and therefore, the court said, they imported a compliance with the law under which they were issued. It was, consequently, ruled that the pur-

chaser was not bound to look further for evidence of a compliance with the condition annexed to the grant of the power.

In *Kenicott v. Supervisors*, 16 Wall., 452 (§§ 1458-64, *infra*), the rule was thus stated: "If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, *with a recital that the election has been held or that the fact exists or has taken place*, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds." In *County of Moultrie v. Savings Bank*, 92 U. S., 631 (§§ 872-875, *supra*), the validity of the bonds there in suit was questioned, upon the ground that certain precedent conditions imposed by statute had not been complied with. The bonds, however, recited their issue to be "*in conformity to the provisions*" of the statute which gave the authority to issue them. So, in *Marcy v. Township of Oswego*, id., 637, where the statute authorizing a municipal subscription, with the sanction of three-fifths of the voters interested, and the issue of bonds in payment thereof, required particular facts to exist and certain acts to be performed before the right to make the subscription and to issue bonds in discharge thereof could be exercised. The statute contained, amongst other things, a proviso to the effect that the amount of bonds sold by the township should not exceed such a sum as would require a levy of more than one per cent. per annum on the taxable property of the township to pay the yearly interest. It appeared that the statute had not, in some of these respects, been complied with; that is, that the conditions had not been performed which the statute required before any subscription should be made or bonds issued. But, adhering to the rule announced in *Town of Coloma v. Eaves*, the defense was overruled in favor of a *bona fide* holder for value, because of the *recital* in the bonds that their issue was "*by virtue of, and in accordance with,*" the statute, and "*in pursuance of, and in accordance with,*" the vote of three-fifths of the legal voters of the township."

§ 1236. *Where there is no recital the constitutional provision puts the purchaser upon inquiry.*

Returning to the case in hand, it will be observed that the bonds issued by the city of Litchfield contain no recital whatever of the circumstances which, under the constitution of the state, must have existed before the city could legally incur the indebtedness for which the bonds were issued. They purport, it is true, to be issued under the authority of the act of April 15, 1873, and in pursuance of the ordinance of the city based upon that statute. But that statute does not expressly restrict the exercise of the power to erect and maintain a system of water-works to cases in which the aggregate indebtedness of the city was within the limit which the constitution declared no municipal corporation should exceed. Nor does the city ordinance recite or state, even in general terms, that the proposed indebtedness was incurred in pursuance of or in accordance with the constitution of the state, or under the circumstances which permitted the issue of the bonds. Consequently, a recital that the bonds were issued under the authority of the statute, and in pursuance of the city ordinance, did not necessarily import a compliance with the constitution. Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated, in any form, that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations

whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn, from such recital or statement, as to the extent of its existing indebtedness. Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds farther than would be consistent with reason and sound policy, and farther than we are now willing to go. The present action cannot be maintained, unless we should hold that the *mere fact* that the bonds *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the constitution, was, in itself, conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We cannot so hold.

Our attention is called by counsel to the exceeding hardship of this case upon those whose money, it is alleged, has supplied the city of Litchfield with a system of water-works, the benefits of which are daily enjoyed by its inhabitants. The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases. Whether the city is under a legal obligation to make restitution of the money, obtained without authority of law, that is, to refund to the proper party or parties such sums as were actually received by its authorized agents or officers upon the sale of the bonds, is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds. Upon this point it is not proper at this time, or in this form of action, to express an opinion. What we have said constitutes a sufficient answer to all of the questions certified to us, and requires an affirmance of the judgment.

Judgment affirmed.

AMEY v. THE MAYOR, ETC., OF ALLEGHENY CITY.

(24 Howard, 364-376. 1860.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Western District of Pennsylvania.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This case has been sent to this court on a certificate of division of opinion between the judges of the circuit court for the western district of Pennsylvania. The plaintiff has sued the mayor and aldermen and citizens of Allegheny City, in actions of debt, upon several coupons of bonds which were issued by that corporation, and made payable to the Ohio & Pennsylvania Railroad Company in payment for two subscriptions of \$200,000 each to the stock of the latter. It was agreed by the parties upon the trial of the cause to submit it for the opinion of the court upon a statement in the nature of a special verdict, and that verdicts upon the coupons should be entered accordingly. The judges, however, in their consideration of the case, differed in opinion on the following points: "Whether the several acts of assembly recited in the case stated conferred any authority on the corporation of the city of Allegheny to issue bonds with coupons, as had been done, or whether the same are altogether null and void, by reason of such want of authority, or for any other irregularity connected with their issue."

It is admitted that the bonds were issued and delivered in payment for sub-

scriptions of stock to the Ohio & Pennsylvania Railroad Company; that they were made payable to that company or its order; that the company had negotiated them to raise funds to construct the road, and that the road had been completed in conformity with the conditions of the subscriptions of the defendants. The parties agree that the subscriptions had been made by the authority of acts of the legislature of the state of Pennsylvania, in conformity with the charter of the railroad company, and were intended to be in pursuance of resolutions and ordinances of the select and common councils of the city of Allegheny. The mayor was first instructed to subscribe for four thousand shares of the capital stock of the Ohio & Pennsylvania Railroad Company, to be paid for in bonds, with coupons attached for interest, payable semi-annually, the bonds having twenty-five years to run. The railroad agreed to pay the interest upon the bonds until the completion of the road, or so much of it as may be adequate to pay the interest, and that the proceeds of the bonds were to be applied to the construction of the road from the city of Allegheny to the mouth of the Big Beaver river, about twenty-five miles. And to secure the city and the bondholders, it was stipulated, in addition to the legal obligations incurred in making the subscriptions, that the stock, with the interest, earnings and dividends of the road, should be pledged to pay the interest, and finally to redeem the bonds. Accordingly two hundred bonds of \$1,000 were prepared, and were delivered to the railroad company on the 1st of January, 1850, and the city at the same time received a certificate of four thousand shares. The coupons now sued upon were a part of those which were attached to those bonds.

The second subscription was made in virtue of another act of the assembly of Pennsylvania, and in compliance with a resolution of the city, dated June 19, 1852. That act authorized the city to increase its subscription to the capital stock of the railroad company, to any amount not exceeding its first subscription, *upon the laws and conditions which had been prescribed for the first*; but it restrained the city from making an issue of bonds of a less denomination than \$100. The act also exempts the stock from the payment of any tax in consequence of the payment of any interest to stockholders, until the net earnings of the company shall realize six per cent. per annum on the capital stock. The city authorities passed an ordinance for this additional subscription, but it was not published in compliance with the charter of the city, nor was it recorded in the manner which it is said the charter requires the city ordinances to be. For those neglects it is said the ordinance was null and void, and that the city had not the power to make the second subscription under the act of the legislature. But the city bonds were issued, and the subscription was made. It is also objected that the ordinance was indorsed upon the bonds, without any proviso requiring the railroad company to pay the interest upon them according to its stipulation. But it is admitted that the road was built first from the city to the Big Beaver river, and afterwards completed to its termination on the western border of Ohio, and thence to Chicago.

The city continues to hold its stock in the railroad company. It has received five dividends from the company — one of \$14,000, another of \$16,000, another of \$12,000 — which were retained by the company by the consent of the city, and had been appropriated to the payment of the coupons for interest, and that \$4,000 of those dividends had been paid in cash and others in stock. Prior to the city's second subscription, it appears that the debt of the city had

become \$500,000, the limit prescribed by an act of the legislature. That act is, "that it should not be lawful for the councils of the city, either directly or indirectly, by bonds or certificates of loan of indebtedness, or by virtue of any contract, or by any means or device whatsoever, to increase its indebtedness to a sum which, added to the existing debt, shall exceed \$500,000, exclusive of the subscription of \$200,000 to the Ohio & Pennsylvania Railroad Company." It is admitted, also, that the stock of the city in the railroad company had been voted at all elections of it by order of the city, except in a single instance, when the city refused to vote. The city was incorporated on the 11th April, 1840, with all the powers and authorities then vested by law in the select and common councils of the city of Philadelphia. We have given the agreed case of the parties in every particular in any way bearing upon the points about which the judges in the court below were divided in opinion, and will now consider them.

§ 1237. *Statutes construed to authorize a city to issue its bonds for railroad stock.*

The subscriptions of the defendants were made under the acts of the 5th April, 1849, and that of the 14th April, 1852. The first permitted a subscription of \$200,000, to be paid for by "certificates of loan." The second permitted the increase of it, to an amount not exceeding the first, without, however, having altered the manner in which the corporate credit of the city was to be used for the payment of the second subscription. We infer from the words of the act, and do not see how it can be otherwise, that it was to be paid for by the *same certificates of indebtedness* which the legislature had directed to be issued and used for the payment of the first subscription. The act is, "that the city of Allegheny is hereby authorized to increase its subscription to the capital stock of the said Ohio & Pennsylvania Railroad Company to any amount not exceeding the subscription heretofore made by the said city, upon the terms and conditions prescribed in regard to said previous subscription; provided no bond for the payment of the subscription shall be issued of a less denomination than \$100." This proviso is merely an inhibition upon the city to use for the payment of the subscription any certificate of indebtedness less than \$100; and the words "no bond for the payment of the subscription shall be issued," when considered in connection with the act authorizing the second subscription, that it should be made "upon the same terms and conditions of the first," cannot be interpreted into a permission or direction of the legislature that the city might use in payment for the stock any other legal or commercial instrument than "*certificates of loan*." Such certificates are well and distinctly known and recognized in the usages and business of lending and borrowing money, in the transactions of commerce, also, and for raising money upon the contract in them for industrial enterprises and internal improvements. They were formerly more generally known than otherwise as "certificates of loan," with certificates for interest attached, payable to the bearer at particular times within the year, at some particular place, being a part of the contract, from which they must be cut off to be presented for payment. But now, in their use, they are called bonds, with coupons for interest — a coupon bond — *coupon* being the interest payable separable from the certificate of loan, for the purpose of receiving it. But neither the instrument nor coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of a debt.

Such certificates of loan have been resorted to for many years in the United

States to raise money for internal improvements. They were as well known and used in Pennsylvania as elsewhere, and were permitted to be issued in that state, by just such enactments as those which authorized the city of Allegheny to subscribe to the capital stock of the Ohio & Pennsylvania Railroad Company. Such an issue was applicable to the subject matter of legislation. The city solicited the state to be allowed to make the subscriptions. It was the policy of the state to grant the application. The subscriptions were made under the act of the 5th April, 1849, and that of the 14th April, 1852. The first permits a subscription of \$200,000, which was to be paid for by certificates of loan. The act of the 14th April, 1852, allowed the increase of the subscription to an amount not exceeding the first, upon the same terms and conditions. It was the understanding of the legislature, of the city, and of the railroad company, that the subscriptions were to be paid for by the corporate credit of the city by the issue of "certificates of loan." That appears from the act of 1849, authorizing it, before the subscription was in fact made. The act provides, in anticipation of its being done, that the certificates of loan which shall hereafter be issued by the city of Allegheny in payment of any subscription to the Ohio & Pennsylvania Railroad Company, were to be exempt from all taxation, except for state purposes. The railroad company took from the city certificates of loan in payment of the subscriptions, sold them as such, and with the money built the road. Such a concurrence of contemporaneous action by all the parties interested in the subject matter of legislation proves that it was the intention of the legislature that the authority given to the city to make the subscriptions to the railroad company had been carried out just as it was meant to have been.

We answer, therefore, that the several acts of assembly stated in the agreed case did confer authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise bonds with coupons, as was done, to pay for its first and second subscriptions to the capital stock of the Ohio & Pennsylvania Railroad Company. We will now inquire whether the bonds or certificates of loan which were issued are null and void "for any irregularity connected with their issue." It is said there were two irregularities which made them so. The first is that the debt of the city had reached its limit of \$500,000 prior to the second subscription. The second is, that the city ordinance authorizing the issue for the payment of the subscriptions was null and void, from not having been published in conformity with the charter of the city.

§ 1238. *Where a corporation is by law limited to a certain amount of debt, a later statute may repeal pro tanto that limitation and authorize further debts.*

The first objection depends upon the proper construction of the act of 8th May, 1850, section 4, in connection with the act of the 14th April, 1852, which authorized the second subscription. The first declares that the indebtedness of the city should not be made to exceed \$500,000, exclusive of the subscription of \$200,000 to the railroad company; and it is urged that the act of 14th April, 1852, though it authorizes the city to make a second subscription of \$200,000, does not permit the city to increase its debt to a larger sum than \$700,000, to which it was limited by the first act of 1850. The objection has risen from a misconception of the fourth section of the act of 1850. It provides that it shall not be lawful for the councils of the city of Allegheny, either directly or indirectly, or by bonds, certificates or loans, or of indebtedness, or by virtue of any contract, or by any other means or device whatsoever, to in-

crease the indebtedness of the said city, in a sum which, added to the existing debt, shall, taken together, exceed \$500,000, exclusive of the subscription of \$200,000 to the Pennsylvania Railroad Company; meaning, obviously, that no increase of debt should be made by the councils beyond the sum of \$500,000, but not intending that the legislature might not authorize an increase of it beyond that amount, as it had previously done by authorizing the first subscription to the railroad company. The same political power which allowed the first subscription could, at a succeeding session of the legislature, give authority to the city to make a second. Such authority was given by the act of the 14th April, 1852. The city councils could not under its charter have made either the first or second subscription without authority from the legislature, *but by its charter it could contract debts for the purposes of its incorporation to a larger amount than \$500,000.* When, then, the legislature was called upon to authorize the city to make the first subscription, increasing its indebtedness \$200,000 beyond what the city might have owed then for other purposes, it was thought prudent, as well for the protection of the citizens of Allegheny as for those who might purchase these certificates of stock with coupons, to declare that the councils of the city should not thereafter, *by virtue of their charter authority to contract debts*, by any device whatever, increase its amount to more than \$500,000. And as it has turned out, judging from the attitude of the mayor, aldermen and citizens of Allegheny in this suit, it must be admitted to have been upon the part of the legislature of Pennsylvania a very commendable precautionary act of legislation.

§ 1239. *A formality required for the ordinary legislation of a city by its charter does not attach to proceedings authorized by special act.*

Having thus disposed of the first irregularity imputed to the councils of Allegheny, in making their issue for the payment of the second subscription, we proceed to the second.

It is, that the ordinance of the city directing the issue for the payment of the second subscription had not been recorded within thirty days. It is admitted in the stated case that it had not been. By the eighth section of the charter of the city of Allegheny, it is provided that, in order that a knowledge of the laws, ordinances, regulations and constitutions of the city authorized by the seventh section of the charter may at all times be had and obtained, and the publications thereof at all times be known and ascertained, such and so many of them as shall not be published in one or more of the public newspapers published in the city, or in such other way as the select and common councils may direct, within fifteen days after these laws severally passed, etc., etc., and also recorded in the office for the recording of deeds, etc., etc., etc., within thirty days after these laws passed, etc., etc., shall be null and void. Now, it does not require a very careful examination of the section to determine that it can have no bearing upon the ordinance directing the issue for the payment of the second subscription of the city to the Ohio & Pennsylvania Railroad Company, for in terms it is only applicable to ordinances, etc., *authorized by the seventh section of the charter*, and that did not permit such a subscription to be made and paid for by the city stock, as the ordinance for that purpose was intended. It could only be made by the authority of the legislature. In other words, the legislature enlarged the powers of the councils of Allegheny, to do what it could not do by charter. Besides, if the section was not limited to such ordinances, etc., as are *authorized by the seventh section of the charter*, and those words were not in it, it could have no application to an ordinance of

the city passed for a special purpose to carry out an act of the legislature, outside of the charter, as was the case here. We have determined that the acts of the legislature have been carried out by the city in the way they should have been done. Neither the ordinance, nor the stock issued by the city, are deficient in any substantial particular. The latter has every formality of the corporation to give them currency. They were circulated for ten years, and were constantly acknowledged by the city, as its bonds, for the purposes for which they were issued. They are now in the hands of *bona fide* transferees, to whom they must be paid according to their terms. It would be inequitable if the city could repudiate them at all, and more especially, if that were allowed to be done upon the ground of any fault in the corporation in their issue. But we will not enlarge further upon the case. The points of objection of which we have treated have already been before this court in several cases, and they are worthy of perusal. See the cases of *The Commissioners of Knox County v. Wallace*, 21 How., 546; *Zabriskie v. Cleveland, Columbus & Cincinnati R. Co.*, 23 How., 381.

We have not, in our treatment of this certified division of opinion, discussed that position of the learned counsel who argued it for the defendant, that the acts of the legislature of Pennsylvania, authorizing the issue of the certificates of loan, were unconstitutional. Agreeing with him in the main, as to the foundations upon which the correctness of legislation should be tested, and the objects for which it ought to be approved, we cannot, with the respect which we have for the judiciary of his state, discuss the imputed unconstitutionality of the acts upon which the subscriptions were made to the Ohio & Pennsylvania Railroad Company; it having been repeatedly decided by the judges of the courts of Pennsylvania, including its supreme court, that acts for the same purposes as those are, which we have been considering, were constitutional. We shall order it to be certified that the issue of bonds with coupons, in the case stated, are not null and void, but that it was done under the authority of constitutional acts of the state of Pennsylvania, in the case stated; and further, that they are not null and void for any irregularity connected with that issue by the city of Allegheny.

LONG v. NEW LONDON.

(Circuit Court for Wisconsin: 9 Bissell, 539-543. 1880.)

Opinion by DYER, J.

STATEMENT OF FACTS.—This is a suit upon municipal bonds, issued by the village of New London, March 11, 1872, in aid of the Green Bay & Lake Pepin Railway. No question is made as to the liability of the defendant city, if the bonds were valid obligations against the village. The amount of the bonds and coupons in suit is about \$6,500, besides interest. The complaint is demurred to, and two grounds of demurrer are urged: 1. That the act of the legislature of this state, under which the bonds were issued, did not apply to the village of New London, nor authorize that municipality to issue bonds in aid of a railroad. 2. That the act under which the bonds were issued is unconstitutional and void, and therefore conferred no power to issue the bonds.

The complaint is in the usual form except that in each count the bond counted on is set out *in hæc verba*. No question is made that the railroad to aid in the construction of which the bonds were issued was duly located to run

through the county in which the village (now city) of New London is situated, and has been so constructed.

The act of the legislature under which the bonds were issued is chapter 93 of Private and Local Laws of Wisconsin for 1867, and, to distinguish it from other statutes important to notice, it may be designated as the enabling act. No objection is made to the bonds in respect to their terms, form and mode of execution, nor is it claimed that there was any irregularity in the proceedings of the municipality preliminary to the issuance of the bonds. Section 1 of the enabling act provides that: "It shall be lawful for any county, through any portion of which any part of the Green Bay & Lake Pepin Railway shall run, or any town or incorporated city or village in such county, to issue and deliver to said company its bonds, payable to such person or persons, trustees or corporation, or to said company, at such time, for such sum or sums, at such rate of interest, transferable by general or special indorsement or by delivery, and in such manner as may be agreed upon by and between the directors of said railway company, and the proper officers of such county, town, incorporated city or village, as hereinafter provided, and to receive in exchange for such bonds the stock or bonds of said railway company, in such manner as shall be agreed upon by and between the directors of said railway company and the proper officers of such county, town, incorporated city or village, as hereinafter provided."

The act further provides for a proposition from the railway company for an exchange of stock for bonds as the basis of proceedings preliminary to the issuance of bonds, and for submission of the proposition to the voters of the city, town or village, for acceptance or rejection, and also prescribes the manner in which bonds may be executed and issued.

By chapter 504 of Private and Local Laws of Wisconsin of 1868, the village of New London was incorporated. This act of incorporation was subsequently amended, the amendatory act being chapter 362 of Private and Local Laws of 1869; and again, in 1870, an act was passed reducing the act incorporating the village and the amendatory act of 1869 into one act, and amending the same. See Private and Local Laws of 1870, chapter 485. In neither of these acts under which the village of New London came into existence is there any provision giving to the municipality authority to issue the bonds in question. By chapter 162 of Private and Local Laws of 1877, the city of New London was incorporated, and embraced within its boundaries, as prescribed in the act, the same district of country that was included within the limits of the village, and in this act there appears to be no authority given to the city to issue bonds in aid of the Green Bay & Lake Pepin Railway.

It should be added as part of the history of legislation touching the bonds in question, that, in 1878, the legislature passed an act to authorize the common council of the city of New London to borrow money from the commissioners of school and university lands of the state, upon certain terms prescribed in the act, by means of which loan the city might be enabled to compromise the indebtedness previously incurred by the village, but the fifth section of the act provided that nothing therein contained should be construed as a recognition of the validity of the instruments issued as bonds of the village of New London. The act referred to is chapter 118 of Laws of Wisconsin for 1878; and an act amendatory thereof is to be found in chapter 340 of the General Laws of the state for the same year. Thus it will be seen that the act under which the bonds were issued was passed in 1867, and before either the village or city

of New London came into existence; that the village was incorporated in 1868; that the bonds were issued in 1872, and that the city was incorporated in 1877. And upon these facts and this state of legislation, in connection with certain provisions contained in the charters of the village and city, it is contended that the village had no legislative authority to issue the bonds.

§ 1240. *An act enabling cities on the line of a certain railway to subscribe and issue bonds, etc., applies to a village or city thereafter incorporated.*

It may first be observed that the voters and the authorities of the village, by their action under the enabling act of 1867, construed and treated it as authorizing them to issue the bonds in suit and as applicable to the village, although it did not exist as a municipality when the act was passed. And we are of the opinion that the act is so far prospective in its language and intent that under it not only could a city or village then existing issue its bonds for the purposes specified, but any city or village thereafter incorporated in any county through which the railway should run, might, if it saw fit, avail itself of the right and authority conferred by the act to incur indebtedness in aid of such railway. It is true, the act does not in terms specify cities and villages then and thereafter existing, but its language and import are nevertheless very general and comprehensive. It provides that it shall be lawful for *any* incorporated city or village in any county, through any portion of which any part of the Green Bay & Lake Pepin Railway *shall run*, to issue and deliver bonds in accordance with the terms of the act. It would not, we think, be consonant with rules of sound construction, to limit the application of this language to municipalities existing at the time of the passage of the act. And especially does it seem unreasonable to give the benefit of such a construction to a municipality which has acted under the statute, and caused its obligations to be issued and to pass into the hands of innocent third parties, thereby adopting the statute as its letter of authority so to act. But it is claimed that certain provisions in the charters of the village and city of New London are so repugnant to the general provisions of the act of 1867 as to operate as a repeal of those provisions so far as they might otherwise be applicable to those municipalities, or either of them. And attention is called to a section which appears in the various acts incorporating the village and city, which provides that "no general law of this state, contravening the provisions of this act, shall be considered as repealing, amending or modifying the same, unless such purpose be expressly set forth in such law." But this clearly has reference to a general law that might be passed in the future, and not to one previously passed and then in force.

§ 1241. *A limitation in the charter of a village, forbidding it to borrow money, etc., does not apply to the issuance of bonds in aid of a railway under a prior enabling act.*

Again, our attention has been directed to section 2 of chapter 7 of the amended charter of the village of New London (chapter 485, Private & Local Laws of Wis., 1870), which forbids the village to borrow money, and provides that it shall not be liable to pay money borrowed, and shall not incur any debt or liability, in any year, greater than the amount of tax allowed by the act to be raised in the year in which such debt or liability should be incurred. This, it is true, constitutes a limitation upon the right of the village to incur indebtedness, but we do not think the debt or liability here spoken of was intended to embrace the case of bonds that might thereafter be issued in exchange for stock and in aid of a railway under the act of 1867. Certainly the issuance of such bonds would not necessarily be a borrowing of money, and even the

power to borrow money, as appears by the terms of this section 2, is only restricted where the right to borrow is not specially authorized by law. To preclude the application of the enabling act of 1867 to the village of New London by any provisions in the charter of the village, the legislative intent should be clear. Unless manifested in such manner as to make the charter provisions clearly operate as a repeal of the act of 1867, the latter act must stand as a law under which the village might act. We are not prepared to hold that such repeal was effected by the charter of 1870. The final repealing clause in that act (section 15 of chapter 11 of charter), which is, that "all acts or parts of acts conflicting with this act are hereby repealed so far as they conflict with the provisions of this act," ought not, we think, to be held as intended to repeal the act of 1867. That section repealed, and was undoubtedly intended to repeal, only the original act of 1868, incorporating the village of New London, and the amendatory act of 1869. Comment on the provisions of the charter of the city of New London, to which our attention was called on the argument, is unnecessary, since the ground is covered by the observations just made upon similar provisions in the charter of the village; and in accordance with the views just expressed, we must hold the first point taken in support of the demurrer untenable.

§ 1242. *The "enabling act" of Wisconsin of 1867, authorizing villages, etc., to issue bonds, is not unconstitutional.*

But it was argued with much earnestness that the village of New London had no authority to issue the bonds, because, as it is claimed, the enabling act of 1867 contained no such restriction upon the power of the village to loan its credit as is required by section 3 of article 11 of the constitution of Wisconsin; and that for the want of such restriction the act must be held unconstitutional and void. The section of the constitution in question is as follows: "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations." It is contended that the enabling act of 1867 contains no such restriction as this constitutional provision requires, and hence that the act does not conform to the constitutional requirement and is void. We cannot adopt this view. The constitution does not specify any particular mode in which the legislature shall restrict the power of municipal corporations to contract debts or loan their credit. It is therefore immaterial how it is done provided the restriction be imposed; and we think the legislature sufficiently performed its duty in that regard in the act of 1867, to make that act a valid law. For it was therein provided that cities and villages might issue bonds to a particular railway company which was named, "for such sum or sums, at such rate of interest, transferable by general or special indorsement or by delivery, and in such manner as may be agreed upon by and between the directors of said railway company and the proper officers of such . . . incorporated city or village." We are of the opinion that when it was thus provided that the issue of bonds should be in such sum or sums as should be agreed on between the company and the officers of the village, and when the object, to promote which bonds were authorized to be issued, was specified, and the whole founded on a prior vote by the people, the constitutional requirement was satisfied. It must be presumed that the officers of the municipality were competent judges of the amount of

bonded indebtedness which the town or village ought to incur. And when the amount is by the act made subject to the concurrence and control of the representatives of the municipality, such a restriction is imposed as constitutes a compliance with the constitutional provision. It may not be a restriction that would as effectually prevent abuse in contracting debts as would a provision expressly fixing a sum that should not be exceeded, but the character of the restriction is a question not for the courts but for the legislature.

Cases bearing on the question are *Maloy v. City of Marietta*, 11 Ohio St., 636, and *People v. Mahaney*, 13 Mich., 481. The constitutions of Ohio and Michigan contain clauses similar to that in the constitution of this state, and now under consideration. In the case first cited the court say: "The constitution clearly imposes a duty upon the legislature, but does not direct when or how it shall be exercised. Speaking of this provision, and the duty thereby enjoined, Judge Ranney, in *Hill v. Higdon*, 5 Ohio St., 243, says: 'a failure to perform this duty may be of very serious import, but lays no foundation for judicial correction.' Be this as it may, the section, while it imposes the duty, leaves to the legislature the power to determine the *mode* and *manner* of the restriction to be imposed." This was a case involving the validity of a statute which authorized an assessment of the cost of improving a street upon abutting lots, and it was held that a restriction which provided that no improvement of a street, the cost of which was to be assessed upon the owners, should be directed without the concurrence of two-thirds of the members of the city council, or unless two-thirds of the owners to be charged should petition in writing therefor, satisfied the constitutional requirement. The court further says: "This may be said to be a very imperfect protection, . . . but it is calculated and designed by the unanimity or the publicity it requires to prevent any flagrant abuses of the power. Such is plainly its object, and we know of no rights conferred upon courts thus to interfere with the exercise of a legislative discretion which the constitution has delegated to the law-making power."

In *People v. Mahaney*, *supra*, the court, speaking of the constitutional provision, says: "That whether it can be regarded as mandatory in a sense that would make all charters of municipal corporations . . . which are wanting in this limitation, invalid, we do not feel called upon to decide in this case, since it is clear that a limitation upon taxation is fixed by the act before us. The constitution has not prescribed the character of the restriction which shall be imposed, and, from the nature of the case, it was impossible to do more than to make it the duty of the legislature to set some bounds to a power so liable to abuse. A provision which, like the one complained of, limits the power of taxation to the actual expenses, as estimated by the governing board, after first limiting the power of the board to incur expense within narrow limits, is as much a restriction as if it confined the power to a certain percentage upon taxable property, or to a sum proportioned to the number of inhabitants in the city. Whether the restriction fixed upon would as effectually guard the citizen against abuse as any other which might have been established was a question for the legislative department of the government, and does not concern us in this inquiry." The reasoning of the courts in the two cases cited, we regard as peculiarly applicable to the question involved in the case at bar. And we adopt it as sustaining our conclusions as to the validity of the statute under consideration.

We are not unmindful of the decisions of the supreme court of this state in

Foster v. Kenosha, 12 Wis., 616, and in *Fisk v. Kenosha*, 26 Wis., 23. In those cases it was held that the legislature cannot confer upon a municipal corporation an unlimited power to levy taxes and raise money aside from and above what may be necessary and proper for legitimate purposes, the grant of such unlimited power being inconsistent with section 3 of article 11 of the constitution of Wisconsin. And it may be difficult to reconcile some of the reasoning of the court in these cases with that of the courts in the Ohio and Michigan cases cited. But it is to be remarked of *Foster v. Kenosha* and *Fisk v. Kenosha* that the statute there under consideration authorized the unlimited levy of taxes for any purpose which might "be considered essential to promote or secure the common interest of the city;" and this feature of the statute is much dwelt upon in the opinion of the court in *Foster v. Kenosha*. The grant of power to levy taxes was absolutely unlimited, both as to amounts and object, and the court held that the legislature could not confer upon a municipal corporation "such unrestrained ability to contract corporate indebtedness and mortgage the real estate of the city." We are not prepared to hold that there is such similarity between the statute passed upon in *Foster v. Kenosha* and *Fisk v. Kenosha* and that under consideration in the case at bar as to make those cases controlling upon the question here involved. The enabling act of 1867 was, in our opinion, a valid enactment, and conferred upon the village of New London authority and right to issue the bonds in suit; and the demurrer to the complaint will, therefore, be overruled.

DRUMMOND, C. J., concurring.

§ 1243. Interest coupons do not form a part of the principal debt, and it is no defense, therefore, to a suit on coupons, that the amount of the bonds, with interest, exceeds the limit of indebtedness prescribed by the state constitution. *Durant v. Iowa County*,* Woolw., 69.

§ 1244. Obligation of contracts.—An act of a legislature of a state which authorizes counties to issue bonds, and makes it the duty of the proper officers of the county to levy an annual tax sufficient to pay the principal and interest of such bonds as the same fall due, forms a contract between the state and the holders of the bonds issued thereunder; and a subsequent constitutional provision limiting the power of the officers of the county to levy taxes, in payment of existing indebtedness, to a certain per cent. of the taxable property is, so far as it interferes with taxation in payment of these bonds, a "law impairing the obligation of contracts," and therefore void. *Merchants' National Bank v. Jefferson County*,* 1 McC., 356; S. C., 5 Dill., 810.

§ 1245. Discretion of the legislature.—An act authorizing a municipal subscription to the stock of a designated railroad company, without limit as to amount, but to be made only after, and in accordance with, a formal written proposition by the company, setting forth the amount and terms of the desired subscription, and also after the approval of such proposition by a majority of legal votes cast at an election for that purpose, is not in conflict with article 11 of the constitution of Wisconsin, which makes it the duty of the legislature to restrict cities and incorporated villages "in their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations," since the determination of what are abuses, what restrictions are required in particular cases, and the mode in which these restrictions should be imposed, is left to the discretion of the legislature. *Smith v. Fond du Lac*,* 8 Fed. R., 289.

VIII. REGISTRATION.

SUMMARY — *No registration; rights of bona fide holder*, § 1246. — *Under Township Aid Act of Missouri; antedating*, § 1247.

§ 1246. By the act under which county bonds were issued in aid of a railroad, it was provided that they should be delivered to the state treasurer in escrow until the fulfilment of the conditions upon which they were voted, and should not bear interest nor be negotiable until

after their delivery and registration. The holder was required by the act to present them to the state auditor for registration, who, upon being fully satisfied that the bonds had been regularly and legally issued and all the signatures genuine, was to certify to that effect under his official seal. The bonds in question were voted upon the condition that they should not be delivered until part of the road had been completed. They were never delivered to the state treasurer, but to one who had them registered and duly certified by the auditor, and put them in circulation. They contained no evidence of the condition as to delivery on their face. It is decided that a *bona fide* holder of these bonds may recover on them, since he had no evidence before him that they were voted on any condition and therefore required to be delivered to the state treasurer, and since the auditor was made a judge of the fulfilment of the requirements of the law, and his certificate to that effect on the bonds is *prima facie* evidence to a purchaser in good faith. *Lewis v. Commissioners*, §§ 1248, 1249.

§ 1247. The act of March 30, 1872, of the state of Missouri provides that "before any bond hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the state auditor, who shall register the same in a book or books provided for that purpose in the same manner as the state bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions in the contract under which they were ordered to be issued have been complied with." It is held (1) that this act applies to bonds issued by counties for and in behalf of its townships under the "Township Aid Act;" (2) that it applies to bonds thereafter issued, although the vote had already been taken and the county court had made subscription to the stock of the railroad company, in aid of which the bonds were voted, subject to the conditions specified in the call; (3) that the fact that the bonds thereafter issued were antedated so as to appear to have been issued before the act, does not estop the county from showing the contrary; (4) that the bonds, having never been presented to the state auditor, nor registered by him, nor certified as required, are invalid. *Anthony v. County of Jasper*, §§ 1250-1254. See §§ 1018, 1074.

LEWIS v. COMMISSIONERS.

(15 Otto, 739-751. 1881.)

ERROR to U. S. Circuit Court, District of Kansas.

STATEMENT OF FACTS.—Section 11 of the act of March 2, 1872, after providing for the issue of bonds, provided that the officers of such county, city, etc., "shall forthwith deliver the same, together with the original or a copy of the subscription, setting forth its terms in full, to the treasurer of state, which said bonds shall be held by the said treasurer of state in escrow, until the conditions in the terms of the said subscription to such railroad or other work of internal improvement shall be in all things fully complied with; that upon the conditions of said subscription being in all things fully complied with, then the treasurer of state shall deliver such bonds to the parties entitled thereto, who shall have the same registered as hereinafter provided: *Provided*, that such bonds shall not bear interest or be negotiable until after the delivery and registration thereof: *And provided further*, that in case of a failure to comply with the conditions in the terms of such subscription, then such bonds shall be by the treasurer of state canceled and redelivered to the county, city or township issuing the bonds: *And provided further*, that this section shall not apply where the people may have named some party as trustee in their vote on the proposition, and the contractor may thereafter agree to the same."

Section 14 of said act provided as follows: "Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the auditor of state for registration, and the auditor shall, upon being satisfied that such bonds have been issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine, register the same in his office in a book to be kept for that purpose, in the same manner

that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued, that the signatures thereto are genuine, and that such bonds have been registered in his office according to law, for which registration and certificate the auditor shall be entitled to a fee of \$1 for each bond so registered, to be paid by the holder thereof."

Opinion by MR. JUSTICE HARLAN.

At an election held on the 27th of August, 1873, in the county of Barbour, state of Kansas, the qualified voters gave their sanction to a donation of \$100,000 in bonds of the county, to aid in the construction of the Nebraska, Kansas & Southwestern Railroad. By the terms of the proposition voted on, the bonds were to be placed in the hands of the state treasurer, who was to deliver to the railroad company one-half of them when the proposed road should be constructed to Medicine Lodge, and the remainder of them when it should be completed through the county. A few days after the election, they were signed, sealed and attested by the proper officers of the county, in conformity with the order of the board of commissioners. They are dated September 1, 1873, and payable to the railroad company, or bearer, with interest, semi-annually, at the rate of ten per cent. per annum, payable at the National Park Bank in the city of New York. Each is signed by the chairman of the board of county commissioners, is attested by the county clerk, and purports, upon its face, to be "one of a series of one hundred bonds of \$1,000 each, all of like tenor and date, . . . issued for the purpose of aiding in the construction of the Nebraska, Kansas & Southwestern Railroad, through said Barbour county, in the state of Kansas, under and in pursuance of an act of the legislature of the state of Kansas, entitled 'An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvements, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872."

There is nothing upon the face of the bonds indicating that the donation was otherwise than absolute and unconditional. They were left by the county officers with one Hutchinson, to be deposited with the treasurer of state, as required by the terms of the proposition upon which the people had voted. But they were never so deposited, and by Hutchinson were procured to be registered by the auditor of state, and then fraudulently put in circulation. An indorsement was made upon each bond as follows:

"STATE OF KANSAS, ss:

"I, D. W. Wilder, auditor of the state of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that the same has been duly registered in my office according to law.

"In witness whereof I have hereunto set my hand and affixed my seal of office, at Topeka, this 19th day of November, 1873.

"D. W. WILDER, Auditor."

Lewis purchased the bonds and coupons before the maturity of any of the coupons, and (according to our interpretation of the facts specifically found) without notice of any fraud in their execution or issue, unless, as claimed by the county commissioners, such notice was furnished by the terms of the act above mentioned. He brought the present action against the board of commissioners of the county, to recover the coupons due September 1, 1875, March

1, 1876, and September 1, 1876. The defense, which was sustained in the court below, is placed upon the ground that the bonds were issued in plain violation of that act, and that all persons, whether purchasers in good faith or not, were required to take notice of the fact that they were not binding obligations of the county.

§ 1248. *The act of Kansas of March 2, 1872, does not require bonds in all cases to be deposited with the treasurer before they are delivered to the auditor for registration, etc.*

We have carefully considered the reasons upon which the judge of the circuit court based the conclusion that the county was not liable upon the bonds even in the hands of a *bona fide* purchaser for value. His opinion seems to proceed upon these grounds: That under the act of 1872 it was a condition precedent that the bonds should not bear interest nor be negotiable until they should pass through the hands of the state treasurer, he alone being invested with authority to determine when they were to be delivered to the parties entitled thereto, for the purposes of registration; that the requirement of that condition was manifest from the statute, of the terms of which all were bound to take notice; that although the bonds on their face disclosed no conditions whatever for their delivery, the purchaser should have ascertained whether, prior to their registration, they had, in the first instance, been deposited with that officer as escrows, and that he could not take the certificate of the auditor as conclusive evidence that the statute had been pursued; that as the bonds were not placed in the hands of the treasurer, they never had the quality of negotiability, and could not, therefore, have been rightfully registered, nor their regularity and legality certified by the auditor under his seal of office; and since the conditions affixed by the popular vote had never been performed by the construction of the proposed road, the bonds were not the valid obligations of the county. We are unable to concur in some of the views expressed by the learned judge, especially in his conclusion that the bonds are not enforceable against the county. The fundamental proposition upon which that conclusion seems to rest is, that bonds executed under the act of 1872 could not consistently with its purpose and language be registered and issued, even when the subscription was payable immediately and without conditions, unless, in the first instance, they be delivered to the treasurer of state, and be by him delivered to the party entitled thereto. This interpretation is not, we think, justified by any fair construction of the act. Under some circumstances, distinctly disclosed upon its face, it is not at all necessary that they be delivered to the treasurer in order that they may be registered and become the valid obligations of the municipality in whose name they are issued. The last proviso of the eleventh section expressly declares that that section — the only one which refers to the custody of the bonds by the state treasurer — “shall not apply when the people have named some party as trustee in their vote upon the proposition, and the contractor [that is, as we suppose, the railroad company proposing to do the work of construction] may thereafter agree to the same.” If the people on one side, and the company on the other, agree upon a trustee to hold the bonds until certain contingencies happen, or certain terms or conditions are performed, the statute explicitly declares the eleventh section shall not apply. Again, suppose the people had voted — as, it would seem that, under sections 1, 2 and 3, they might have done — for a donation, or a subscription of stock, to be paid in bonds deliverable at once, without any conditions or terms whatever. Could it be claimed that the bonds must, of necessity, have been delivered to the treas-

urer of state? If so, for what purpose could he have received them? What ends could have been subserved by his custody of them, when to their delivery no conditions were attached? When should he, in such case, have delivered them to the parties entitled thereto? If, in the case supposed, the company, under the agreement with the county, and under the vote of the people, became entitled at once to the bonds for the purpose of having them registered, and the required certificate of the auditor indorsed thereon, it cannot be that the legislature intended the parties to perform the idle ceremony of passing them through the hands of the treasurer, to be by him immediately surrendered to the proper parties. That officer, in the case put, has no duty to perform, such as the act imposes when conditions are attached to a subscription. For these reasons we are of opinion that the eleventh section, in so far as it requires a delivery of bonds to him, has no application except in cases where, to the subscription of stock or to the donation, are annexed conditions to be complied with before that officer may rightfully surrender the bonds intrusted to him. The object of that section is to prescribe a mode in which the people of a county may, if they pursue the statute, be protected, in some degree, against a premature delivery of county bonds by local officers in advance of the performance of conditions imposed by the popular vote.

If we are correct in this view, it follows that the purchaser of these bonds was not informed by the statute that they belonged to that class which were imperatively required to be deposited, in the first instance, with the state treasurer, and by him held until the conditions upon which they were to be delivered were fully performed. But it remains for us to consider the important practical question as to the rights of the parties, in view of the admitted fact that the proposition approved by popular vote did, in terms, provide for the ultimate delivery of the bonds only upon certain conditions—bonds, therefore, which ought to have been, but were not, delivered by the county officers to the state treasurer to be held until the prescribed conditions were performed. The determination of this question, so far as it involves the good faith and diligence of the parties, is somewhat complicated by the absence of any finding as to whether the subscription was, in fact, made on the books of the company, “specifically setting forth the conditions” upon which it was made (sec. 9); or whether the original or a copy of the subscription was in fact delivered or even transmitted to the treasurer of state (sec. 11); or whether the officers of the county themselves made a record of the bonds in a book kept for that purpose (sec. 12); or whether they transmitted to the state auditor a certified statement, attested by the county clerk, “of the number, amount and character of the bonds so issued, to whom issued, and for what purpose” (sec. 12). We cannot, therefore, certainly know what facts would have been ascertained by the purchaser had he resorted to all those sources of information—an investigation upon which, for reasons hereafter to be stated, he was not required to enter. We have in the special finding only the fact that the county, under the order of the board of commissioners, executed bonds payable to the railroad company or bearer, and purporting to have been issued under and in pursuance of the act of 1872, and that the bonds were left by the county officers with Hutchinson for delivery to the state treasurer, when the statute required the county authorities themselves to deliver the bonds to that officer.

Now it is to be observed that the bonds do not upon their face indicate that they were deliverable upon the performance of certain conditions. They are made payable, unconditionally, to bearer, at a designated place and at a speci-

fied time. By the act of the county officers, intrusting the bonds to one upon whom no official responsibility rested, he was enabled to represent himself to the auditor as presumptively the owner, because the bearer of the bonds. But these facts, it is insisted, are of no consequence in view of the statutory provision, declaring, in effect, that bonds of the kind here in suit "shall not bear interest or be negotiable" until after their delivery by the state treasurer to the parties entitled thereto. Whatever force might be conceded to this argument, looking alone to the requirements of the eleventh section of the act, we are of opinion that more consequence is to be attached to the action of the auditor of state, under the fourteenth section, than seems to have been done by the court below. The presumption is that the legislature, while aiming to guard local communities against the fraudulent conduct of their officers, did not intend to withdraw all protection to the *bona fide* purchasers of municipal securities which those officers were authorized to execute and which they might put into circulation or negligently permit to get into circulation. Hence, as we think, the requirement as to the registration of bonds issued under the act, and the duty of the state auditor, upon registration, to attest their regularity and legality by a certificate under his seal of office.

§ 1249. *The certificate of the auditor of Kansas that the bonds of a county have been duly registered is conclusive as between a bona fide holder for value and the county. (a)*

The state treasurer may improperly surrender bonds deposited with him for delivery only upon the performance of specified conditions. But such delivery would not render them binding upon the municipality in whose name they are executed. The holder is under a necessity, by the statute, to do something more. He is required to present them for registration to another officer, the auditor of the state, in whose office (if the county authorities obey the statute) is kept a record of the number, amount and character of the bonds, to whom issued, and for what purpose. And that officer is not under a duty to admit the bonds to registration, simply because asked to do so, and without making inquiry as to their regularity and legality. Unless satisfied that they are issued in accordance with the provisions of the act, he is bound to deny the application for registration. But, if satisfied that the provisions of the statute have been pursued, he is required to register the bonds, and certify, upon each one, under his seal of office, that it has been regularly and legally issued. To him, therefore, is committed, by the state, the important function of finally determining whether the law has been, in all respects, obeyed, and, consequently, whether the bonds have been regularly and legally issued. His determination necessarily involves an investigation as to every fact essential to their validity. Purchasers in good faith, although required to know what the statute contains, are not bound, under such circumstances as are here disclosed, to go behind the auditor's certificate and find out whether he has ascertained all the facts, or whether he has correctly and honestly passed upon the questions arising upon an application for registration. The investigation which the statute authorized him to make involved the inquiry whether the bonds were of the class which should have passed through the hands of the treasurer, and, also, whether the conditions upon which they were deliverable had been performed. Purchasers have the right to assume—having no notice to the contrary—that he has, in these respects, discharged his duty. The registration acts in some of the states, while imposing like duties upon state auditors, and requiring them

(a) Reversing the ruling in *Lewis v. County Commissioners*, * 1 McC., 458.

(when the facts justified them in so doing) to certify, upon municipal bonds, that they have been issued in compliance with law, expressly declare such certificates to be *prima facie* evidence only of the facts stated, and shall not prevent proof to the contrary in any suit involving the validity of the bonds, or the power and authority of the municipality in whose name they are executed to issue them. *Anthony v. County of Jasper*, 101 U. S., 693 (§§ 1250-54, *infra*). But the statute in question contains no such provision. The legislature of Kansas confers upon the auditor of state full authority to ascertain and determine whether bonds presented for registration have been issued in accordance with the statute, and, if satisfied such is the fact, it is made his duty to certify upon the bonds that they have been regularly and legally issued. Had it appeared upon the face of these bonds that they were deliverable upon certain terms, and, therefore, belonged to the class which should pass through the hands of the state treasurer, and if the purchaser, in such a case, be held to have taken the bonds subject to the statutory requirement that they were not negotiable unless they had been, in the first instance, actually delivered by or in behalf of the county officers to the state treasurer, and by the latter surrendered to the proper parties, it is clear no such condition can be attached to the purchase by appellant. For the bonds here in suit do not disclose the conditional nature of the subscription, nor that they belonged to the class which, as a condition precedent to their negotiability, must have been delivered to the state treasurer. That these facts are not disclosed upon the face of the bonds is the fault of the county, and it is estopped, as against a *bona fide* purchaser, to deny that they are of the class which might have been delivered at once, and without going through the hands of the state treasurer, to the auditor of state, and been registered and certified as regularly and legally issued. In such a case, at least, the action and certificate of the auditor of state must be deemed conclusive evidence, as between the county and a *bona fide* purchaser, that the bonds were regularly and legally issued, and, therefore, negotiable in the fullest sense of that word. If such be not the construction of the registration act, it is difficult to perceive of what practical value is the auditor's certificate, or what the legislature intended by the requirement that he should, after examination into the facts, attest the regularity and legality of the bonds. If the determination of that officer, in this case, operates hardly upon the people of the county, the result must be attributed to the legislation in question as well as to the negligence of the state and county officers. What we have said is in harmony with the settled doctrines of this court upon the subject of negotiable securities issued by municipal corporations, as announced in numerous cases with which the profession is familiar, and which need not be here cited.

There are other questions in the case, but they are of minor importance, and it seems to be unnecessary to consider them. Judgment reversed, and cause remanded with directions to enter a judgment in favor of the plaintiff below.

ANTHONY v. COUNTY OF JASPER.

(11 Otto, 693-700. 1879.)

ERROR to U. S. Circuit Court, Western District of Missouri.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This is a suit upon interest coupons originally attached to bonds issued under the Township Aid Act of Missouri, and presents the following facts: On the 10th of February, 1872, the township of Marion, in

Jasper county, upon a call duly made under the law, voted to subscribe \$75,000 to the stock of the Memphis, Carthage & Northwestern Railroad Company upon certain conditions, and on the 28th of March following the county court made the subscription on the terms and subject to the conditions specified.

On the 30th of March, in that year, an act was passed by the general assembly of Missouri, entitled "An act to provide for the registration of bonds issued by counties, cities and incorporated towns, and to limit the issue thereof." Section 4 of that act is as follows: "Before any bond hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity, or be negotiated, such bond shall first be presented to the state auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceedings to test or determine the validity of such bonds, or the power of any county court, city or town council, or board of trustees, or other authority to issue such bonds, and the remedy by injunction shall also lie at the instance of any tax-payer of the respective county, city or incorporated town to prevent the registration of any bonds alleged to be illegally issued or founded under any provision of this act."

On the 4th of June, 1872, the county court ordered that \$50,000 of the bonds which had been voted should be issued, that the clerk have them registered according to law, and, when registered, that they be deposited in escrow with some responsible banker in St. Louis. John Purcell was the presiding justice of the court in March. He continued in office until September, 1872, when he resigned, and R. S. Merwin was appointed in his place October 21, 1872. The bonds now in question were sealed with the seal of the court, affixed by the clerk, and signed by Merwin, as presiding justice, and by the clerk in October, 1872, but antedated as of March 28. Merwin delivered them during the same month, with the first two coupons cut off, to the Union Savings Bank of St. Louis, for the use of Edward Burgess, a contractor for building the road. In November, Burgess sold them to one Wilson at fifty-five cents on the dollar, and the bank gave them up to the purchaser on his order. Neither the other justice of the county court, nor the court as a court, consented to what was done by Merwin, and the railroad company has never fully complied with the conditions of the vote authorizing the issue of the bonds. No registry of the bonds was ever made, as required by the act of March 30, 1872, and they did not have upon them the certificate of registration. Anthony, the plaintiff below, was a purchaser for value of the bonds from which the coupons sued on were cut, and without any notice that they had been antedated, or were in any respect irregular or invalid. The circuit court, on this state of facts, gave judgment against Anthony, and he brought this writ of error.

§ 1250. *Bonds issued by counties for townships, in Missouri, are county bonds, and subject to registration under the act of March 30, 1872.*

All the questions presented in the argument of this case were disposed of in *Douglass v. County of Pike*, 11 Otto, 677 (§§ 1708-11, *infra*), except such as arise under the act of March 30, 1872. That act, it is claimed, renders the

bonds invalid, because they were not registered and had no certificate of registry on them. Against this it is urged: 1. That the act does not apply to bonds issued under the township aid law; and 2. That if it does, the county is estopped from denying that these bonds were actually issued on the day they bear date.

The first objection is, as we think, untenable. It does not appear to have been taken or considered below. While the bonds are township bonds, in the sense that they are payable out of taxes levied on the property in the township which voted them, they were issued by the county. The county court, which represented the county in its corporate capacity, made the subscription voted by the township, and issued the bonds in the name of the county. Under the same authority the necessary taxes are to be levied on the property in the township, and from moneys obtained in this way the county treasurer is to pay the bonds and coupons as they mature. The bonds on their face acknowledge an indebtedness of the county "for and on account of" the township. Since townships have no corporate organization of their own they act through the county, which, for this purpose, represents them, as, under other circumstances, it does the people of the whole county.

The act in question is not confined to the bonds of counties, but embraces all issued by counties. As there can be no township bonds except they are issued by counties, it seems to us that they come within the descriptive words used in the fourth section, and we have been unable to find anything in the other parts of the act manifesting an intention to give these words any other than their usual and ordinary signification. The object of the new legislation undoubtedly was to guard against unauthorized issues of this class of public securities. For this purpose a new policy was adopted by the state. The evil which the general assembly had in view affected township bonds, as well as those of counties, cities or towns. In fact, as ordinarily the same officers put out the township bonds that did those of the county, it is impossible to discover any good reason for guarding one against frauds and mistakes rather than the other. The records of the county court should contain an account of all that has been done in this way by that body for the townships, and the chief financial officer of the county can as easily furnish the state auditor with a statement of these obligations as he can of those of the county at large. When the state auditor certifies to the county court the amount required during the next year to meet maturing coupons and costs and expenses, the special tax can be levied by the county court, under the township aid law, as amended in 1871 (Wagner's Stat., 331, sec. 52), on the real estate and personal property in the township for whose account the bonds were issued. No embarrassment can possibly arise in this particular, for there is no such conflict between the two statutes as to produce a repeal by implication. The registration statute is supplementary only to that under which the bonds were originally issued.

§ 1251. *Unless bonds issued under the act of 1868 are registered under that of 1872 they have no legal validity. (a)*

This brings us to consider the question of estoppel. There can be no doubt that it is within the power of a state to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability. Other circumstances may exist

(a) To the same effect also is the ruling in *Douglass v. Lincoln Co.*, 2 McC., 449. Bonds are not void for want of registration, where registration is not made a condition to their issue and negotiation. *First Nat. Bank of North Bennington v. Town of Arlington*, 16 Blatch., 57. See, also, § 1255.

which will give the holder of them an equitable right to recover from the municipality the money which they represent, but he cannot enforce the payment, or put them on the market as commercial paper. The act now in question is, we think, of this character. It, in effect, provides that no bond issued by counties, cities or incorporated towns shall be valid, that is to say, completely executed, until it has been countersigned or certified in a particular way by the state auditor. For this purpose, after being executed by the corporate authorities, it must be presented to that officer, and he must inquire and determine whether all the requirements of the law authorizing its issue have been observed, and whether all the conditions of the contract in consideration of which it was to be put out have been complied with. To enable him to do this, evidence must be submitted which he is required to file and preserve. If he is satisfied, the registry is made, and the requisite certificate indorsed on the bonds. This being done the execution of the bond is complete, and, under the law, it may then be negotiated, that is to say, put on the market as valid commercial paper. When the certificate is found on the bond the purchaser need not inquire whether what has been certified to is true. As against a *bona fide* holder the public is bound by what its authorized agents have done and stated in the prescribed form.

§ 1252. *Dealers in municipal bonds are charged with notice of the law.*

Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created. When the bonds now in question were put out, the law required that to be valid they must be certified to by the auditor of state. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider in *McGarrahan v. Mining Company*, 96 U. S., 316, the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: "Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires." The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent. For this purpose the law has provided that the instrument must not only be signed and sealed on behalf of the county court of the county, but it must be certified to or countersigned by the auditor of state. Of this law all who deal in the bonds are bound to take notice.

§ 1253. *Antedating will not validate an illegal instrument. A false date is as nugatory as a false signature. (a)*

In order to recover in this case it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding justice and clerk of the court, and were sealed with the seal of the court. This, before the act of March 30, 1872, would have been enough, but after that more

(a) Affirming the ruling in *Anthony v. Jasper County*,* 4 Dill., 136.

was necessary. The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating under such circumstances partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In *Bayley v. Taber*, 5 Mass., 285, it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain day, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that day, although they bore a previous date.

§ 1254. *Bonds are controlled by the law in force when they were issued.*

It matters not that when the bonds were voted the registration law was not in force. Before they were issued it had gone into effect. It did not change in any way the contract with the railroad company. The company was just as much entitled to its bonds when it complied with the conditions under which they were voted after the law as it could have been before. All the legislature attempted to do was to provide what should be a good bond when issued. There was nothing changed but the form of the execution. Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it. This plaintiff is charged with notice of the fact that Merwin was not the presiding justice of the county court until October, 1872, and that he could not have signed the bonds in his official capacity until that time. Had he signed them in March, he could not have bound the township for their payment. This is equivalent to notice that they were not in fact issued before March 30th, and that consequently they were not valid because not certified by the auditor of state.

This case is entirely different from *Town of Weyauwega v. Ayling*, 99 U. S., 112 (§ 1374, *infra*), where we held the town was estopped from proving that the bonds were actually signed by a former clerk after he went out of office; because the clerk in office adopted that signature as his own when he united with the chairman in delivering the bonds to the railroad company, pursuant to the vote of the town. There the bonds were not only complete in form at the time they bore date, but when they were actually issued as genuine by the proper agents, one of whom was the clerk who should have signed them. Here they were not actually complete in form when they were issued, and it was only by a false date inserted by one of the two agents required by law to

unite in their execution, and without the knowledge or consent of the other, who never acted at all, that they were apparently so. They were never in a condition to be issued, and were never in fact issued by the proper authorities. They were in legal effect forged. It follows that the judgment of the circuit court was right, and it is consequently affirmed.

JUSTICES CLIFFORD, SWAYNE and STRONG dissented.

IX. RECOVERY ON INVALID BONDS.

SUMMARY — *Recovery for money had and received*, §§ 1255-1257. — *Valid bonds issued in place of void bonds*, §§ 1258, 1259. — *Estoppel by vote in favor of funding bonds*, § 1260.

§ 1255. The bonds issued in July, 1872, by the city of Louisiana, being invalid for having been antedated to January, 1872, to evade the registration act of Missouri of March, 1872, the holders may recover the money they have paid to the city's agent from whom they purchased, on the common law rule that an action "lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition." It is not material that the bonds involved an obligation to pay interest beyond the limited rate, since the ground of recovery is on the implied obligation, the express obligation being void. It cannot be objected that the act of borrowing money was *ultra vires*, because the act of 1872, which allowed new bonds to be taken in place of old ones outstanding, did not repeal the old power to borrow money. *Louisiana v. Wood*, §§ 1261-1263.

§ 1256. Where a city borrows money and issues bonds without authority of law, and applies the money to legitimate corporate uses, an action for money had and received will lie by a holder of the bonds; an assignee of the bonds may maintain such action. *Gause v. City of Clarksville*, §§ 1264-1268.

§ 1257. And where the consideration for which a bond is issued is void in part and valid in part, the action must be for money had and received. *Ibid.*

§ 1258. Where a valid bond of a city is surrendered, and a renewal bond is issued which is found to be void, the holder may sue on the original bond. *Ibid.*

§ 1259. A city issued certain bonds or notes for which it received money, which was expended for the purposes of the city. Under a new statute, and an ordinance pursuant thereto, the city issued new bonds, with which the old bonds or notes were taken up and canceled. *Held*, that a party receiving the new bonds was entitled to recover on them, whether the old bonds were valid or not. *Little Rock v. National Bank*, § 1260.

§ 1260. A county was authorized, on a vote of the people, to fund such outstanding bonds as were "binding and subsisting legal obligations," "properly authorized by law." *Held*, that, by taking a popular vote and issuing new bonds, it was estopped from denying the validity of the old bonds. *County of Jasper v. Ballou*, §§ 1270, 1271.

[NOTES. — See §§ 1272, 1273.]

LOUISIANA v. WOOD.

(12 Otto, 294-300. 1880.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS. — The city of Louisiana, Missouri, issued bonds in July, 1872, dated January, 1872. In March, 1872, an act was passed requiring all municipal bonds issued thereafter to be registered, and the bonds in question were antedated to evade that law. The bonds in suit were bought in good faith from the agent of the city and value paid for them. There was judgment for the plaintiff.

§ 1261. *A city issuing bonds invalid under existing laws is liable for the money it borrows upon them.*

Opinion by WAITE, C. J.

That the bonds in question are invalid is conceded. Such is the effect of *Anthony v. County of Jasper*, 101 U. S., 693 (§§ 1250-54, *supra*), decided at the last

term. It is equally true that the legal effect of the transactions by which the plaintiff and his assignors got possession of the bonds was a borrowing by the city of the money paid for what was supposed to be a purchase of the bonds. As the broker through whom the business was done was the agent of the city, and acting as such, the case, so far as the city is concerned, is the same as though the money had been paid directly into the city treasury and the bonds given back in exchange. The fact that the purchasers did not know for whom the broker was acting is, for all the purposes of the present inquiry, immaterial. They believed they were buying valid bonds which had been negotiated and were on the market, when in reality they were loaning money to the city, and got no bonds. The city was in the market as a borrower, and received the money in that character, notwithstanding the transaction assumed the form of a sale of its securities. The city, by putting the bonds out with a false date, represented that they were valid without registry. The bonds were bought and the price was paid under the belief, brought about by the conduct of the city, that they had been put out and had become valid commercial securities before the registry law went into effect. It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. The city could lawfully borrow. The objection goes only to the way it was done. As the purchasers were kept in ignorance of the facts which made the bonds invalid, they did not knowingly make themselves parties to any illegal transaction. They bought the bonds in open market, where they had been put by the city in the possession of one clothed with apparent authority to sell. The only party that has done any wrong is the city.

§ 1262. *A city issuing invalid bonds is liable for the money received as money paid by mistake, and upon other grounds. (a)*

In *Moses v. MacFerlan*, 2 Burr., 1005, it is stated as a rule of the common law, that an action "lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition." The present action can be sustained on either of these grounds. The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed, because the bonds were not, in fact, valid obligations of the city. And the money was got through imposition, because the city, with intent to deceive, pretended that the false date the bonds bore was the true one. While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. As we took occasion to say in *Marsh v. Fulton County*, 10 Wall., 676 (§§ 1186-89, *supra*), "the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

§ 1263. *In the sale of invalid bonds there is no contract for interest.*

It is argued, however, that, as the city was only authorized by law to borrow money at a rate of interest not exceeding ten per cent. per annum, the money cannot be recovered back, because a sale of the bonds involved an obligation to pay interest beyond the limited rate, and the borrowing was, therefore, *ultra vires*. There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit,

that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other.

Again, it was contended that, as the money in this case was borrowed to take up bonded indebtedness, the transaction was *ultra vires*, because the effect of the eleventh section of the act of 1872 was to repeal all earlier laws authorizing the borrowing of money for such purposes. We do not so understand that section. The old power to borrow, which the charter gave, was left unimpaired, but under this new provision, registered bonds might be issued in place of old ones if the city and the holders of the old bonds could agree on terms and the people gave their assent. In this way the holders of old bonds might avail themselves of the special tax which the law of 1872 required should be levied to meet the obligation of all registered bonds; but the city was not prevented from borrowing money to pay old bonds if it saw fit to do so, or if it could not agree on the terms of exchange.

The judgment below was right, and it is consequently affirmed.

GAUSE v. CITY OF CLARKSVILLE.

(Circuit Court for Missouri: 1 McCrary, 78-86; 5 Dillon, 165. 1880.)

STATEMENT OF FACTS.— Action on a number of bonds issued by the city of Clarksville. There were numerous special counts and two common counts in the amended petition. Upon demurrer to the original petition all the bonds had been held void on the ground that there had been no express grant of power in the charter of defendant to issue bonds or borrow money. Part of the bonds were given in direct payment of subscriptions to the stock of certain road companies and others in renewal of other bonds given for that purpose. Several of the bonds were given in part for renewal of other subscription bonds and in part for money applied to the general use of the city. The bond in the fourteenth count had been surrendered to the city by the holder in exchange for a new bond, which, however, had not been registered according to the law in force at the time (April 20, 1872). The old bond, however, seemed to have been reissued, and came into the hands of the plaintiff. Other bonds set out in counts 18 to 27 were issued in payment of a subscription to a gravel road company. Connected with these there had been an election, the validity of which was contested on the ground that the voters had not been registered, and because the voters had not been sworn as required by section 5, article II, of the Missouri constitution of 1865. A question was made at the trial as to the jurisdiction of the court, it being alleged that the bonds had been transferred without value to the plaintiff, a citizen of Texas, in order to give the circuit court jurisdiction. No plea to the jurisdiction was filed.

Opinion by TREAT, J.

Most of the legal propositions involved in this case were heretofore decided on the demurrers to some of the counts. 8 Am. Law Reg., 497.

§ 1264. *Where a city sells its void bonds and applies the proceeds to corporation uses, an action will lie to recover the money, and the assignee of the bond may sue for it.*

In the case of *Wood v. The City of Louisiana*, recognized as correct by Judge Dillon in his opinion on said demurrers, it was held that although a

municipality issued bonds which it had no authority to issue, and no recovery could be had on the bonds as such, yet if the money derived therefrom was received for an authorized purpose and applied to that purpose, an action would lie as for money had and received, and that the *bona fide* holder of said bonds could recover as assignee of the original demand. This doctrine receives some support from the views expressed in the case of *Little Rock v. National Bank*, 98 U. S., 308 (§ 1269, *infra*), and *Shirk v. Pulaski County*, 4 Dill., 209. Accepting the doctrines thus stated, it was for the plaintiff to prove what amount the city actually received for wharf and for street improvement bonds, respectively. The evidence shows that these bonds sold at par, and that the proceeds thereof were paid into the city treasury, and expended for the specific purposes designated. There were ordinances of the city authorizing said improvements and making the needed appropriations therefor, all of which were lawful, and the money raised therefor by the sale of said bonds faithfully applied. Hence, under the rulings heretofore made in this case, the plaintiff is entitled to recover the amounts so actually loaned, with unpaid interest due from date of demand, at the rate of six per cent. The city bought a cemetery lot, to pay for which it borrowed \$1,500, and issued a bond for \$1,650. As there was no power to issue a bond therefor, the recovery can be only for \$1,500, with unpaid interest, at the rate of six per cent. The foregoing items cover all the counts, from the first to the eleventh, inclusive, on which, as held, there can be no recovery; but that the plaintiff would be remitted to his count for money had and received.

§ 1265. *Where a bond is made for two considerations, one valid and one invalid, the bond is void, and the holder must sue for the valid consideration in an action for money had and received.*

The demands embraced in counts from 12 to 17, inclusive, are on bonds issued in payment for subscription to gravel roads, held by Judge Dillon to be a lawful exercise of municipal authority, from which view I dissented. As his ruling must prevail, the only question open under this head is as to two of said bonds, which the evidence shows were issued on renewal, not for part payment of said subscription alone, but for an additional sum also, then borrowed for general uses of the city. It has been contended that said bonds, though invalid, *pro tanto*, as to the amount in excess of what pertained to said subscription, should be held valid as to the amount included therein for which the city had authority to issue negotiable securities. If this were so, a suit on a specialty would necessarily require an examination into the various items of the consideration therefor, and thus, instead of proceeding as on a specialty, with the legal presumption arising therefrom, cause the single demand under one general head to be split into an indefinite number of demands under various heads.

§ 1266. — *when a recital in the face of a bond estops the city.*

As to those two bonds of this last named series, therefore, the recovery must be had under the count for money had and received; while on the other bonds the recovery will be had as on specialties, according to their tenor. The counts from 18 to 27, inclusive, are also on subscription bonds. To these bonds it is objected that the required assent of the voters was not obtained, because, though numerically the needed vote was given, yet the voters were not registered, nor did they take the oath prescribed by the state constitution of 1865. It was conceded, but, if not, such is the fact, that the registration clause alluded to was not then in force. No doubt the prerequisite of the oath for qualification to vote was then in operation. Whether such oath was duly administered

or not to each voter is doubtful, in the light of the testimony; and if not administered to all, how many voters failed to take it, is still more uncertain. It seems that the vote was nearly unanimous in favor of the proposition; so that if the inquiry were to extend to each vote, it might appear that the required number of qualified voters did assent to the subscription. The ascertainment of the precise facts in this regard is considered unimportant, inasmuch as the ordinance under which these bonds were issued recites that the needed election was duly had, etc. If a recital on the face of the bonds estops the municipality, as held in all similar cases on municipal bonds, the same rule should obtain when the recital is in the city ordinance; for the reason of the rule is the same in both instances.

§ 1267. *A valid bond renewed by a void bond is still in force.*

Two of said bonds are dated after the registry act of the state was in force, and therefore are not valid, as bonds, on their face. An effort was made to show, by the evidence, that they were delivered before, and post-dated; but the court finds otherwise. Hence, the recovery on those two bonds must be as for money had and received. As to the fourteenth count, the facts are, substantially, that the original bond was lawfully issued, and that the holder of said bond agreed to surrender the same and accept a renewal bond therefor. Said original bond was returned to the city, and what purported to be a renewal bond was issued in lieu thereof, but the latter bond was void, because the city failed to comply with the requirements of the then existing law. Hence, the original bond, being unsatisfied, remains a valid bond, on which a right of action can be maintained, such original bond being produced by plaintiff as the holder thereof.

§ 1268. *Objections to the jurisdiction of the court must be presented by plea in abatement.*

There is a grave question of jurisdiction presented, relating to the plaintiff's interest in this suit. It seems that the bonds sued on, and the rights resulting from the assignment thereof, were transferred to the plaintiff, a citizen of Texas, for the purpose of having him sue thereon in a United States court—evidence concerning which was received, subject to the ruling of the court as to its admissibility under the issues. By the practice act of Missouri, as uniformly ruled, the holder of negotiable paper, to whom the same is transferred merely for the purpose of collection, can maintain an action thereon in his own name. But it is urged that if such transfer, or the assignment of a demand, negotiable or non-negotiable, is for the purpose of having the same adjudicated in a United States court, there is a fraud on the jurisdiction of the latter court. Such a question should have been presented by a plea in abatement. This case furnishes an apt illustration. The time of counsel and court has been occupied for a long period on the merits of this controversy, when, if a plea in abatement had been interposed, a few hours might have sufficed for its determination. If the court, through issues made by pleas in abatement or in bar, had ascertained that no jurisdiction exists, its judgment would be of dismissal without passing on the merits. There are, however, no *issues* in this case under which evidence of the kind, to defeat the jurisdiction, can be received. There is no time at command to analyze the varied learning on the subject, and the decided cases to which the learned counsel have referred. A few are referred to in a note to this opinion. (a) If practicable, a special finding would

(a) Conard v. Atlantic Ins. Co., 1 Pet., 450; De Wolf v. Rabaud, 1 Pet., 476; Sims v. Hundley, 6 How., 1; Bailey v. Dozier, 6 How., 23; Smith v. Kernachen, 7 How., 198; Sheppard v. Graves, 14 How., 505; Jones v. League, 18 How., 78; Scott v. Sandford, 19 How., 393; Spencer v. Lapsley, 20 How., 264; Thompson v. Railroad Co., 6 Wall., 124.

have been made as to each count; but this opinion will clearly show the conclusions reached and the grounds on which the decision rests.

LITTLE ROCK v. NATIONAL BANK.

(8 Otto, 306-315. 1878.)

ERROR to U. S. Circuit Court, Eastern District of Arkansas.

STATEMENT OF FACTS.—The city of Little Rock, Arkansas, issued a large amount of notes, or bonds, of various denominations, which circulated as a local currency, and, having been authorized by statute to fund its indebtedness, it took up that class of paper by issuing regular bonds, upon some of which this suit was brought. There was also included in the suit a balance for certain currency bonds which had not been replaced by regular bonds, but were credited to the bank by the city. The city pleaded that the original currency bonds were issued in violation of law. There was judgment for the plaintiff.

Opinion by MR. JUSTICE HUNT.

We do not perceive that there is any difference between the right to recover for the amount issued to the bank in bonds, and for that credited on the books of the city. If the debt was legally created, the holder had the right to recover the amount of the bills held by him. If it derived a new validity from the surrender of an old debt of a disputed character, it is to be observed that all of the debt was equally given up. New bonds were issued for a portion, but all of the debt was surrendered. It was the surrender of what was claimed to be a legal debt, and the creating a new obligation thereby, that is said to create the liability. If a city has power to bind itself by substituting a new liability for a canceled one, it may do so by any instrument of acknowledgment which affords sufficient evidence of a debt. We are of opinion that the two classes of obligations are governed by the same rule.

The statutes of Arkansas upon the subject of notes issued for the purposes of currency are complicated and hard to be understood. On the 25th of November, 1837, was passed the first act to which we are referred, entitled "An act to prevent the circulation of private notes in the state," prohibiting the circulation of all money or bank notes by persons unauthorized by law, and of notes of a less denomination than \$5.

On the 14th of February, 1838, was passed the act entitled "An act to compel the payment of change tickets," which provided that the holder of any change ticket, bill or small note should have the right to sue the issuer or indorser thereof before any justice of the peace, and recover the amount held by him, and providing that the act first above mentioned should take effect from the 1st day of March, 1838.

The effect of the two statutes would appear to be that the general circulation of private notes was prohibited by law, but the holder of notes thus illegally circulated was authorized to recover the amount from the party issuing or indorsing the same, and to have execution without appeal or delay.

On the 8th of January, 1855, was passed "An act to restrain the circulation of change tickets," prohibiting the circulation by any person or persons of notes or bills of less denomination than \$5, to pass as currency, whether first issued within this state or not, punishable by fine and imprisonment.

On the 8th of February, 1859, was passed "An act to prevent the people from being defrauded with bank paper," and on the 18th of November, 1861, "An act to repeal all state laws that prohibit the circulation of bank bills of

any denomination." The last act is in these words: "All acts or parts of acts prohibiting the circulation of bank bills of any denomination or amount, and fixing a penalty for such circulation, be, and the same are hereby, repealed; but nothing herein contained shall be construed so as to authorize the issuance of shin-plasters, change notes or other irresponsible paper, by individuals, corporations, or others."

"Shin-plasters and change notes" we may assume to be paper money of a less denomination than one dollar, intended to take the place of small pieces of coin. But what is "other irresponsible paper?" It would seem that shin-plasters and change notes are irresponsible paper, as not only are they expressly required not to exist, but they are condemned in the company of "other irresponsible paper." Nor can we treat this subject as paper or notes issued by those who are not solvent in their pecuniary affairs, or not able to respond to the consequences of their actions. There is no standard known to the law to determine where responsibility or irresponsibility exists. We apprehend this expression may have been intended to apply to fractional paper, which in its form, character and nature was considered as a debased and unhealthy circulating medium. By an act approved December 14, 1875, it was enacted "that all city warrants, scrip acceptances or money shall be receivable for any city purposes except for interest tax, and for all debts due the municipal corporation by whom the same were issued, without regard to the time or date of issuance of such warrant, scrip acceptance, or money, or the purpose for which they were issued."

§ 1269. *Bonds issued by a city in pursuance of authority granted by statute, which replace obligations of doubtful validity, are themselves valid and bind the city. (a)*

Upon this state of the law the judge at the circuit was of the opinion that the original issue of its notes by the city of Little Rock was illegal. It is not necessary that we concur in this view, or that we should dissent from it. We have referred to the statutes that the actual position of the parties towards each other might be understood, and the point on which the decision in favor of the bank was made be appreciated. There was evidence that the bonds sued on, and the ledger accounts sued on, were given and allowed on the immediate consideration of the surrender of bonds of the form, character and material first issued by the city. The court charged as follows, viz.:

"That the bonds in suit issued by the defendant in lieu of said bonds on bank-note paper — the last-named bonds having been originally issued under the circumstances above stated for valid debts against the city to other creditors of the city than the plaintiff, and the plaintiff not having been connected with their issue — constitute a valid ground of action against the city, and the city is liable thereon to the plaintiff, although the said city bonds on bank-note paper were of such an appearance and of such a form as to be especially adapted to constitute a circulating medium, and were, in fact, used in and about the city as a local circulating medium in lieu of money.

"There is also a claim against the city for the amount of certain city bonds on bank-note paper surrendered by the plaintiff to the city at its request, for which the city issued no new bonds, but placed the amount of the bonds sur-

(a) Affirming the ruling in the lower court. *Merchants' National Bank v. City of Little Rock*, 5 Dill., 300. There was also a claim against the city for the amount of certain city bonds, on bank-note paper, surrendered by the plaintiff to the city at its request, for which the city issued no new bonds, but placed the amount of the bonds surrendered on the ledger of the city. It was held that the same principles of law applied to this claim as to the claim on the new bonds.

rendered by the plaintiff and destroyed by the city to the credit of the plaintiff on the ledger of the city. The same principles of law apply to this claim as to the claim on the new bonds."

It can scarcely be doubted that whoever is capable of entering into an ordinary contract to obtain or receive the means with which to build houses or wharves, or the like, may, as a general rule, bind himself by an admission of his obligation. The capacity to make contracts is at the basis of the liability. The first liability of the city was disputed by it. It had gone beyond its power, as it said, in making a debt in the form of bank notes. If it had not denied its power, judgment and an execution might have gone against it, and the creditor would have obtained his money. This privilege of non-resistance every person retains, and continues to retain. He can reconsider at any time and confess, and admit what the moment before he denied. In 1874 the city of Little Rock did reconsider. It said, we will purge the transaction of its illegality. We had the authority to accept from you in satisfaction of amounts received by us for legitimate purposes the sums in question. We did so receive and expend for legitimate purposes. We erred in making the payment to you in an objectionable form. We now pay our just and lawful debt by canceling the bank notes issued by us, and delivering to you obligations in the form of bonds, to which form there is no legal objection. If the city had borrowed \$1,000 of the bank upon its note at a usurious interest, but the bank had subsequently canceled the illegal note, had refunded the excessive interest, and received a new note for a lawful amount, the new note would be valid and collectible. *Kent v. Walton*, 7 Wend. (N. Y.,) 256. So where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract. *Washburn v. Franklin*, 35 Barb., 599; S. C., 13 Abb. Pr., 140. If the act of December 14, 1875, *supra*, repeal the restraining laws absolutely as to cities, which we do not decide, the notes first issued by the city were valid from that time. We think the charge quoted was right. *Hitchcock v. Galveston*, 96 U. S., 341; *The Mayor v. Ray*, 19 Wall., 468; *Police Jury v. Britton*, 15 id., 566; *Mullarky v. Cedar Falls*, 19 Ia., 24; *Sykes v. Laffery*, 27 Ark., 407; *Wright v. Hughes*, 13 Ind., 109, are authorities to the point. See, also, the numerous cases cited in *Dillon, Munic. Corp.*, sec. 407, note. *Judgment affirmed.*

COUNTY OF JASPER v. BALLOU.

(13 Otto, 745-753. 1880.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

Opinion by WATTE, C. J.

STATEMENT OF FACTS.—The constitution of Illinois, which went into effect April 1, 1848, contained the following:

"ART. VII, SEC. 6. The general assembly shall provide, by a general law, for township organization, under which any county may organize whenever a majority of the voters of such county, at any general election, shall so determine, and whenever any county shall adopt a township organization, so much of this constitution as provides for the management of the fiscal concerns of the said county by the county court may be dispensed with, and the affairs of the said county may be transacted in such manner as the general assembly may provide."

Accordingly, in February, 1849, a law was passed authorizing the township organization of counties, and directing that, when such an organization was

adopted, the affairs of the county should be conducted by a board of supervisors. Counties not under township organization were managed by county courts. The Grayville & Mattoon Railroad Company was incorporated February 6, 1857, and on the 1st of March, 1867, its charter was amended so as to allow counties to subscribe to the stock and issue bonds in payment, if a majority of the voters of the county, at an election called by the *county court*, should vote in favor of such a subscription. The county of Jasper, through which the road of the company ran, was under township organization, and its *board of supervisors* called upon the voters of the county to vote at an election to be held on the 7th of April, 1868, whether a subscription of \$100,000 should be made to the stock of the company by the county, payable in bonds of the county, to be issued as the work progressed, one-sixth of which were to fall due annually from the time they were put out. The election was held, and resulted in a majority in favor of the subscription. At a meeting of the board of supervisors, January 23, 1863, the chairman was authorized to subscribe the stock as soon as it might legally be done. An act of the general assembly of the state, approved March 27, 1869 (Acts of 1869, vol. iii, p. 360), relating to this company, and to votes which had been taken for subscriptions to its stock, contained the following as section 3: "That all elections held for the purpose of voting said stock, and the manner in which said stock was voted, are hereby legalized in all respects, and the stock to be subscribed in the manner the same was voted."

On the authority of these several acts and this election the board of supervisors issued one hundred bonds of \$1,000 each, in the following form:

"Know all men by these presents, that the county of Jasper, state of Illinois, acknowledges itself to be indebted in the sum of one thousand dollars lawful money of the United States of America, which said sum of money the said county promises to pay the Grayville & Mattoon Railroad Company, or bearer, at the office of the county treasurer of said county, on the first day of —, in the year of our Lord one thousand eight hundred and —, with interest at the rate of ten per centum per annum, which interest shall be payable on the first day of each year, at the office of the treasurer of said county, on the presentation and delivery of the coupons severally hereto annexed.

"This bond is issued under and by virtue of a law of the state of Illinois, entitled an act to incorporate the Grayville & Mattoon Railroad Company, passed February 6, 1857, and amendatory acts thereto in force March 1, 1867, and March 27, 1869, in compliance with a vote of the electors of said county at an election held April 7, 1868, in accordance with said acts.

"This bond is one of a series limited to one hundred thousand dollars, one-sixth of the amount made payable annually, at ten per centum per annum, issued for stock in the Grayville & Mattoon Railroad Company by the county of Jasper, and placed in trust for delivery only by the trustee herein named, to wit, —, of the county of Jasper, which shall not become obligatory unless the certificate indorsed hereon be signed by said trustee.

"The faith of the county of Jasper is hereby pledged for the payment of the principal sum and interest aforesaid.

"In testimony whereof, the county of Jasper, by its chairman of the board of supervisors of said county, and the clerk of the county court as *ex-officio* clerk of said board of supervisors, have subscribed this bond this — day of —, A. D. 187—.

"County Clerk.

"Chairman of the Board of Supervisors.

"I hereby certify that this bond is one of a series of bonds held by me as trustee of the county of Jasper, to be delivered to the Grayville & Mattoon Railroad Company, as per order of the board as stated therein.

"Trustee."

The bonds fell due, some in 1877 and others in each year thereafter, until and including the year 1883. It nowhere appears when the bonds were put in the hands of the trustee, but none of them bore date prior to October 19, 1876. At all the times when these several things were done there was in the county of Jasper a county court as well as a board of supervisors. On the 14th of April, 1875, the general assembly passed an act, the material part of which is as follows:

"SEC. 1. That in all cases where any county, city, town, township, school district or other municipal corporation have issued bonds or other evidences of indebtedness for money on account of any subscription to the capital stock of any railroad company, or on account of or in aid of any public buildings or other public improvement, or for any other purposes which are now binding or subsisting legal obligations against any county, city, town, township, school district or other municipal corporations, and remain outstanding, and which are properly authorized by law, the proper authorities of any such county, city, town, township, school district or other municipal corporation may upon the surrender of any such bonds or other evidences of indebtedness, or any number thereof, issue in place or in lieu thereof to the holders or owners of the same new bonds, etc. . . . And such new bonds or other evidences of indebtedness so issued shall show on their face that they are issued under this act: *Provided*, that the issue of such new bonds in lieu of such indebtedness shall first be authorized by a vote of a majority of the legal voters of such county, city, town, township, school district or other municipal corporation, voting either at some annual or special election of such municipal corporation: *And provided further*, that such bonds or other evidences of indebtedness shall not be issued so as to increase the aggregate indebtedness of such municipal corporation beyond five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes prior to the issuing of such bonds or other evidences of indebtedness." Acts of 1875, p. 68.

Under the authority of this act the board of supervisors called an election of the voters of the county, to be held on the 3d day of April, 1877, for the purpose of voting for or against funding the "bonds issued to the Grayville & Mattoon Railroad Company for the sum of \$100,000, drawing ten per cent. interest; said hundred bonds to be due in twenty years, and payable at the option of the county in ten years; said bonds to draw interest not to exceed seven per cent. per annum, said interest to be payable semi-annually at the treasurer's office in Jasper county." At this election a majority of the voters were found to be in favor of the measure. Afterwards funding bonds were issued in exchange for old bonds in the following form:

"For value received, the county of Jasper, in the state of Illinois, promises to pay the bearer one thousand dollars on the first day of May, A. D. 1897, with interest from date, payable on the first days of May and November in each year (on surrender of the annexed coupons), at the rate of seven per cent. per annum, until the principal sum shall be paid.

"Principal and interest payable at the county treasurer's office, in the town of Newton, in said county. The county of Jasper reserves the right to pay this bond on or at any time after May 1, 1887, upon giving at said place of

payment, and also by an advertisement in some New York city daily newspaper, at least six (6) months' notice of such intention, and interest shall cease from the day on which this bond is by such notice made payable.

"This bond is one of a series of bonds numbered from 1 to 100, inclusive, amounting in all to one hundred thousand dollars, issued by said county of Jasper, for the purpose of funding legally incurred indebtedness of the county, and under and in accordance with an act of the general assembly of the state of Illinois, approved April 14, 1875, entitled 'An act to amend an act entitled "An act to enable counties, cities, townships, school districts and other municipal corporations to take up and cancel outstanding bonds and other evidences of indebtedness, and fund the same,"' approved and in force March 26, 1872, all provisions of which act have been duly complied with.

"In testimony whereof, we, the undersigned, officers of Jasper county, being duly authorized to execute this obligation on its behalf, have hereunto set our signatures and affixed the county seal this — day of May, A. D. 1877.

[SEAL]

"County Clerk.

"Chairman."

After these bonds were put out the indebtedness of the county exceeded somewhat five per cent. of the value of the taxable property as ascertained by the last preceding assessment. The plaintiff below, and defendant in error here, being the owner of coupons cut from some of the funding bonds falling due in May and November, 1878 and 1879, which were unpaid, brought this suit to recover them. He was the holder and in possession of a part or the whole of the original bonds when the funding took place, and took the funding bonds in exchange for such of the original bonds as he then held. Upon this state of facts the court below gave judgment against the county. The case is now here by writ of error, and the single question is presented, whether the county made out a valid defense to the coupons sued on.

§ 1270. *After a ratification by popular vote and a refunding of old bonds, a county is estopped from denying the validity of the first issue. (a)*

In our opinion the county is estopped from setting up the alleged invalidity of the original bonds as a defense in this action. It is true, the funding law only authorized the funding of "binding and subsisting legal obligations," "properly authorized by law," but no new bonds could be issued in lieu of old ones except on a vote of the people. All outstanding bonds were not to be taken up in this way, but only such as were recognized by the people, acting together in their political capacity at an election for that purpose, as binding and subsisting legal obligations. After such a recognition the corporate authorities could make the exchanges, but not before. The law under which the original bonds were put out was sufficient. No complaint is made of any illegality in its provisions. The only objection is that there was a mistake in carrying it into execution. The election was called by the wrong corporate agency. The county court should have brought the people together and not the board of supervisors. This, if there had been nothing more, would, under the rulings of the highest court of the state, made long before the vote was taken, render the bonds invalid. *Supervisors of Schuyler Co. v. People*, 25 Ill., 181. It was for this reason, undoubtedly, that the board of supervisors, at their meeting after the election, authorized the subscription to be made and the bonds delivered in payment *as soon as it might lawfully be done*, and that the

(a) If a county is authorized to issue bonds to pay for improvements made by it, it may take up previously issued but invalid bonds issued by it for the same work and replace them with the new bonds. *Ritchie v. Franklin County*, 22 Wall., 67 (§§ 859-860).

act to legalize the election was passed in 1869. We have not had our attention called to any case in which the courts of the state had decided, before this funding took place, that, under the constitution of 1848, an act which simply legalized an invalid or irregular election for a subscription, and left the corporate authorities free to make the subscription at their option, would not cure any defect there may have been in the election, and empower the proper authorities to bind the county by anything that might be done under it and within its scope. It had been decided more than once that the legislature could not *compel* a municipal corporation to incur a debt without the consent of the corporate authorities. *Harward v. St. Clair Drainage Co.*, 51 Ill., 130; *Hessler v. Drainage Commissioners*, 53 id., 105; *Marshall v. Silliman*, 61 id., 218. But under the constitution of 1848 a vote of the people was not essential to the validity of a municipal subscription to the stock of a railroad company. The legislature could authorize the corporate authorities, whoever they might be, to act in such a matter without the express direction of the people. What it could not do was to make it mandatory on them to subscribe without a vote. This we understand to have been the extent of the decisions, and in this way it was that, if with the legalization of the vote there was coupled a command on the corporate authorities to subscribe, or a confirmation of a subscription already made, the curative statutes were held to be inoperative. It had never been held that language, such as was employed in this curative act, was compulsory, or that it did more than legalize the election, leaving it for the board of supervisors to determine whether they would subscribe or not. That was an open question in the state courts until the case of *Gaddis v. Richland County*, 92 id., 119, not decided until June, 1879, two years and more after the bonds now in question were out.

§ 1271. *Where the people of a county by popular election, held according to law, authorize their officers to treat outstanding liabilities as valid, they cannot afterwards contest their validity.*

When, therefore, the people were called on to vote whether the old bonds should be funded, the facts they had to consider were these: A valid law authorizing the subscription and an issue of the bonds had been passed. The people, at an election which had been irregularly called, had voted to make the subscription and issue bonds bearing ten per cent. interest, and all payable within six years. An act had been passed to legalize the election, and under it the subscription which had been voted was made, and bonds such as were contemplated had been issued and were then outstanding in the hands of various parties. Whether these bonds were valid was, so far as any direct decisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the county, in a manner authorized by law, whether they would recognize these bonds as "binding and subsisting legal obligations," and issue in lieu of them other bonds having twenty years to run and bearing seven per cent. interest instead of ten; and they by their vote said they would. There is no complaint of any illegality in this election, or of fraud or imposition. So far as the record shows, the proposition to fund went from the county authorities to the bondholders, and not from the bondholders to the county. The facts were as well known to one party as the other. If the people intended to rely on their defenses to the old bonds, then was the time for them to speak, and by their vote say they would not recognize them as binding obligations. By voting the other way they, in effect, accepted them as legal and subsisting for the purposes of the proposed

extension of time at reduced interest, and said to the holders, if their proposition was accepted, no question of illegality would be raised. Their offer having been accepted, they are now estopped from insisting upon an irregularity which they have by their votes voluntarily waived, with a full knowledge of the facts. The case is clearly, as we think, within the principle acted on by the supreme court of the state in *President and Trustees of Town of Keithsburg v. Frick*, 84 Ill., 405. As was very properly said below by the learned circuit judge, "there must be an end of these contests and defenses some time or other." There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as "properly authorized by law" for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended.

This disposes of all questions as to the excessive issue of bonds. For all the purposes of this case the original bonds must be taken as binding. The issue of the funding bonds did not increase the aggregate of the indebtedness of the corporation, but only changed its form.

Judgment affirmed.

§ 1272. In general.—Bonds issued by a town to pay bounties for the enlistment of soldiers, and to aid the town in supplying its quota of volunteers under a call made by the president, are left with a provost marshal, the dates and amounts being left blank, to be filled out and delivered to one B., a volunteer. B., being absent on leave, never returned. The bonds are afterwards filled up in B.'s name without his authority or the authority of the officers of the town. In this condition they are found in the provost marshal's office, and forfeited to the United States on the ground of B.'s desertion, and sold to the highest bidder. The purchaser, failing to collect from the town, claims his purchase money from the United States, and is held entitled to have it. *Mayer v. United States*,* 5 Ct. Cl., 312.

§ 1273. A deed of trust given to secure the payment of void municipal bonds is invalid. But the persons giving the deed of trust have a right to reclaim the property; and where the bonds were delivered to them, and assigned by them, the holders of the bonds succeed to their rights, and have a right to call on the city to which the deed of trust was given to account for the trust property. *Parkersburg v. Brown*,* 16 Otto, 487.

X. NEGOTIABILITY; BONA FIDE HOLDER.

[As to negotiability of Bills and Notes, and the rights of a bona fide holder, see *BILLS AND NOTES*, III, IV. See, also, §§ 974, 976, 982, 1019, 1030, 1033, 1043, 1045, 1053, 1057, 1061, 1081, 1172, 1177, 1182, 1193, 1200, 1222, 1234, 1235, 1236, 1239.]

SUMMARY—*General principles*, §§ 1274, 1275, 1288.—*Doctrine of notice*, §§ 1276, 1305, 1307.—*Effect of possession*, § 1277.—*Suspicious circumstances*, § 1278.—*Purchaser for value*, § 1279.—*Proof of good faith*, § 1280.—*Negotiability*, §§ 1281, 1286, 1287, 1293, 1311, 1312.—*Fraud and irregularities*, §§ 1282, 1283, 1285, 1288, 1299, 1320.—*Purchaser from bona fide holder*, § 1284.—*Overdue coupons*, §§ 1289-1291.—*Stolen bonds*, §§ 1292-1294.—*Irregularities will not invalidate*, §§ 1295, 1315, 1320.—*Change in route of road*, § 1297.—*Lis pendens*, §§ 1298, 1299, 1303, 1337-1339.—*Effect of recitals*, §§ 1298, 1304, 1305, 1314, 1316-1320, 1324-1332, 1333a-1335.—*Amendment of charter*, § 1300.—*Questions as to organization of company*, § 1301.—*Effect of judgment*, § 1302.—*Purchaser not bound to make inquiry*, §§ 1305, 1307, 1314, 1316-1320.—*Bonds not under seal*, § 1306.—*Sale of bonds below par*, § 1308.—*Conclusiveness of acts of officers*, §§ 1309, 1310, 1318, 1331-1333, 1335.—*Effect of power in corporation to issue bonds*, §§ 1313, 1315, 1321.—*Excess of authority*, §§ 1315, 1327, 1333a.—*Reference to wrong statute; ratification*, § 1321.—*Purchaser must take notice of authority*, §§ 1322, 1323.—*Burden on holder*, § 1336.

§ 1274. The rule of the common law, that, except by sale in market overt, no one can give a better title than he had himself, does not apply to commercial securities, transferable by delivery. *Murray v. Lardner*, §§ 1340-1342.

§ 1275. A party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. Suspicion as to a defect of title, or even gross negligence, will not defeat his title. *Hotchkiss v. National Banks*, §§ 1843-1845.

§ 1276. Where the holder of negotiable bonds is held to have knowledge of facts sufficient to put him on inquiry he is only charged with notice of such facts as the inquiry would have led to. *Railway Co. v. Sprague*, §§ 1848-1852.

§ 1277. Possession of negotiable bonds is *prima facie* evidence of ownership in the holder. *Ibid.*

§ 1278. The fact that the seller of bonds is an officer of the company issuing the same does not of itself throw suspicion on his title. *Ibid.*

§ 1279. Where the purchaser of bonds gives his negotiable notes for the purchase money, payable at different times, he is a purchaser for value. *Orleans v. Platt*, §§ 1863-1866.

§ 1280. In an action on bonds issued by a county in aid of a railroad, the plaintiff may offer evidence in addition to the presumption in his favor that he is a *bona fide* holder. *County of Macon v. Shores*, §§ 1889-1894.

§ 1281. There is nothing contrary to good morals or public policy in making a bond negotiable; and where bonds are issued by corporations with negotiable qualities, they are treated by the courts as negotiable instruments. *Mercer County v. Hacket*, §§ 1409-1412.

§ 1282. In an action on county bonds by a *bona fide* holder, evidence of fraud or irregularities in the issue of the bonds and in their delivery is properly rejected. *County of Macon v. Shores*, §§ 1889-1894.

§ 1283. Where fraud in the inception of the contract is not shown, subsequent purchasers of bonds and coupons are presumed to be *bona fide* holders. *Commissioners of Douglas County v. Bolles*, §§ 1435-1438.

§ 1284. The purchaser from a *bona fide* holder is a *bona fide* holder, and may stand upon the rights of his vendor. *Ibid.*

§ 1285. Where there is fraud in the origin of negotiable paper, it devolves on a *bona fide* holder before maturity to prove that he paid value for it; and the statement that the party became a holder by transfer before maturity does not imply that he was a purchaser for value. *Smith v. Sac County*, §§ 1465, 1466.

§ 1286. Municipal bonds and coupons are negotiable paper, and in the hands of *bona fide* holders are not subject to equities existing between the original parties. *Moran v. Commissioners of Miami County*, §§ 1439-1442.

§ 1287. Municipal bonds are placed on the footing of negotiable paper. They are transferable by delivery, and, when issued by competent authority, pass into the hands of a *bona fide* purchaser for value before maturity freed from any infirmity in their origin. *Cromwell v. County of Sac*, §§ 1467-1471.

§ 1288. A purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. *Ibid.*

§ 1289. The presence of past-due and unpaid coupons is sufficient, under certain circumstances, to put a purchaser on inquiry. *Parsons v. Jackson*, §§ 1846, 1847.

§ 1290. The mere presence upon bonds of unpaid coupons does not make them dishonored paper, when there has been no demand of the interest due, as required by the face of the bond, in order to render the principal due. *Railway Co. v. Sprague*, §§ 1848-1852.

§ 1291. The fact that municipal bonds have overdue and unpaid coupons attached at the time of their purchase does not render them dishonored paper so as to subject them, in the hands of an innocent holder, to defenses good against the original holder. *Cromwell v. County of Sac*, §§ 1467-1471.

§ 1292. In detinue by the owner of railroad bonds, payable to bearer, against a broker who received them of a thief, a charge that the burden of proving good faith is on the defendant, and that reasonable ground of suspicion of defect of title will destroy defendant's right as a *bona fide* holder, is bad. *Murray v. Lardner*, §§ 1840-1842.

§ 1293. The negotiability of a railroad bond, containing an absolute promise to pay, is not affected by an independent agreement, contained therein, on the part of the makers, that "scrip preferred stock" attached to the bond would be made full-paid stock on certain conditions mentioned. The absence of these certificates of "scrip preferred stock," at the time the bond was received by purchasers from one who stole it, will not affect their title as *bona fide* holders; since suspicion that there is a defect of title in the holder, or knowledge of circumstances which might excite such suspicion, or even gross negligence at the time, will not defeat the title of purchasers. *Hotchkiss v. National Banks*, §§ 1843-1845.

§ 1294. A. purchases railroad bonds which had never been delivered, but had been stolen while still in the possession of the company. He bought them for about fifteen cents on the

dollar, with several unpaid interest coupons attached, but without notice of the theft from the company. Each bond was an obligation to pay £225, or \$1,000, depending on whether it should be made payable in London or the United States. Each one declared on its face that the president of the company should by his indorsement fix the place of payment, and a printed form, with the place of payment left blank, was placed on the back. *Held*, that the president not having fixed the place of payment by indorsement, the amount was uncertain, and therefore the bonds were not negotiable; also, that the purchaser was in possession of sufficient facts to affect him with notice and was not a *bona fide* holder. *Parsons v. Jackson*, §§ 1346, 1347.

§ 1295. The fact that the organization of the railroad company was not complete at the time the election to vote the aid was held will not invalidate the bonds in the hands of an innocent holder. *County of Daviess v. Huidekoper*, §§ 1371-1373.

§ 1296. In the issuing of bonds by a town, an appropriate form was lithographed and printed, with blanks left for the signatures of the chairman and clerk. The signatures to the coupons were lithographed, but before the bonds were signed the clerk went out of office and a new clerk was appointed. To save the expense of a new lithograph, however, the old clerk signed the bonds, and they passed into the hands of innocent holders. *Held*, that the town was estopped to deny the validity of the bonds. *Town of Weyauwega v. Ayling*, § 1374.

§ 1297. An act in New Jersey empowered any township, town, or city, "along the routes of the Montclair Railway Company or at the termini thereof," to issue its bonds and exchange them for the bonds of said railroad company to aid in its construction. The circuit judge of the county, upon a required petition from citizens, was to appoint commissioners to carry into effect the provisions of the act. These commissioners were not to issue bonds, except upon the written consent of two-thirds of the owners of two-thirds of the real estate of the township, town or city. The power of the commissioners was hedged about with many limitations and safeguards, but their discretion as to the circumstances and time of the sale of the bonds was left unfettered and subject to no review. One terminus of the proposed road was on the boundary of Pompton township, and, after all necessary acts previous to the issue of bonds had been performed by this township, the charter of the road was so amended that the road ran through this township instead of to it. The bonds were issued and sold and the new route completed. The bonds were held valid notwithstanding the change in the route. (*FIELD and BRADLEY, JJ., dissented.*) *Pompton v. Cooper Union*, §§ 1375, 1376.

§ 1298. In an action on municipal bonds in aid of railroads, where it is pleaded in defense that the condition precedent to their issue has not been fulfilled, that the city refused to issue the bonds on that account, but was compelled by *mandamus* to issue them, which judgment was reversed on appeal and the company ordered to deliver up the bonds, and that the company notwithstanding sold the bonds, and the plaintiff had notice of these proceedings, it is held that the demurrer to the declaration admits that the plea is untrue, and that the plaintiff is a *bona fide* holder; it is further held that the plaintiff, being protected by recitals that the bonds were issued in pursuance of the requirements of law, is entitled to recover. *Lexington v. Butler*, §§ 1377-1381.

§ 1299. Where one purchases county bonds issued to a railroad company, for value, before maturity and without knowledge that the county claimed that the bonds had been delivered to the company relying upon fraudulent concealments and representations, his assignee may maintain his action on the bonds, although he knew that the county relied on the fraud as a defense to the bonds, and that an action was pending to contest their validity. *Commissioners v. Clark*, §§ 1382-1388.

§ 1300. It is no defense to an action on county bonds, issued to a railroad company to aid in the construction of its road, that, after the vote was had and before the bonds were issued or the stock subscribed by the county, the company had its charter amended so as to include additional length of road, without the knowledge of the county, the bonds having been purchased in good faith for value and before maturity. *Ibid.*

§ 1301. In an action on county bonds, issued in aid of a railroad, evidence is not admissible to prove that the company did not, as required by statute, organize and accept its charter within one year from the time of granting it, or that the making and building of the road was a wild and visionary enterprise. *County of Macon v. Shores*, §§ 1389-1394.

§ 1302. A judgment for plaintiff in a suit on interest coupons, where the recovery is had on the fact that the plaintiff is a *bona fide* holder, is not conclusive of the *bona fides* of the same plaintiff in an action on other coupons belonging to the same class of bonds. *Stewart v. Town of Lansing*, § 1395-1397.

§ 1303. The town of Lansing had authority to issue bonds in aid of a railroad, upon the judgment rendered by the county judge that the petition of the tax-payers for that purpose was sufficient. Pending a *certiorari* to review the judgment of the county judge and the

action of the commissioners appointed by him in issuing the bonds, the commissioners issued the bonds and delivered them to the company, who pledged them to secure a loan. All these persons were made parties to the *certiorari* proceeding. After judgment was had on the *certiorari*, reversing and annulling the action of the judge and the commissioners, the company took up the bonds and pledged them again, and the coupons sued on came to the plaintiff. It is held that as between the railroad company and the town the bonds are invalid, and that the plaintiff must show himself a *bona fide* holder in order to recover. It is further held that there being no evidence that the plaintiff was a *bona fide* holder, the circuit court did not err in taking that question from the jury. *Ibid*.

§ 1304. The act of Kansas of March 1, 1872, under authority of which township bonds were issued, was not by its terms to go into effect till published in the "Kansas Weekly Commonwealth." This did not take place until March 21st. The statute further provided that no bonds could be issued under its authority until the question of their issue had been submitted to the legal voters of the township at an election of which thirty days' notice had been given. The bonds bore date April 15, 1872, and, pursuant to an express requirement in the act, contained a reference to the act under which they were issued, and the result of the vote, which is stated to have been taken April 8, 1872. It was held that a purchaser was charged with notice of the act, that it did not take effect until March 21st, that there was not time for the required thirty days' notice of election between March 21st and April 8th, and having thus taken the bonds, with knowledge of this defect in their issue, he could not recover on the coupons. *McClure v. Township of Oxford*, §§ 1308-1401.

§ 1305. In an action on municipal bonds by *bona fide* holders, a plea that the officers of the town, being deceived by the managers of the railroad, delivered the bonds before the fulfillment of the condition in the notice of election and in the subscription of stock, that no bonds were to be delivered and no subscription paid for until the road should be completed through the town, which does not allege that the holders purchased with notice of this condition, or that the bonds contained recitals showing this condition, is no defense to the action; since a purchaser is not bound to inquire as to the form and terms of the subscription, whether it was absolute or conditional, where such condition is not contained in the law authorizing the bonds. *Brooklyn v. Insurance Co.*, §§ 1402-1404.

§ 1306. It is no objection to the obligations of a town, issued in payment for stock subscribed in a railroad company under authority of an act authorizing it to pledge its credit in aid of railroads by issuing its bonds in payment for stock, and which are bought in good faith by the purchasers for a valuable consideration, that they are not under seal. *Draper v. Springport*, §§ 1405, 1406.

§ 1307. A town issues its bonds under power given by an act which requires as a condition that the consent shall first be obtained in writing of such number of the tax-payers, appearing upon the last assessment roll for a certain year, as shall represent a majority of the taxable property of the town. It is also required that this writing shall be duly acknowledged and recorded in the clerk's office. In an action on the bonds, which recite a compliance with the conditions of the law, the holder testifies that he examined the consent roll and compared it with the assessment roll and found the condition of the law fulfilled. It is held that the consent roll and the assessment roll are not admissible to show the non-fulfilment of the condition, since it is not pretended that the holder had actual knowledge of such non-fulfilment. No rule of constructive knowledge obtains from the holder's examination of the records. *Carrier v. Shawangunk*, §§ 1407, 1408.

§ 1308. A *bona fide* holder is not affected by the fact that the railroad company sold the bonds below their par value, contrary to the provisions of its charter. *Mercer County v. Hackett*, §§ 1409-1412.

§ 1309. Where the statute authorizes a subscription by the board of county commissioners pursuant to a vote taken at an election, and the election is held and the bonds are issued, the question whether proper notice of the election was given cannot be raised in a suit on the bonds by an innocent holder. The question whether the election was properly held and a majority of the votes cast in favor of the subscription is one for the determination of the board; though it is not held that the decision of the board would be conclusive in a direct proceeding brought before the bonds had passed into the hands of *bona fide* holders. *Commissioners of Knox County v. Aspinwall*, §§ 1413-1418.

§ 1310. The fact that the subscription was made is sufficient to justify the purchaser in assuming that the vote of the county had been taken. *Ibid*.

§ 1311. Where bonds issued by a municipality in Illinois are made payable to a person or bearer, such bonds, under the rulings of the supreme court of that state, pass by delivery, and the holder may sue in his own name. (As to what law would govern as to their negotiability where the bonds are made payable in another state, *quære*.) *Ottawa v. National Bank*, §§ 1443-1445.

§ 1812. The interest on bonds was made payable at a certain place on the presentation and surrender of the coupons. The bonds recited that they were issued for the purpose of subscribing to the capital of a certain railroad, and for the construction of the railroad through a certain township, etc., pursuant to a certain act, "and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the said township," etc., is pledged. *Held*, that the bonds were negotiable; the presentation and surrender of the coupons being the only condition prescribed, the bonds were not payable contingently. *Humboldt Township v. Long*, §§ 1451-1453.

§ 1813. When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. *Gelpcke v. City of Dubuque*, §§ 1367-1370.

§ 1814. Where the bond purports on its face to be issued pursuant to law, the purchaser need not look further for evidence of a compliance with the conditions to the grant of power. *Commissioners of Knox County v. Aspinwall*, §§ 1413-1418.

§ 1815. If there is power to issue bonds, such bonds, when issued, will pass from hand to hand as negotiable paper, unaffected in the hands of an innocent holder by the fact that the agents of the county may have exceeded the authority conferred, or exercised it in an irregular manner. *County of Daviess v. Huidekoper*, §§ 1371-1373.

§ 1816. Where bonds purport to have been issued in compliance with the law, a purchaser need not look beyond the bonds. *Moran v. Commissioners of Miami County*, 2 Black, 722.

§ 1817. Where bonds are issued by the proper authority, and recite that they are issued according to law and pursuant to the required vote, a *bona fide* holder is required to look outside of the bonds for nothing except the legislative authority. *Commissioners of Douglas County v. Bolles*, 4 Otto, 104.

§ 1818. Where a municipality has power to subscribe to the stock of a railroad company and issue bonds, and it is made the duty of certain officers to determine whether antecedent conditions have been complied with, a recital in the bonds that all the conditions annexed to the exercise of the power have been complied with is conclusive in favor of a *bona fide* holder. *Town of Coloma v. Eaves*, §§ 1419, 1420.

§ 1819. Where bonds on their face import a compliance with the law under which they were issued, a purchaser is not bound to look further, though there may be such defects as would have invalidated the bonds in a direct proceeding brought before the bonds passed into innocent hands. *Mercer County v. Hacket*, §§ 1409-1412.

§ 1820. If there be lawful authority for a municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, cannot be urged against a *bona fide* holder seeking to enforce them. *Kenicott v. The Supervisors*, §§ 1458-1464.

§ 1821. Where there is a law in force authorizing the issue of bonds, and they are issued by the proper authorities and delivered and interest paid for a time, and the county accepts certificates of stock, the bonds are valid in the hands of *bona fide* holders notwithstanding they refer to the wrong statute as the authority under which they were issued. *Commissioners v. January*, §§ 1361, 1362.

§ 1822. A municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril. *Town of South Ottawa v. Perkins*, §§ 1353-1360.

§ 1823. In a suit on municipal bonds it may be shown that no law existed which authorized them—that the law under which it was claimed they were issued was not constitutionally enacted. There can be no estoppel in such a case, and in considering such a question the federal courts will follow the state courts. (WAITE, C. J., and CLIFFORD, SWAYNE and STRONG, dissented.) *Ibid*.

§ 1824. Recitals in township bonds importing a compliance with all the provisions of the law under which they are issued are conclusive of these facts as between the township and *bona fide* holders of the bonds. *Harter v. Kernochan*, §§ 1421-1430.

§ 1825. Where bonds recite that they are issued by the proper authorities pursuant to law, the county is estopped to contradict such recitals as against a *bona fide* holder. *Moran v. Commissioners of Miami County*, §§ 1439-1442.

§ 1826. Where there is a difference between the recitals in a bond and those in the mortgage securing the bond, as to the maturity of the principal by failure to pay the interest, the recitals in the bond should control, in a question involving the *bona fides* of a holder. *Railway Co. v. Sprague*, §§ 1348-1352.

§ 1827. Where bonds issued by a school district import simply that they were issued by the proper authorities and pursuant to a vote, but do not imply by their recitals that the law as

to the amount of indebtedness which the district might incur had been complied with, the district is not estopped, as against a *bona fide* holder, to show that the amount of the bonds was more than five per cent. of the taxable value of the property of the district. *School District v. Stone*, §§ 1481, 1482.

§ 1828. Where a town has by law the right to prescribe conditions in making a subscription, and the bonds issued recite that they are issued pursuant to law, etc., but contain no recitals that any conditions were imposed, the town is estopped, as against a *bona fide* holder, to show that the notice under which the election was held set forth the conditions under which the bonds were to be payable, and that the conditions had not been complied with. *Insurance Co. v. Bruce*, §§ 1483, 1484.

§ 1829. Where municipal bonds recite on their face that they are issued in virtue of power conferred by the city charter on the council, and in pursuance of certain ordinances, the city is estopped, as against a *bona fide* holder, to allege that the bonds were not issued for a corporate purpose. (Affirming *Hackett v. Ottawa*, 99 U. S., 86.) *Ottawa v. National Bank*, §§ 1443-1445.

§ 1830. Where the order of a county court recited that the interest on county bonds issued for the benefit of a township had become due, etc., that the credit of the county was likely to suffer, etc., and directed the issue, for the benefit of the township, of funding bonds, *held*, that the county was estopped to deny that the debt for which the bonds were issued under said order was a county debt. *County of Cass v. Shores*, § 1446.

§ 1831. Where a tribunal is created to determine whether the assent of the proper number of tax-payers has been obtained, and it decides the question and records its decision, and the bonds also contain a recital that the assent was had, such decision and recitals are conclusive against the municipality in a suit on the bonds by a *bona fide* holder. The burden is not on the holder to prove that the requisite assent was obtained. *Town of Venice v. Murdock*, §§ 1447, 1448.

§ 1832. Where a city council has power to subscribe and issue bonds on the petition of three-fourths of the legal voters, and the records of the council and the bonds recite that the bonds were issued on such petition, in a suit by an innocent holder, parol evidence is not admissible to prove that the petition was not signed by three-fourths of the legal voters. *Bissell v. City of Jeffersonville*, §§ 1449, 1450.

§ 1833. Where certain officers are made the judges whether all the conditions precedent to the issue of bonds have been complied with, the question whether the election was held on too short notice is not open as against a *bona fide* holder. *Humboldt Township v. Long*, §§ 1451-1453.

§ 1833a. Where bonds recite that they were issued pursuant to law, it cannot be set up against a *bona fide* holder that the taxable value of the property of the township was not sufficient to authorize the bonds to the amount for which they were issued. (Justices MILLER, DAVIS and FIELD dissent.) *Ibid*.

§ 1834. The certificate on the face of county bonds, that they were issued in conformity with the vote of the electors of said county cast at an election held at a certain date, precludes the county from setting up as a defense to an action by holders in good faith that the notice of the election was not sufficient under the act, which required as a proviso that notice of the election should be given at a certain time and in a certain manner. And this notwithstanding the preliminary proceedings were so defective as to sustain a direct proceeding to prevent the issue of the bonds. *County of Warren v. Marcy*, §§ 1454-1457.

§ 1835. If an election is required to authorize the issue of the bonds of a municipal corporation, and the result of the election is to be ascertained and declared by any officer or tribunal, and the officer or tribunal, on behalf of the corporation, executes and issues the bonds with a recital that the election has been held, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds. *Kenicott v. The Supervisors*, §§ 1458-1464.

§ 1836. A county judge issued bonds for the building of a court-house, signed, sealed and delivered them out of his county, and at the time of the delivery accepted one of the bonds as a gratuity. No court-house was ever built. *Held*, that the burden was upon the holder of coupons attached to such bonds to prove that he paid a consideration for them. (CLIFFORD, J., dissented, contending that the holder before maturity was *prima facie* a holder for value, and that the burden was on the defendant.) *Smith v. Sac County*, §§ 1465, 1466.

§ 1837. A county judge, on the proper application, appointed commissioners to issue bonds. A *certiorari* then issued from the supreme court, to which the county judge made return. Neither the commissioners nor the corporation to which the bonds were issued were parties to the *certiorari*. The bonds were issued before the judgment of affirmance, but afterwards the court of appeals reversed the judgments of the lower courts, on the ground that the county judge refused to permit certain tax-payers to withdraw their signatures from the petition, although, if their application had been allowed, the numbers and taxable property rep-

resented would have been below the standard required. The bonds purported to be regular on their face, and were purchased by the plaintiff after the judgment of reversal. *Held*, that the plaintiff was entitled to recover; that the doctrine of *lis pendens* does not apply to commercial securities. *Orleans v. Platt*, §§ 1363-1366.

§ 1338. A decree, in an action *in personam* against the holders and owners of municipal bonds, declaring the bonds void and ordering them to be surrendered for cancellation, will not affect non-resident owners of bonds who were not personally served and who did not appear. Constructive service in such case will not avail. *Brooklyn v. Insurance Co.*, §§ 1402-1404.

§ 1339. After the dissolution of an injunction restraining the issue of county bonds, and pending an appeal to the supreme court, on which the decree dissolving the injunction was afterwards reversed and the cause remanded with instructions to enter a decree in accordance with the prayer of the bill, the bonds were issued and were subsequently purchased, before maturity, for value, without actual notice of the injunction suit. *Held*, that the *bona fides* of the purchasers was not affected by the injunction suit, and the doctrine of *lis pendens* did not apply in this case. (*MILLER, FIELD AND HARLAN, JJ.*, dissented.) *County of Warren v. Marcy*, §§ 1454-1457.

[NOTES.— See §§ 1472-1572.]

MURRAY v. LARDNER.

(2 Wallace, 110-122. 1884.)

STATEMENT OF FACTS.— This was an action of detinue brought by Lardner for three coupon bonds of the Canada & Amboy Railroad Company for \$1,000 each, of the ordinary kind, *payable to bearer*. They had been stolen from Lardner's safe in Philadelphia, and, before the discovery of the theft, had been negotiated to Murray, a broker of character in New York, for \$2,000. The holder of the bonds gave his name as Dr. D. A. Bates, of Milford, Sussex county, New Jersey, although, on subsequent examination, no such place was found on the map. The appearance and manner of Bates was unexceptionable, and he answered questions without hesitation. He stated on inquiry that he supposed if he had time he could find acquaintances in New York; that he was acquainted with several physicians, and that he had obtained the bonds from Lardner, of Philadelphia.

The court below refused the following instruction: "That there were no such suspicious circumstances attending the transaction between Bates and Murray as to put Murray on inquiry; and that Murray was not chargeable with bad faith by any omission on his part to inform himself in regard to the bonds, and Bates' title to them, further than he did."

The court charged the jury that it was for them to say whether the defendant had made out that he received the paper in good faith, without any notice of the defect of title; or whether there were circumstances of a character sufficient to awaken suspicion, and whether the defendant should have made further inquiry.

Opinion by MR. JUSTICE SWAYNE.

The question presented by the instruction excepted to is not a new one, either in commercial jurisprudence or in this court.

§ 1340. *Coupons, like other commercial securities transferable by delivery, form an exception to the rule that one cannot give better title to personal property than he has himself.*

The general rule of the common law is, that, except by a sale in market overt, no one can give a better title to personal property than he has himself. The exemption from this principle of securities, transferable by delivery, was established at an early period. It is founded upon principles of commercial policy, and is now as firmly fixed as the rule to which it is an exception. It

was applied by Lord Holt to a bank bill in *Anonymous*, 1 Salk., 126. This is the earliest reported case upon the subject. He held that the action must fail "by reason of the course of trade, which creates a property in the assignee or bearer." The leading case upon the subject is *Miller v. Race*, 1 Burr., 452, decided by Lord Mansfield. The question, in that case, also related to a bank note. The right of the *bona fide* holder for a valuable consideration was held to be paramount against the loser. He put the decision upon the grounds of the course of business, the interest of trade, and especially that bank notes pass from hand to hand, in all respects, like coin. The same principle was applied by that distinguished judge in *Grant v. Vaughan*, 3 id., 1516, to a merchant's draft upon his banker. He there said: In "*Miller v. Race*, 31 Geo. II, B. R., the holder of a bank note recovered against the cashier of a bank, though the mail had been robbed of it, and payment had been stopped, it appearing that he came by it fairly and *bona fide*, and upon a valuable consideration; and there is no distinction between a bank note and such a note as this is." In *Peacock v. Rhodes*, 2 Doug., 633, he said: "The law is settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, unless, perhaps, in the single case, which is a hard one, but has been determined, of a note for money won at play." The question has since been considered no longer an open one, in the English law, as to any class of securities within the category mentioned.

§ 1341. *What impeaches good faith in the transfer of negotiable notes; authorities reviewed.*

What state of facts should be deemed inconsistent with the good faith required was not settled by the earlier cases. In *Lawson v. Weston*, 4 Esp., 56, Lord Kenyon said: "If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defense to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going a great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for £10 as for £10,000." In the later case of *Gill v. Cubitt*, 3 Barn. & Cress., 466, Abbott, Chief Justice, upon the trial, instructed the jury, "That there were two questions for their consideration: first, whether the plaintiff had given value for the bill, of which there could be no doubt; and secondly, whether he took it under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant." The jury found for the defendant, and a rule *nisi* for a new trial was granted. The question presented was fully argued. The instruction given was unanimously approved by the court. The rule was discharged, and judgment was entered upon the verdict. This case clearly overruled the prior case of *Lawson v. Weston*, and it controlled a large series of later cases.

In *Crook v. Jadis*, 5 Barn. & Ad., 909, the action was brought by the indorsee of a bill against the drawer. It was held that it was "no defense that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained; the defendant

must show that the plaintiff was guilty of gross negligence." In *Backhouse v. Harrison*, 5 Barn. & Ad., 1098, the same doctrine was affirmed, and *Gill v. Cubitt* was earnestly assailed by one of the judges. Patterson, Justice, said: "I have no hesitation in saying that the doctrine laid down in *Gill v. Cubitt*, and acted upon in other cases, that a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man cannot recover, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I never could understand that a party who takes a bill *bona fide*, but under the circumstances mentioned in *Gill v. Cubitt*, does not acquire a property in it. I think the fact found by the jury here, that the plaintiff took the bills *bona fide*, but under circumstances that a reasonably cautious man would not have taken them, was no defense." In *Goodman v. Harvey*, 4 Ad. & Ell., 870, the subject again came under consideration. Lord Denman, speaking for the court, held this language: "I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title." A final blow was thus given to the doctrine of *Gill v. Cubitt*. The rule established in this case has ever since obtained in the English courts, and may now be considered as fundamental in the commercial jurisprudence of that country.

§ 1342. *Suspicious circumstances attending the transfer of negotiable paper before due will not defeat the title of a bona fide purchaser.*

In this country there has been the same contrariety of decisions as in the English courts, but there is a large and constantly increasing preponderance on the side of the rule laid down in *Goodman v. Harvey*. The question first came before this court in *Swift v. Tyson*, 16 Pet., 1 (BILLS AND NOTES, §§ 382-386). *Goodman v. Harvey*, and the class of cases to which it belongs, were followed. The court assumed the proposition, which they maintain to be too clear to require argument or authority to support it. The ruling in that case was followed in *Goodman v. Simonds*, 20 How., 343 (BILLS AND NOTES, §§ 420-425), and again in *Bank of Pittsburg v. Neal*, 22 id., 96 (BILLS AND NOTES, §§ 405-407). In *Goodman v. Simonds* the subject was elaborately and exhaustively examined, both upon principle and authority. That case affirms the following propositions: The possession of such paper carries the title with it to the holder. "The possession and title are one and inseparable."

The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may, perhaps, be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud there can be no question. The circumstances mentioned, and others of a

kindred character, while inconclusive in themselves, are admissible in evidence, and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder. The rule laid down in the class of cases of which *Gill v. Cubitt* is the antetype is hard to comprehend and difficult to apply. One innocent holder may be more or less suspicious under similar circumstances at one time than at another, and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. The rule established by the other line of decisions has the advantage of greater clearness and directness. A careful judge may readily so submit a case under it to the jury that they can hardly fail to reach the right conclusion.

We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep-rooted and wide-branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction. In *Miller v. Race* Lord Mansfield placed his judgment mainly on the ground that there was no difference in principle between bank notes and money. In *Grant v. Vaughan* he held that there was no distinction between bank notes and any other commercial paper. At that early period his far-reaching sagacity saw the importance and the bearings of the subject.

The instruction under consideration in the case before us is in conflict with the settled adjudications of this court. Judgment reversed, and the case remanded for further proceedings in conformity to this opinion.

HOTCHKISS v. NATIONAL BANKS.

(21 Wallace, 354-360. 1874.)

APPEAL from U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Action to compel the surrender of three coupon bonds of the Milwaukee & St. Paul Railroad Company. The instruments were made payable to a certain person named, or bearer, at the office of the company in New York city. In each bond there was also an agreement to make certain "scrip preferred stock," attached to the bond, full-paid stock at any time within ten days after any dividend shall have been declared and become payable on such preferred stock, upon surrender of the bond and the unmaturing coupons. Attached by a pin to each of the bonds there was originally a certificate of scrip preferred stock, to the effect that the complainant was entitled to ten shares of stock, etc., on surrender of the bond as above; and that this stock was transferable only on the books of the company on surrender of the certificate. The bonds were stolen and delivered to defendants as collateral security for notes discounted by them. At the time of such delivery the certificates above mentioned were detached. The questions for decision were, whether the agreement as to the scrip preferred stock affected the negotiability of the bonds, and whether the absence of the certificates was a circumstance sufficient to put a purchaser on inquiry.

§ 1343. *The negotiability of railroad bonds is unaffected by an agreement contained therein allowing a holder the privilege to receive stock upon their surrender. (a)*

Opinion by MR. JUSTICE FIELD.

The character and form of the instruments which are the subject of controversy in the present suit would seem to furnish an answer to the questions that are raised before us. The agreement respecting the scrip preferred stock is entirely independent of the pecuniary obligation contained in the instrument. The latter recites an indebtedness in a specific sum, and promises its unconditional payment to bearer at a specified time. It leaves nothing optional with the company. Standing by itself it has all the elements and essential qualities of a negotiable instrument. The special agreement as to the scrip preferred stock in no degree changes the duty of the company with respect either to the principal or interest stipulated. It confers a privilege upon the holder of the bond, upon its surrender and the surrender of the certificate attached, of obtaining full preferred stock. His interest in and right to the full discharge of the money obligation is in no way dependent upon the possession or exercise of this privilege. Whether the privilege was of any value at the time the bonds were received by the defendants we are not informed, nor in determining the negotiability of the bonds is the value of the privilege a circumstance of any importance. Its value can in no way affect the negotiable character of the instrument. An agreement confessedly worthless, providing that upon the surrender of the bonds the holder should receive, instead of full paid-up stock in the railway company, stock in other companies of doubtful solvency, would have had the same effect upon the character of the instrument.

In *Hodges v. Shuler*, 22 N. Y., 114, which was decided by the court of appeals of New York, we have an adjudication upon a similar question. There the action was brought upon a promissory note of the Rutland & Burlington Railway Company, by which the company promised, four years after date, to pay certain parties in Boston \$1,000, with interest thereon semi-annually, as per interest warrants attached, as the same became due; "or, upon the surrender of this note, together with the interest warrants not due, to the treasurer, at any time until six months of its maturity, he shall issue to the holders thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period." It was contended that the instrument was not in terms or legal effect a negotiable promissory note, but a mere agreement, and that the indorsement of it operated only as a mere transfer, and not as an engagement to fulfil the contract of the company in case of its default. But the court of appeals held otherwise. "The possibility seems to have been contemplated," says the court, "that the owner of the note might, before its maturity, surrender it in exchange for stock, thus canceling it and its money promise, but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock, and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of opinion that the instrument wants none of the essential requirements of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a

(a) Affirming the ruling in *Hotchkiss v. Tradesman's National Bank*, * 10 Blatch., 334.

fixed day, and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character or make the promise in the alternative in the sense in which that word is used in respect to promises to pay." In *Welch v. Sage*, 47 N. Y., 143, the effect of the certificate attached to the bonds issued by the Milwaukee & St. Paul Railway Company, identical with those in this case, was considered by the same court of appeals, and the court there held that the certificate constituted no part of the bond; that the latter was entire and perfect without it, and that the admission of the debt and the promise to pay were in no degree qualified by it.

§ 1344. — *the absence of stock certificates, referred to in such bonds as attached and to be surrendered therewith, if the election to exchange for full-paid stock is made, does not put a purchaser upon inquiry.*

The absence of the certificates, at the time the bonds were received by the defendants, was not of itself a circumstance sufficient to put the defendants upon inquiry as to the title of the holder. There is no evidence in the case, as already observed, that the privilege which the certificates conferred was of any value; and if it had value, no obligation rested upon the holder to preserve the certificates. He was at liberty to abandon the privilege they conferred and rely solely upon the absolute obligation of the company to pay the amount stipulated. The absence of the certificates when the bonds were offered to the defendants amounted to little, if anything, more in legal effect than a statement by the holder that in his judgment they added nothing to the value of the bonds. In the case of *Welch v. Sage*, already cited, it was held that the absence of the certificate from the bond when taken by the purchaser would not of itself establish the fact that the purchaser was guilty of fraud or bad faith, although it would be a circumstance of some weight in connection with other evidence.

§ 1345. *Nothing short of bad faith will defeat the title of a holder of negotiable paper for value before maturity.*

The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title. It was so expressly held by this court in *Murray v. Lardner*, 2 Wall., 110 (§§ 1340-42, *supra*). See, also, *Goodman v. Simonds*, 20 How., 343 (BILLS AND NOTES, §§ 420-425), where Mr. Justice Swayne examined the leading authorities on the subject and gave the conclusion we have stated. In the present case it is not pretended that the defendants, when they took the bonds in controversy, had notice of any circumstances outside of the instruments themselves, and the absence of the certificates referred to in them, to throw doubt upon the title of the holder. We see no error in the rulings of the court below, and its judgment is, therefore, affirmed.

PARSONS v. JACKSON.

(9 Otto, 434-441. 1878.)

APPEAL from U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This case arises out of the supplementary proceedings which took place in the case of Jackson v. Vicksburg, Shreveport & Texas R. Co. (reported under the name of Jackson v. Ludeling, in 21 Wall., 616), after our decision therein. In pursuance of the mandate issued in that case, the court below made a further decree on the 22d day of March, 1875, directing, amongst other things, as follows, that is to say:

"3. It is ordered that F. A. Wollfley be appointed special master to take the proofs of the bonds *bona fide* issued by the said Vicksburg, Shreveport & Texas Railroad Company, and to report the names of the owners and the amounts due to the holders of such bonds so issued. . . .

"He will give notice to the holders of bonds *bona fide* issued for twenty days by publication in one of the city papers that he is ready to receive proofs of the debt aforesaid, and that he shall hold sessions for thirty days, each day, Sunday excepted, from the date of his first publication in the paper for that purpose."

In pursuance of this decree the master gave the required notice, and received proofs adduced by those claiming to hold bonds entitled to the benefit of the decree rendered by this court. By his report, filed the 17th day of January, 1876, it appears that there were then outstanding seven hundred and sixty-one bonds *bona fide* issued by the said railroad company, of which schedules were annexed to his report. He further reported a schedule of certain other bonds executed by the company, and presented to him as issued under the mortgage mentioned in the decree; but which the testimony taken by him proved were never issued by the said company, its officers or agents, but were carried off by persons belonging to, or taking advantage of, a raid upon the town of Monroe, La., during the late war, in the month of April, 1864. As to these bonds, the master further reports as follows: "None of the parties presenting these bonds, or the coupons on them, have proved at what time, for what consideration, or under what circumstances, they acquired them, except Francis T. Willis, Charles Parsons, E. G. Pearl, Edwin Parsons, George Parsons, and Scott, Zerega & Co. in liquidation. In reference to this class, if the bonds were complete in all their parts and no circumstances of suspicion appeared on their face, the proof that they had not been issued *bona fide* under the authority of the corporation, and other facts relative to the issue, would have required the parties to prove that they were *bona fide* holders for a valuable consideration.

"In reference to the claims of Francis T. Willis, Charles Parsons, E. G. Pearl, Edwin Parsons and Scott, Zerega & Co. in liquidation, I report that in addition to the fact that the bonds were not issued *bona fide*, but were taken by force from the custody of the company, that there appears on the indorsement of the bonds a material deficiency and an incompleteness which deprives them of the character of commercial instruments fit for circulation. I also report that the railroad was at the date of their purchase in a damaged condition, it having been under the control of the military power of the Confederate States and the United States, which had been used to partially destroy it. That there were several years of unpaid coupons on each of the bonds, in the most of

cases being contemporaneous with the execution of the mortgage; that these bonds were sold for an insignificant sum, and apparently purchased at a hazard, without any view to their character as commercial instruments fit for circulation, and that neither from the date of this suit, the 1st of December, 1866, nor in any proceedings antecedent thereto, did the holders, or any of them, appear to maintain any claim for protection. I therefore report that the said bonds mentioned in the schedule BB were not issued *bona fide* by the said railroad company, and ought not to be allowed as a charge on the mortgage."

The parties above named excepted to this report; but after hearing thereon, the court confirmed the same, and made a decree disallowing the said last-mentioned bonds, and from that decree the present appeal was taken. From the evidence taken by the master it appears that the appellants purchased the bonds held by them, in the city of New York, in November and December, 1865, at from ten to fifteen cents on the dollar, without any actual knowledge that they were not issued by the company. But it further appeared that none, or very few, of the coupons had been cut off from the bonds, and that the latter were imperfect in form. Each bond, on its face, certifies "that the Vicksburg, Shreveport & Texas Railroad Company is indebted to John Ray or bearer, for value received, in the sum of either £225 sterling or \$1,000 lawful money of the United States of America; to wit, £225 sterling if the principal and interest are payable in London, and \$1,000 lawful money of the United States of America if the principal and interest are payable in New York or New Orleans," etc. This is the obligatory part of the instrument, and is necessarily indeterminate in its character without some further designation of the place at which it is to be paid. Each bond further on its face declares that "the president of said company is authorized to fix, by his indorsement, the place of payment of the principal and interest in conformity with the terms of this obligation." And on the back of the bonds is indorsed a printed blank in the following words, to wit: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in ——." On the bonds, which are conceded to be genuine and *bona fide* issued, this blank is filled up with the name of some place, as, for example, "the city of New York;" or in some cases, "New Orleans, at the Citizens' Bank of Louisiana," etc. All the indorsements have the signature of the president of the company, but on the bonds in question the above blank for the place of payment is not filled up. The mortgage under which the bonds purport to be issued, and which is referred to in the body thereof, contains the same provision with respect to the place of payment. After referring to the bonds to be issued under and secured by it, its language is as follows: "The principal and interest of said bonds being made payable in New Orleans, New York or London, as he, the said president, by his indorsement may determine." The resolutions of the board of directors, authorizing the execution of the mortgage and the issue of the bonds, which resolutions are copied in the mortgage, contain the same provision, namely, "The principal and interest of said bonds being made payable in New Orleans, New York or London, as the president by his indorsement may determine." These resolutions, being the authority by virtue of which the mortgage and bonds were executed and issued, would seem to be mandatory, and to require that the place of payment should be indorsed by the president on the bonds independently of the necessity of such indorsement for the purpose of fixing the amount payable thereon.

§ 1346. *That the place of payment and the precise amount to be paid is left unsettled in an obligation deprives it of the character of negotiability. (a)*

The uncertainty of the amount payable, in the absence of the required indorsement, is of itself a defect which deprives these instruments of the character of negotiability. As they stand they amount to a promise to pay so many pounds or so many dollars,—without saying which. One of the first rules in regard to negotiable paper is that the amount to be paid must be certain, and not be made to depend on a contingency. 1 Daniel, Neg. Inst., sec. 53. And although it is held that *id certum est quod certum reddi potest*,—a maxim which would have given the bonds negotiability in this instance, had the requisite indorsement been made, yet, without such indorsement, the uncertainty remains and operates as an intrinsic defect in the security itself. Now it is shown by the master's report, and if it were necessary to go behind the report, the evidence shows, that these bonds were never issued by the railroad company at all, but were seized and carried off by a raid of soldiers during the war. They afterwards turned up in New York, and were purchased by the appellants; and the question is, whether the fact that the past-due coupons were still attached, and that no place of payment was indorsed on the bonds, as required to be done by the bonds themselves, was sufficient to put the appellants upon inquiry as to their validity, and as to the *bona fides* of their issue; these marks of suspicion being supplemented by the further fact, that the bonds were offered for a very small consideration.

§ 1347. *That a stipulated indorsement is lacking, and overdue coupons still attached to bonds, should put a purchaser upon inquiry.*

Our opinion is, that the appellants had abundant cause to question the integrity of these bonds, that they were affected with notice of their invalidity, and cannot be allowed to sustain the position of *bona fide* holders without notice. The presence of the past-due and unpaid coupons was itself an evidence of dishonor, sufficient to put the purchasers on inquiry. The imperfection as to the place of payment is another strong evidence of want of genuineness. Of course, it is not necessary to the validity of a bond that it should name a place of payment; but these bonds expressly declare that they are to be payable at the place which should be determined by the president's indorsement, and that the sum payable should depend on that indorsement; and yet no indorsement appears thereon. We do not say that this defect would have invalidated the bonds if they had in fact been issued by the company, and the amount had been certain; but it was a pregnant warning to the purchasers to inquire whether they had been issued or not. These facts, taken in connection with the price at which the bonds were offered, were abundantly sufficient to affect the purchasers with notice of any invalidity in their issue. The case is so plain, that it is hardly necessary to cite any authorities on the subject. "A person who takes a bill," said this court in *Andrews v. Pond*, 13 Pet., 65, "which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice." The same doctrine is reaffirmed in *Fowler v. Brantley*, 14 id., 318 (BILLS AND NOTES, § 427); and indeed is elementary law. The circumstances in this case went farther

(a) A railroad bond whose obligation is to pay either £225 or \$1,000, depending on whether it should be payable in London or America; and whose face recites that the place of payment shall be fixed by the president of the maker by his indorsement; and whose back contains a blank form for the president's indorsement fixing the place of payment, is not certain as to its amount and therefore not negotiable until place of payment is fixed. Neither the thief of such a bond, nor any one claiming under him, has authority to fill up this blank for fixing the place of payment, notwithstanding this indorsement has been signed by the president. *Jackson v. Vicksburg, etc., R. Co.*,* 2 Woods, 141; 13 Alb. L. J., 838.

than merely to cast a shade of suspicion upon the bonds; they were so pointed and emphatic as to be *prima facie* inconsistent with any other view than that there was something wrong in the title. See 1 Daniel, Neg. Inst., sec. 796.

Decree affirmed.

RAILWAY COMPANY v. SPRAGUE.

(13 Otto, 756-764. 1880.)

APPEAL from U. S. Circuit Court, District of Indiana.

Opinion by MR. JUSTICE WOODS.

STATEMENT OF FACTS.—This was a suit in equity in which the Union Trust Company of New York was complainant, and the Indiana & Illinois Central Railway Company and others were defendants. It was brought for the foreclosure of a mortgage upon the property of the railway company, and it resulted in a decree of foreclosure and sale. An interlocutory decree directed a master of the court to ascertain and report the names of all the holders of bonds and coupons, which had been duly issued under the mortgage, and were entitled to share in the proceeds of the sale. Under this order of reference Mrs. Henrietta P. Sprague, the appellee, presented a claim to be the owner and holder of seventy-five bonds, numbered from 629 to 703 inclusive, of \$1,000 each, with coupons attached. The railway company objected to the allowance of her claim. The master heard the proofs of the parties and the arguments of their counsel, and reported that she had made sufficient proof of her ownership of the bonds in question, and that they were entitled to be paid out of the purchase money of the road. To this report the railroad company filed exceptions. The court, at the May term, 1878, overruled the exceptions, and entered a decree directing, among other things, that the seventy-five bonds of the appellee, with the coupons thereto annexed, should be allowed as valid, and as secured equally with the other outstanding bonds by the mortgage foreclosed, and that they should be paid their *pro rata* shares out of the proceeds of the foreclosure. From this order, and this part of the foreclosure decree in the cause, the railway company brings this appeal.

Mrs. Sprague was the widow and administratrix of John H. Sprague, deceased. J. Elliott Condict had long been a friend of her husband, doing business in New York in railway securities, under the style of "Condict & Co., bankers and brokers." In February, 1870, she loaned Condict \$25,000, for which she took his note. Before its maturity he advised her to buy, and offered to sell her, \$75,000 of the first mortgage bonds of the Madison & Portage Railroad Company. She made the purchase for the price of \$60,000, and paid that sum partly by giving up to him his note to her for \$25,000 money loaned, and the residue in securities at the market price. This purchase was made in November, 1870.

The Madison & Portage Railroad Company failing to pay interest on its bonds, she, on June 24, 1871, at Condict's instance, returned them to him, and received from him in exchange seventy-five bonds for \$1,000 each of the Indiana & Illinois Central Railway Company. These bonds were dated April 1, 1870, and secured by a mortgage or deed of trust of the same date. At the time of the exchange there were attached to each of the bonds which Mrs. Sprague received all the coupons, beginning from the date of the bonds, sixty in number. Of these coupons two, one payable October 1, 1870, and one payable April 1, 1871, for \$35 each, were past due and unpaid. The bonds contained this provision: "In case of the non-payment of any half-yearly

instalment of interest, which shall have become due and been demanded, and such default shall have continued six months after demand, the principal of this bond shall become due in the manner and with the effect provided for in the trust deed securing its payment." The bond also recited that it, together with the residue of two thousand seven hundred and fifty bonds, was secured by a deed of trust or mortgage, dated the 1st day of April, 1870. The mortgage contained the following clause: "In case default be made for six months in the payment of any interest upon either of said bonds when the same shall become due and payable, the whole principal sum in all and each of said bonds shall forthwith become due and payable, and the lien or incumbrance hereby created for the security and payment of such bonds may be at once enforced, anything herein to the contrary notwithstanding."

Before making the exchange of bonds, Mrs. Sprague had placed the management of the affair in the hands of Mr. John M. Whiting as her counsel, who, in her behalf, investigated not only the question of the value of the Indiana & Illinois Central Railway bonds, but also of the right of Condict to sell them. At the time of this investigation the Indiana & Illinois Central Railway was not a completed, but only a projected, road. Condict was vice-president and acting president of the company. There was an executive committee consisting of three members besides the president. These were Condict, Seaman and Lazare. Five hundred bonds of \$1,000 each, secured by the mortgage of April 1, 1870, had been executed. Before they could be issued, they had to be countersigned by the Union Trust Company. They were so countersigned and delivered to the railroad company, and were in all respects regularly executed. In June, 1871, three hundred of the bonds were delivered by the treasurer of the company to Condict and Lazare, members of the executive committee. They delivered two hundred of them to parties to whom they belonged. The residue remained in the possession of Condict. He did not appear to have any express authority from the company to sell or dispose of them, but claimed to have a lien on them for advances made to the company. There was evidence tending to show, however, that the company had never received consideration for the bonds transferred to Mrs. Sprague, but none to show that she, so far as it regarded any direct notice to her personally, was not a *bona fide* purchaser.

Whiting, in his testimony touching what he learned of Condict's right to transfer the bonds, said: "He came to me with statements, and upon them I acted. He asserted his entire capacity to make the exchange; that he owned the bonds; that he had made advances to the company; that they were his by the highest possible title, and made all the asseverations under my very sharp and close cross-examination. He claimed to own the bonds." Whiting also testified as follows: "Seaman," the colleague of Condict on the executive committee, "assured me of Condict's right to assign them," the bonds. "My memory is very active on this point. He sustained him," Condict, "in every regard."

The error complained of in the part of the decree appealed from is this: It being established by the evidence and reported by the master that the company had never received any value for its bonds either from Mrs. Sprague or any other person, the court erred in holding that she was a purchaser for value and without notice, and that the bonds were instruments of such a character and in such a condition as to enable her to enforce them against the company, notwithstanding the fact that it had received no value for them. It is not dis-

puted that they, when first executed and made ready for circulation, had all the qualities of commercial paper. The contention of the appellant is that Mrs. Sprague was not a purchaser in good faith and for value.

§ 1348. *Lawful possession of negotiable bonds is prima facie evidence of the holder's title.*

It seems to be conceded, and the evidence establishes, that no facts were known to her in relation to them, other than those which came to the knowledge of her agent, Whiting. Of course she was bound by what he knew. Does the knowledge of the facts learned by him, and which it is presumed he communicated to her, make her a purchaser in bad faith? Two facts must be taken as established: *First*, Condict's custody of the bonds was lawful. The appellant admits that it placed them in his possession for safe keeping. *Second*, there can be no question that Mrs. Sprague paid full value for them. Possession of negotiable bonds carries with it the title to the holder. *Murray v. Lardner*, 2 Wall., 110 (§§ 1340-42, *supra*). Mrs. Sprague, therefore, bought the bonds of a person presumptively the owner, and paid for them a full and valuable consideration. Condict was an officer of the company, and as such had possession of the bonds. If he had told Mrs. Sprague or her agent that he was selling the bonds for the company and as its agent, and had then applied them to the payment of his individual indebtedness to her, her purchase would have been made in bad faith. But this is not the case. Having possession of them, and being *prima facie* their owner, he asserted to her agent in the most positive manner that they were his property. The fact that he was an officer of the company did not of itself preclude him from dealing in them, or throw the slightest suspicion on his title.

§ 1349. *Overdue and unpaid interest coupons do not necessarily make the bonds to which they are attached dishonored paper. (a)*

The question, therefore, and the only question, in the case is, Was there anything upon the face of the bonds and of the mortgage which secured them to put the purchaser on notice? The appellant asserts that there was; that attached to each of the bonds sold to Mrs. Sprague were two unpaid coupons, due respectively October, 1870, and April, 1871, and that this fact, by the terms of the bonds and of the mortgage which secured them, rendered the principal due and payable, and that, as a consequence, when she purchased them, they were dishonored paper.

§ 1350. *Where there is a difference between the recitals of the bonds and those of the mortgage which secures them, the recitals of the former should control.*

There appears to be a difference between the terms of the bonds and of the mortgage. The mortgage provided that, upon non-payment of interest for six months, the principal of the bonds should become due, whether demanded or not. On the other hand, the bonds declared that, in case of the non-payment of any half-yearly instalment of interest which had become due and had been demanded, if such default should continue six months after demand, the principal of the bond should become due. A copy of the bonds was set out in full in the mortgage. The bonds being the principal thing containing the obligation of the company, and the mortgage a mere security to insure the performance of that obligation, the terms of the bonds should control. Therefore, a demand for the payment of her coupons and a failure to pay for six months

(a) The fact that bonds have overdue coupons attached is not of itself sufficient to charge a purchaser with notice of an infirmity in the issue of the bonds. And especially where it appears that the sale of the bonds was enjoined during the time the coupons were maturing. *Preble v. Board of Supervisors*,* 8 Biss., 358.

were necessary to make the principal of the bonds payable. There having been no demand of the overdue coupons, it follows that, by the terms of the bonds, the principal sum was not due when Mrs. Sprague purchased. The controversy, therefore, is reduced to this: Did the mere presence upon the bonds purchased by Mrs. Sprague of two past-due unpaid interest coupons make the bonds dishonored paper?

Coupons are separable obligations for the interest payable upon demand. It constantly occurs that they are not demanded for weeks and months, and sometimes years, after they are due. As they bear interest after maturity, it will frequently happen that the owner of a bond who holds it as an investment will keep the coupon for the same purpose. Bonds executed by a railroad company may not be put upon the market until one or more coupons have matured. The company may cut them off when it sells the bonds, or leave them on to be accounted for in the purchase. Negotiable bonds have been used as a means of raising money, not only by railroad companies, but by the national government, states, counties and cities. To hold that the moment an unpaid coupon is left on a bond its character and negotiability are changed would greatly embarrass the traffic in such securities, and lead to endless uncertainty and confusion. The mere presence, therefore, of two unpaid coupons upon the bonds purchased by Mrs. Sprague was not of itself sufficient evidence of the dishonor of the bonds to which they were attached.

§ 1351. — *authorities reviewed.*

This point has been expressly ruled by this court in *Cromwell v. County of Sac*, 96 U. S., 51 (§§ 1467-1471, *infra*). In that case the court, speaking by Mr. Justice Field, said: "The non-payment of an instalment of interest when due could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity, a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities." To the same effect see *National Bank of North America v. Kirby*, 108 Mass., 497, and *Boss v. Hewitt*, 15 Wis., 260. In *Parsons v. Jackson*, 99 U. S., 434, the bonds of the railroad company which were the subject of controversy had never been issued, but had been stolen from its office. They were made payable either in New Orleans, New York or London, as the president of the company might, by his indorsement on the bonds, determine. They did not contain his indorsement designating the place of payment; they were offered in the New York market and sold for a very small consideration. Coupons for several years, due and unpaid, were attached to them. The court held that all these circumstances affected the purchaser with notice of the invalidity of the bonds. It is true the court said that the presence of the past-due and unpaid coupons was of itself an evidence of dishonor sufficient to put the purchaser on inquiry. But the case did not turn on this circumstance alone. There were other significant indications of the invalidity of the bonds, and the opinion must be restricted to the case before the court. But conceding, for the sake of argument, that the possession of two unpaid coupons on the bonds purchased by Mrs. Sprague had been sufficient to put her on inquiry, she can only be charged with knowledge of the facts which she might have learned by inquiry. Investigation would have disclosed to her, as the record shows, that the construction of the road of the company by which the bonds were issued was just begun; that of the twenty-seven hundred and fifty bonds, for \$1,000 each, which the mortgage was executed to secure, only five hundred had been signed and prepared for circulation; that these bonds had not been

put upon the market for sale, but that a part of them had been used as collateral security for debts due from the company, and that those sold to her had not been put in general circulation, but, after their execution, had been turned over to Condict, the vice-president of the company, who, on account of his advances to it, claimed to be their owner, and that none of the coupons on any of the five hundred bonds had been paid. If, therefore, Mrs. Sprague had investigated the reason why the two past-due coupons on the bonds which she purchased had not been paid, these facts would have afforded a most satisfactory explanation.

§ 1352. *The title of a holder of negotiable bonds acquired for value before maturity is valid against the world.*

"The party who takes negotiable coupon bonds, before due, for a valuable consideration, without knowledge of any defect of title and in good faith, holds them by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transaction, will not defeat his title. That result can be produced only by bad faith on his part." *Murray v. Lardner*, 2 Wall., 110. "Bonds for the payment of money, with interest warrants attached, are everywhere encouraged as a safe and convenient medium for the settlement of balances among mercantile men; any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation would be contrary to the soundest principles of public policy. Such instruments are protected in the possession of an indorsee, not merely because they are negotiable, but also because of their general convenience in mercantile affairs." *Smith v. Sac County*, 11 Wall., 139 (§§ 1465, 1466, *infra*). The inference to be drawn from these authorities, when applied to the facts in this case, is that Mrs. Sprague was a *bona fide* purchaser for value of the bonds transferred to her by Condict. Our conclusion, therefore, is that the circuit court was right in directing a *pro rata* payment to be made on her bonds out of the proceeds of the property in which they were secured.

Decree affirmed.

TOWN OF SOUTH OTTAWA v. PERKINS.

(4 Otto, 260-277. 1876.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—The first of these actions was brought by Perkins, the plaintiff below, to recover the amount due upon two negotiable bonds of the town of South Ottawa, in the usual form, for \$1,000 each, made payable to the Ottawa, Oswego & Fox River Valley Railroad Company, or bearer, in three years from July 1, 1869, with coupons for the semi-annual payment of interest attached. They each contained recitals as follows:

"This bond is one of a series of twenty bonds, bearing even date herewith, each for the sum of \$1,000, . . . and is issued in pursuance of an election held in said town on the 8th day of October, 1866, under and by virtue of a certain act of the legislature of the state of Illinois, approved February 18, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads,' . . . at which election a majority of the legal voters participating in the same voted 'for

subscription' to the capital stock of said railroad in the sum of \$20,000, and to issue the bonds of said town therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application having been made to the town clerk of the town, and said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid."

The second action was brought on a bond issued by the county of Kendall, in Illinois, bearing date the 4th day of May, 1869, in aid of the same railroad, and by virtue of the same act of the legislature, and containing substantially the same recitals, *mutatis mutandis*, as those in the Ottawa bonds, except that the election authorizing the issue of the bonds is stated to have been held on the 30th day of March, 1869. The facts in the two cases are, in other respects, substantially the same.

§ 1353. *A municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons must take notice at their peril.*

The only authority claimed for issuing these bonds is the act referred to in the above recital therein. If no such act was ever passed by the legislature of Illinois, the bonds are void. A municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril. *Pendleton County v. Amy*, 13 Wall., 297; *Kenicott v. The Supervisors*, 16 id., 452 (§§ 1458-64, *infra*); *St. Joseph Township v. Rogers*, 16 id., 644 (§§ 1671-77, *infra*); *Town of Coloma v. Eaves*, 92 U. S., 484 (§§ 1419-20, *infra*). It is insisted on the part of the plaintiffs in error in these cases that the law relied on for authority to issue the bonds in question was never passed, no entry of its passage appearing on the journal of the senate of Illinois. The constitution of Illinois, adopted in 1848, contains the following provisions:

"ART. 3, SEC. 1. The legislative authority of the state shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people."

"SEC. 3. Each house shall keep a journal of its proceedings, and publish them. . . ."

"SEC. 21. . . . On the final passage of all bills, the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each house."

The constitution also provides that all bills passed shall be signed by the speakers of the two houses, and approved and signed by the governor, or, in case of his refusal, shall be re-passed by a majority elected to each house. The general laws of the state provide for depositing all acts of the legislature, and the original journals of the two houses, in the office of the secretary of state, who is charged with having them printed; and the printed statute books are made evidence of the acts contained therein.

§ 1354. *In Illinois it is necessary to the validity of a statute that it should appear by the legislative journals that it was duly passed.*

In the construction of the constitutional provisions above recited, the supreme court of Illinois, by a long course of decisions, has held that it is necessary to the validity of a statute that it should appear by the legislative journals that it was duly passed in the manner required by the constitution. As early as 1853, it was decided in *Spangler v. Jacoby*, 14 Ill., 297, that it was "compe-

tent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether. The constitution requires each house to keep a journal, and declares that certain facts, made essential to the passage of a law, shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear on the face of its journal. And when a contest arises as to whether the act was passed, the journal may be appealed to, to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the constitution that the signatures of the speakers and the executive should furnish conclusive evidence of the passage of a law. The presumption, indeed, is, that an act thus verified became the law, was pursuant to the requirements of the constitution; but that presumption may be overthrown. If the journal is lost or destroyed, the presumption will sustain the law, for it will be intended that the proper entry was made on the journal. But when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the constitution, the presumption is overcome, and the act must fall." This case was followed, in 1855, by *Turley v. County of Logan*, 17 id., 151. There, a law was supposed to have been passed at the session of the legislature in 1853, for the removal of the seat of justice of Logan county, by a vote of the people. In the fall after, a vote was taken, which resulted in favor of the removal. Turley and his associates then filed their bill to restrain the county officers from erecting county buildings at the new location, on the ground that, as appeared by the journal, the act had not been read in the house of representatives the full number of times required by the constitution, and so was no law. The fact being as alleged, the injunction was, in the first instance, allowed, but afterwards, in February, 1854, the same legislature met in extra session, and, on recollection of members, and by the manuscript notes of the clerk, the house of representatives amended its journal so that it showed the bill had been read the requisite number of times. Thereupon the supreme court, when the case came there, while recognizing fully the authority of *Spangler v. Jacoby*, affirmed a decree dissolving the injunction and dismissing the bill, for the reason that it was within "the power of the same legislature, at the same or a subsequent session, to correct its own journals, by amendments which show the true facts as they actually occurred."

The same question was also considered by the same court in *Prescott v. Trustees of Illinois & Michigan Canal*, 19 id., 324, decided in 1857. There, Prescott and Arnold were entitled to purchase, at the appraised value, certain lots in Chicago, which had been appraised twice; and the point to be decided was, whether they should pay according to the first or second appraisal. The second appraisal was made under a law supposed to have been passed February 14, 1851, but which the journals showed had never in fact passed either branch of the general assembly. Accordingly, the court held, upon the authority of *Spangler v. Jacoby*, that the second appraisal was invalid, and that the parties had the right to purchase under the first.

In the case of *Supervisors of Schuyler County v. People*, 25 id., 181, which came before the court in 1860, it was objected that the senate journal did not show that the bill incorporating the railroad company was read three

times in that body before it was put on its final passage; but the court, while still approving *Spangler v. Jacoby*, held that the constitution did not require the fact that the bill had been read three times to be entered on the journals, and, consequently, that the validity of the law could not be impeached on that ground. In 1864, in the case of *People v. Starne*, 35 id., 121, an application was made for a *mandamus* to compel the treasurer of the state to countersign, register, and pay a warrant issued upon him in favor of Barnes, the relator, by the auditor of public accounts. The warrant was issued upon the authority of what was supposed to be a statute of Illinois, approved February 14, 1863, as compensation for transporting and bringing home certain wounded soldiers belonging to the state; but it being shown that the journal of the house of representatives did not contain entries to the effect that the bill was passed by a majority of the members elect, or that the vote was taken by ayes and noes upon the final passage, the *mandamus* was refused. In the opinion of the court the authorities are extensively reviewed, and the rulings in the previous cases reaffirmed.

§ 1855. — *there has been no vacillation in the decisions of the state court as to this question.*

These cases were all decided before the issue of the bonds sued on in this case. But since that time two cases have arisen under the very law now in question, in which the supreme court of Illinois has decided that it was never passed and is not an act of the legislature of that state. The first of these cases, *Ryan v. Lynch*, 68 id., 160, was decided in 1873. Certain tax-payers of the town of Ottawa sought to enjoin the tax collector from collecting a tax which had been levied to pay interest upon bonds issued in aid of the Ottawa, Oswego & Fox River Railroad Company, upon the ground that the act under which the bonds were issued, that of February 18, 1857 (the same which is now under consideration), had not been enacted in conformity with the requirements of the constitution. At the hearing in the court below it was proved that the journal of the senate did not show that the bill had ever passed that body. Upon this proof, the court, recognizing the authority of *Spangler v. Jacoby*, and other cases which followed it, granted the injunction asked for. In the supreme court, on appeal, it was insisted that the decree ought to be reversed, because the bondholders had not been made parties. The objection was overruled, and the action of the court below affirmed. Following this is the case of *Miller v. Goodwin*, 7 Ch. Leg. N., 294, not yet reported in the regular series of the reports of the state. It being shown in this case, as in *Ryan v. Lynch*, that the journals did not contain the requisite evidence of the passage of the law, it was again adjudged invalid. This was in January, 1875. An effort was made in this last case to impeach the transcript of the legislative journals; but it was unsuccessful. The court repeated what it had said in the case of *Ryan v. Lynch*, using this language: "The bill never became a law, and the pretended act conferred no power. It follows that the bonds were not merely voidable, but that they were absolutely void, for want of power or authority to issue them; and, consequently, no subsequent act or recognition of their validity could so far give vitality to them as to estop the tax-payers from denying their legality." This opinion, it is true, was delivered after the trial of the case now before us. But it goes to show that, up to the very moment of that trial, there had been no vacillation in the state court as to the construction and effect of the constitution of Illinois.

§ 1356. *There can be no estoppel as to whether what purports to be a law is or is not a law, even in favor of bona fide holders.*

When the cases now under consideration came on for trial in May, 1874, the defendants below offered to prove, by the journals of each house of the legislature, that there was no entry in the same of the passage by the senate of the act of February 18, 1857. The testimony was objected to, and ruled out. Substantially the same questions were raised by demurrer to a plea. The ground of this decision seems to have been that the holder of the bonds was a *bona fide* purchaser of them without notice of any objection to their validity; that the first instalment of interest was paid at maturity; and, therefore, that the defendant was estopped from offering any evidence to show that the act was not passed, the same having been duly published among the printed statutes as a law, and being, therefore, *prima facie* a valid law; in other words, that although the act might not have been duly passed, the town, under the circumstances of the case, was estopped from denying its passage. We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of the state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise.

§ 1357. *Unless a federal question is involved the federal courts will adopt the settled construction placed by the highest court of a state upon its constitution and laws.*

It is declared by the judiciary act as a fundamental principle, "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Section 34. And this court has always held that the laws of the states are to receive their authoritative construction from the state courts, except where the federal constitution and laws are concerned; and the state constitutions, in like manner, are to be construed as the state courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities. If, therefore, the law in question had never been passed upon by the state courts, the courts of the United States would nevertheless be bound to give to the constitution of Illinois the same construction which the state courts give to it, and to hold a pretended act of the legislature void and not a law which the state courts would hold to be so. Otherwise, we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same state, differing as to the validity and existence of a statute of that state, without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decisions upon

the other. As a matter of propriety and right, the decision of the state courts on the question as to what are the laws of the state is binding upon those of the United States.

But the law under consideration has been passed upon by the supreme court of Illinois, and held to be invalid. This ought to have been sufficient to have governed the action of the court below. In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without taking the advice of a jury on the subject. When once it became the settled construction of the constitution of Illinois that no act can be deemed a valid law unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States. This subject was fully discussed in *Gardner v. The Collector*. After examining the authorities, the court in that case lays down this general conclusion, "that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." 6 Wall., 511.

§ 1358. *A state may, by its constitution and laws, prescribe what shall be evidence of the existence or non-existence of a statute; but the question of such existence or non-existence is a judicial one.*

Of course, any particular state may, by its constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but the question of such existence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed. Not only the courts, but individuals, are bound to know the law, and cannot be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score, and can take no advantage from the allegation that he is a *bona fide* purchaser without notice. He would, it is true, be precluded from doing so on another ground, namely, the want of any legislative authority in fact in the town to issue the bonds in question. Want of such authority is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them.

§ 1359. *Subsequent acts, by adopting the provisions of a void act, or assuming that it was legally passed, do not give it validity.*

Thus far we have not adverted to the argument attempted to be drawn by the defendants in error from the fact that the act in question was referred to in two subsequent acts of the legislature as an existing law. One of these was passed on the 27th day of March, 1869, entitled "An act to amend an act entitled 'An act to incorporate the Ottawa, Oswego & Fox River Valley Railroad Company.'" This act authorized the company to build a railroad from the town of Wenona to the city of Peoria; and, by the second section, it was enacted "that any city, county, town or township near to or through which said road is now or may hereafter be located is hereby authorized to subscribe to the

capital stock of said railroad, upon the terms and conditions prescribed in an act entitled 'An act to authorize certain cities, counties, towns and townships to subscribe to the stock of certain railroads,' in force February 18, 1857." The title here recited is not the title of the act in question. It differs from it in several respects, though this was probably the one that was intended to be referred to. Supposing it to have been the one referred to, it is not pretended that this act of March 27, 1869, embraces the town of South Ottawa, or the county of Kendall, whose bonds are the subject of the present suits. But it is urged that the reference to the act of 1857 is such a recognition of that act as to give it validity, if it had none before. This was certainly not the purpose of the act of 1869, nor do we think that such was its effect. The legislature could not thus, in 1869, give validity to a void act as an act passed in 1857, which was not constitutionally passed in that year; for that would be an evasion of the constitution. It could at most give it vitality as a new act from the date of the act of 1869. But this it does not profess to do; it only adopts its provisions for the purposes of the act then passed. And if the legislature of 1869 could have validated all proceedings had under the supposed act of 1857, it did not do so. It did not profess to do it. No such purpose is indicated in it. The most that can be said is, that, in referring to the act of 1857, the legislature inadvertently supposed that it had been regularly passed. Whether such inadvertence was the result of a false suggestion by interested parties, or otherwise, is of no consequence. No intent to validate and establish the act of 1857, as a law, can be gathered from the terms of the act of March 27, 1869. To give to such a reference in a subsequent act, as is here relied on, the effect of validating or reviving or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous, and would lay the foundation for evil practices. The legislature might in this way be entrapped into the enactment or re-enactment of laws when it had no intention, or even suspicion, that it was doing so.

The other act relied on was passed on the 20th day of April, 1869, and is entitled "An act to amend an act entitled 'An act authorizing certain cities, counties, towns and townships to subscribe to the stock of certain railroads,' in force February 18, 1857;" being the act in question, if the words "in force" are construed to refer to the date of its supposed passage. This amendatory act declares that in addition to the cities, counties, towns and townships authorized by the said act to which this is an amendment, to subscribe to the stock of the Ottawa, Oswego & Fox River Valley Railroad, the following portions of cities, counties, towns and townships be authorized to subscribe to the capital stock of said railroad in manner as provided in said act, except as hereinafter provided. The act then proceeds to designate the portions of towns referred to. The same observations apply to this act which have been made in regard to the act of March 27, 1869. It does not profess or purport to give any new force or validity to the supposed act of 1857, or to validate any proceedings had under that act. It takes for granted—mistakenly, as we have seen—that the act was duly passed, and does nothing more.

The last mentioned act could not, in any event, by any prospective effect, aid the holders of the bonds in suit; for the elections called to authorize their issue were held before this act was passed, as appears by the recitals in the bonds themselves. Indeed, the election authorizing the Ottawa bonds was held in 1866,—long before the passage of either of the acts referred to; and, in the absence of any expression in the laws themselves, evincing such an in-

tention, it can hardly be claimed that these laws gave any retroactive validity to elections which were without authority and void when they were held. It is to be observed that these statutes were before the supreme court of Illinois when deciding the case of *Miller v. Goodwin*, being set up and relied on in the answer of the defendants in that case; but the court evidently did not regard them as having the effect claimed. The bonds were held to be void, and the collection of taxes to pay them was perpetually enjoined.

§ 1360. *The act prescribing the mode of proof of public acts, etc., in each state does not give them greater force than they have in the state from which they are brought.*

We do not perceive that the act of congress, prescribing the mode in which the public acts, records and judicial proceedings in each state shall be authenticated so as to take effect in every other state, has any bearing whatever on the case. The authentication thus provided for was intended as evidence only of the existence of such acts and records, and not to give them any greater validity or effect than that which they had in the state from which they were thus accredited. The act expressly declares that, when thus authenticated, they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence they are taken. It merely provides a mode of proving public records, leaving them, when proved, invested with the same force and effect (and no other) which they have at home. But when a court of the United States is held in any state, it is bound to know the laws of such state the same as the domestic courts are.

Judgments reversed, and records remanded, with directions to award in each case *a venire facias de novo*.

WAITE, C. J., dissented (CLIFFORD, SWAYNE and STRONG, JJ., concurring), holding, (1) That, in Illinois, the question whether a statute has been legally enacted is one of fact and not of law (citing *Spangler v. Jacoby*, 14 Ill., 297; *Ill. Cent. R. Co. v. Wren*, 43 id., 79; *Larrison v. Peoria, etc., R. Co.*, 77 id., 18; *Grob v. Cushman*, 45 id., 124; *People v. De Wolfe*, 62 id., 253); (2) That the act being *prima facie* valid, and the bonds having been issued under it, the town is estopped to deny that the act was regularly enacted (citing *Knox Co. v. Aspinwall*, 21 How., 545; *Royal British Bank v. Turquand*, 6 Ell. & Bl., 527).

COMMISSIONERS OF JOHNSTON COUNTY v. JANUARY.

(4 Otto, 202-206. 1876.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an action brought to recover the amount of certain coupons taken from bonds issued by the plaintiffs in error to the St. Louis, Lawrence & Denver Railroad Company, of which bonds the defendant in error was the holder. By consent of parties the case was tried by the court without a jury. The court found the facts, and gave judgment for the defendant in error. The plaintiffs in error thereupon brought the case to this court for review. There is no dispute between the parties as to the leading facts of the controversy. The proper authorities submitted the question to the electors of the county, whether the county should subscribe for \$100,000 of the stock of the company, to be paid for by issuing its bonds to that amount. The elec-

tion was ordered on the 25th of January, 1869, and took place on the 6th of April, 1869. The proposition was sanctioned by a majority of more than two to one. The bonds were thereafter executed and deposited as escrows. On the 22d of May, 1871, the commissioners made an order that they should be delivered, and they were delivered accordingly. A certificate of stock was issued and delivered by the company, and is still held by the county. It has never been surrendered, nor offered to be surrendered. The bonds were signed by the chairman and clerk of the board of commissioners, and attested by the county treasurer. There was in each one a recital "that this bond is executed and issued by virtue of, and in accordance with, an act of the legislature of Kansas, entitled 'An act to authorize counties and cities to issue bonds to railroad companies,' approved February 25, 1868, and is in pursuance of, and in accordance with, the vote of a majority of the qualified electors of the county of Johnson, at a regular election, held on the 6th day of April, 1869." Each one bore, also, the following indorsement:

"I, A. Thoman, auditor of the state of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine; and that the bond has been duly registered in my office, in accordance with an act of the legislature, entitled 'An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvements, and providing for the registration of such bonds and the repealing of all laws in conflict therewith,' approved March 2, 1872. Witness my hand and official seal, this 21st day of March, 1872."

The certificate is authenticated by the official signature and seal of the auditor. The road was finished, and has since been in operation. The county and its inhabitants are in the enjoyment of the benefits arising from it. There is no imputation of any taint of fraud upon either side.

The county authorities paid the interest upon the bonds for a time. The county has received what it contracted to receive, and has paid what it contracted to pay. The plaintiff in the suit is the *bona fide* holder of the bonds.

A case of stronger equity can hardly exist. Several objections have been taken to the validity of the bonds. They have been elaborately and ably argued upon both sides. The view which we take of the controversy renders it necessary to advert to but one of the objections, and to that one briefly. Our judgment will be placed upon a different ground.

§ 1361. *An erroneous reference to the act under which the bonds were issued, in the recital in the bonds, does not invalidate the bonds.*

The act mentioned in the recital in the bond was erroneously referred to. That act does not affect the case, and may be laid out of view. The act of February 25, 1868, was in force when the order for the election was made. It gave ample authority for making the order, and for all that was subsequently done. It is insisted that this act was repealed by the act of February 27, 1869; that the order for the election fell with the act repealed, and that, consequently, the election was held without any legal authority. Such repeal, so far as regards the authority to make the order, and the continuing efficacy of the order, is strenuously controverted upon the other side. Whatever may be the fact, we are satisfied that after the passage of the act of 1869 all the proceedings were in substantial conformity to its requirements. It was in force before the election was held and until after the bonds were issued and delivered. This act, like the act of 1868, authorized the commissioners to issue the bonds when the

requirements of the law had been complied with. They were thus constituted a tribunal for the adjustment of all questions touching the subject. They were clothed with the power and charged with the duty to decide them. No appeal or review was provided for. Their issuing the bonds was the reflex and embodiment of their judgment that it was proper to do so. It implies a prior determination to that effect. The fact carries with it this presumption. The bonds recite that they were issued in conformity to law, and in pursuance of the election held on the 6th of April, 1869. It is true they refer to the wrong statute, but *falsa demonstratio non nocet*. The bad here does not hurt the good. The act of the commissioners was the act of the county, and the county is conclusively bound by what they have done. As between the county and a *bona fide* holder, no question involving the infirmity of the securities can be raised.

§ 1362. *The principle of estoppel precludes municipalities who retain the consideration received for their bonds from alleging their invalidity.*

The principle of estoppel applies, and it precludes the obligor from interposing such a defense. Whether the certificate of the auditor of state, indorsed on the bonds, has or has not the same effect, is a point not necessary in this case to be considered. Taking and holding the certificate of stock, issuing and delivering the bonds, and paying the interest for a time, cured the defect as to the order for an election, if any such existed. Under the circumstances, a *bona fide* taker had a right to presume that everything had been properly done which was necessary to the validity of the bonds. When this suit was instituted, the objections which have been made were too late. The views we have expressed have been repeatedly sustained by the adjudications of this court. *Supervisors v. Schenck*, 5 Wall., 772 (§§ 1683–86, *infra*); *Olcott v. Supervisors*, 16 id., 678; *City of Lexington v. Butler*, 14 id., 283 (§§ 1377–81, *infra*); *Pendleton County v. Amy*, 13 id., 298; *Meyer v. Muscatine*, 1 id., 385 (§§ 921–925, *supra*); *Com'rs of Knox Co. v. Aspinwall*, 21 How., 544 (§§ 1413–18, *infra*); *Lynde v. The County*, 16 Wall., 6 (§§ 1051–55, *supra*); *St. Joseph Township v. Rogers*, id., 644 (§§ 1674–77, *infra*); *Pine Grove v. Talcott*, 19 Wall., 666 (§§ 861–866, *supra*). We refer especially to the closing part of the opinion in the case last mentioned.

Judgment affirmed.

ORLEANS v. PLATT.

(9 Otto, 676–683. 1878.)

ERROR to U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This suit was brought upon interest coupons belonging to alleged bonds of the town of Orleans, in the state of New York. There are thirteen assignments of error in the record. Ten of them relate to the admission or rejection of evidence. All these ten have been pressed upon our attention, but we think there is nothing in them. We shall, therefore, pass them by without giving to either of them special consideration. The proceedings of the county judge touching the issuing of the bonds and the bonds themselves were sought to be excluded. This proceeded upon a misconception of the law of evidence. The plaintiff had a right to exhibit his case. These documents, according to his view, were links in his chain of title to recover. To shut them out would have been to condemn him unheard, and to give judgment against him without trial. The admissibility of testimony under such

circumstances, and its effect after it is admitted and all the other evidence is in, are very different questions.

§ 1363. *A rule as to instructing the jury.*

The twelfth assignment is that the defendant asked the court to submit to the jury, as distinct issues to be tried, the propositions whether the two railroad companies which had held the bonds and the plaintiff were *bona fide* holders, and that the court refused. Where the testimony is all one way and is conclusive in its effect, a party has no right to ask a charge which assumes that it is otherwise. It would tend to create a doubt where none existed or ought to exist, and might mislead the jury. Admitting that there could be no doubt as to the companies, a concession by no means necessary to be made, there could be none, as the case appears in the record, with respect to the plaintiff. The inquiry was, therefore, immaterial as to them and wrong as to him. The court properly declined to accede to the request.

§ 1364. *Where the facts are undisputed it is competent for the court to direct the verdict according to the law.*

The tenth and eleventh assignments charge error in the refusal of the court to direct the jury to find for the defendant. The former relates to a general request and refusal; the latter to a request upon twelve specified grounds, with the same result. The last assignment complains that the court directed the jury to find for the plaintiff. It is well settled in the jurisprudence of this court that if the facts are clearly established and are undisputed it is competent for the court to give such a charge. In one of the cases brought before us, where it had been done, the practice was commended, and it was remarked that "It gives the certainty of applied science to the results of judicial investigation." *Merchants' Bank v. State Bank*, 10 Wall., 604. In whose favor the charge should have been given will appear by the result of our examination of the case.

§ 1365. *Giving his negotiable promissory notes is sufficient to constitute a purchaser of bonds a holder for value.*

We have already adverted to the good faith of the defendant in error as a purchaser. When he bought he gave his negotiable notes, payable at different times, for the purchase money. The consideration was sufficient. 1 Daniel, *Neg. Securities*, 584. Whether the notes were absolute, presumptive or conditional payment, or only special collaterals to the amount to be paid, are points upon which there is great conflict in the authorities. 1 Pars., *Notes & Bills*, 151, c. 7. We need not consider the subject in this case. The plaintiff was not bound to allow his paper to go to protest and take the hazards of the litigation which would have followed. The refusal to pay the note first due, upon the ground of the want of consideration, would doubtless have led to the transfer of the other notes, all under-due, and as to them, in that case, there could have been no defense. But irrespective of this, there could have been none upon the merits. In *Otis v. Cullum*, 92 U. S., 447 (§ 1774, *infra*), a city bond issued in Kansas was sold to the plaintiffs in New York. This court, on the ground that the legislature had no power to pass the act under which the bond was issued, adjudged it void. The plaintiffs subsequently sued to recover back what they had paid for it. This court held that in such cases there is only an implied warranty of title and genuineness, and that if there were no guaranty, and no fraud or misrepresentation on the part of the vendor in selling, the plaintiffs could not recover. It was said that such instruments pass from hand to hand like bank notes, and that, if invalid, the law would not inflict the hard-

ship of compelling every one who had passed them to pay back what he had received from his transferee. This case followed *Lambert v. Heath*, 15 Mees. & W., 486, in which the same point was ruled in the same way.

The important question here is, whether the bonds were wholly void,—like a promissory note given for a gaming consideration, and made a nullity by statute,—or whether they were of such a character that a *bona fide* holder could enforce them like any other commercial security, free from infirmity. It is not denied that the statutory authority to issue them under the circumstances designated was ample and valid. In this respect our attention has been called to no defect; no question has been raised upon the subject.

Parties claiming to be a majority of the tax-payers, and to own the greater part of the taxable property of the town, petitioned the county judge for an order that the bonds of the town, to the amount of \$30,000, should be issued to enable it to subscribe and pay for that amount of the capital stock of the Clayton & Theresa Railroad Company. After hearing the petitioners and their opponents at the appointed time, the judge, on the 1st of July, 1871, ordered the bonds to be issued, and, pursuant to the statute, appointed three commissioners to execute and deliver them. An application was thereupon made by the dissatisfied parties to the supreme court for a writ of *certiorari*. The writ was allowed on the 30th of September, 1871. It was served upon the county judge, and he made the proper return. On the 27th of June, 1872, the supreme court, at a general term, affirmed the judgment. In the month of July following the case was taken to the court of appeals, and in February, 1873, that court reversed the previous judgments and ordered the petition to be dismissed. On the 3d of April, 1872, the commissioners appointed by the county judge subscribed for eight hundred shares of the stock of the railroad company, amounting to \$80,000, and on the next day issued and delivered in payment one hundred and sixty of the bonds of the town of \$500 each, and thereupon received from the company scrip for the stock, which the town still holds. On the face of each bond was a certificate that it had been duly registered in the clerk's office of the county. The coupons in suit in this case were attached to one hundred and forty of these bonds. On the 26th of February, 1872, and on the 31st of May, 1873, the Clayton & Theresa Railroad Company entered into a contract with the Utica & Black River Railroad Company, and at the date of the second contract delivered all the bonds to Isaac Maynard, as collateral security for the fulfilment of both contracts, and with authority to him to sell the bonds and pay over the proceeds to the latter company. On the 4th of February, 1874, Maynard sold to the plaintiff the bonds here in question, under the circumstances before stated.

§ 1366. *The judgment of the tribunal charged with deciding, that all conditions precedent have been complied with, cannot be questioned in a suit upon town bonds.*

The court of appeals reversed the judgment of the county judge, solely upon the ground that when the case was before him he had refused to allow tax-payers who had signed the petition to withdraw their signatures, although applications for that purpose were made, and, if it had been permitted, the numbers and taxable property represented would have been below the standard required by the statute to authorize the judgment that was rendered. It does not appear that any other objection was made by the contestants. *People v. Sawyer*, 52 N. Y., 296. The previous reported adjudications are said to have been all contrary to this decision; none of them, however, were by the court

of last resort. *In re Tax-payers of Town of Greene*, 38 How. Pr. (N. Y.), 515; Mem. of Decisions of Sup. Court, fols. 281, 282. See, also, *People v. Mitchell*, 35 N. Y., 555. The bonds showed no defect upon their face. They purported to be issued by virtue of certain specified acts of the legislature, and set forth that the "commissioners, under the acts above referred to, for the town of Orleans, . . . upon the faith and credit and on behalf of said town, and confirmed by a majority of the tax-payers, representing a majority of the taxable property of the same, according to said acts, for value received, do hereby promise," etc. When the county judge appointed the commissioners to issue the bonds, it was made their duty to proceed "with all reasonable dispatch." They were not parties to the proceedings upon the *certiorari*, and hence were not directly affected by them. The same remarks apply to the corporation that received the bonds in payment for its stock. It is expressly provided by statute that in case of disagreement of the commissioners touching the issuing of the bonds the supreme court may decide and direct what shall be done, and that "said court . . . shall have power at any time, by injunction, to prevent the issue of said bonds, or any part thereof, on notice and for good cause shown; and any judge of said court may grant a temporary injunction until such motion can be heard." Laws of 1871, vol. ii, p. 2119, c. 935, sec. 5. In this case, a preliminary injunction might and should have been procured forbidding the commissioners to issue the bonds, and the railroad company, if it received them, from parting with them, until the case made by the *certiorari* was finally brought to a close. This would have involved only an ordinary exercise of equity jurisdiction. *State of Illinois v. Delafield*, 8 Paige (N. Y.), 527; S. C. on appeal, 2 Hill (N. Y.), 160. The omission was gross laches. This negligence is the source of all the difficulties of the plaintiff in error touching the bonds. The loss, if any shall ensue, will be due, not to the law or its administration, but to the supineness of the town and the contestants. *County of Ray v. Vansycle*, 96 U. S., 675 (§§ 1190-93, *supra*).

Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him, and not upon the other party. *Hern v. Nichols*, 1 Salk., 289; *Merchants' Bank v. State Bank*, 10 Wall., 604. The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray v. Lardner*, 2 Wall., 110 (§§ 1340-42, *supra*). This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities, and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. *Mercer County v. Hackett*, 1 id., 83 (§§ 1409-12, *infra*); *San Antonio v. Mehaffy*, 96 U. S., 312; *County of Moultrie v. Savings Bank*, 92 id., 631 (§§ 872-875, *supra*); *Moran v. Commissioners of Miami County*, 2 Black., 722 (§§ 1439-42, *infra*); *Knox v. Aspinwall*, 21 How., 539 (§§ 1413-18, *infra*); *Royal British Bank v. Turquand*, 6 Ell. & Bl., 325. A corporation is liable for the acts of its servants, while engaged in the business of their employment, to the same extent that individuals are liable under like circumstances. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How., 209; *Green v. London Gen'l Omnibus Co.*, 7 C. B. (N. S.), 290; *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co. of New York*, 7 Wend. (N. Y.), 31. The doctrine of *lis pendens* has no application to commercial securities. *Murray v. Lylburn*, 2 Johns. Ch., 441;

Kieffer v. Ehler, 18 Penn. St., 388; *Stone v. Elliott*, 11 Ohio St., 252; *Mims v. West*, 38 Ga., 18; *Leitch v. Wells*, 48 N. Y., 585; *County of Warren v. Marcy*, 97 U. S., 96 (§§ 1454-57, *infra*). See, in the case last named, Mr. Justice Bradley's full examination of the subject.

The county judge was the officer charged by law with the duty to decide whether the bonds could be legally issued, and his judgment was conclusive until reversed by a higher court. *Lynde v. The County*, 16 Wall., 6 (§§ 1051-55, *supra*); *Township of Rock Creek v. Strong*, 96 U. S., 271 (§§ 1010-12, *supra*). The plaintiff had no notice, actual or constructive, of the proceedings in the case subsequent to the first judgment, and is in nowise affected by them. *The County of Warren v. Marcy*, *supra*, is in effect decisive of the case in hand. There the board of supervisors claimed to be authorized by a popular vote to subscribe for the stock of a railroad company, and to pay in county bonds to be issued by themselves. A tax-payer filed a bill in the county circuit court, and procured a preliminary injunction prohibiting the issue of the bonds. Before the final hearing this injunction was dissolved; at the final hearing the bill was dismissed. There had been no injunction in force after the preliminary injunction was disposed of. The complainant appealed to the supreme court of the state. There, in due time, the decree of the lower court was reversed, and the case was remanded with directions to enter a decree in conformity to the prayer of the bill. But between the time of the dissolution of the preliminary injunction and the final hearing in the court below the supervisors subscribed for the stock and issued the bonds. The same question arose as to the bonds there as here. This court held that in the hands of a *bona fide* holder they were free from objection and could be enforced. Our examination of this case with respect to the bonds here in question constrains us to come to the same conclusion. There is no difference between the two cases in any material point. We think the instruction given by the court below to the jury was correct.

Judgment affirmed.

MR. JUSTICE BRADLEY did not sit.

GELPOKE v. CITY OF DUBUQUE.

(1 Wallace, 175-220. 1863.)

STATEMENT OF FACTS.—With the statutes and constitutional provisions in force, as recited in the opinion, the city of Dubuque issued its coupon bonds, payable to a person named, or bearer, and purporting by their recitals to be for stock in the Dubuque Western Railroad Company. In a suit on coupons, the city set up in defense, (1) that the bonds were issued in aid of a railroad extending beyond the limits of the city into the interior of the state; (2) that at the time the bonds were issued the indebtedness of the city exceeded \$100,000; also, that at that time the indebtedness of the state, and of the cities and counties of the state, exceeded \$100,000.

Opinion by MR. JUSTICE SWAYNE.

The whole case resolves itself into a question of the power of the city to issue bonds for the purpose stated. The act incorporating the city, approved February 24, 1847, provides as follows:

"SEC. 27. That whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Dubuque, the nature and object of the loan shall be stated, and a

day fixed for the electors of said city to express their wishes; the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

By an act approved January 8, 1851, the act of incorporation was "so amended as to empower the city council to levy annually a special tax to pay interest on such loans as are authorized by the twenty-seventh section of said act."

An act approved January 28, 1857, contains these provisions:

"That the city of Dubuque is hereby authorized and empowered to aid in the construction of the Dubuque Western and the Dubuque, St. Peter's & St. Paul Railroad Companies, by issuing \$250,000 of city bonds to each, in pursuance of a vote of the citizens of said city, taken in the month of December, A. D. 1856. Said bonds shall be legal and valid, and the city council is authorized and required to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources." "The proclamation, the vote, and bonds issued or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the money arising from the sale of said bonds, without the limits of the city and county of Dubuque, in the construction of either of said roads, and neither the city of Dubuque, nor any of the citizens, shall ever be allowed to plead that said bonds are invalid."

§ 1367. *Where corporation has power to issue bonds, bona fide purchaser may presume its rightful exercise.*

By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. The qualifications coupled with the grant of power contained in the twenty-seventh section of the act of incorporation are not now in question. If they were, the result would be the same. When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. Commissioners of Knox Co. v. Aspinwall, 21 How., 539 (§§ 1413-18, *infra*); Royal British Bank v. Turquand, 6 Ell. & Bl., 327; Farmers' Loan & T. v. Curtis, 3 Seld., 466; Stoney v. American L. Ins. Co., 11 Paige, 635; Morris Canal & B. Co. v. Fisher, 1 Stock. Ch., 667; Willmarth v. Crawford, 10 Wend., 343; Alleghany City v. McClurken, 14 Penn. St., 83. If there were any irregularity in taking the votes of the electors or otherwise in issuing the bonds, it is remedied by the curative provisions of the act of January 28, 1857. Where there is no defect of constitutional power, such legislation, in cases like this, is valid. This question, with reference to a statute containing similar provisions, came under the consideration of the supreme court of Iowa in *McMillen v. Boyles*, 6 Ia., 305, and again in *McMillen v. The County Judge and Treasurer of Lee County*, id., 391. The validity of the act was sustained. Without these rulings we should entertain no doubt upon the subject. *Wilkinson v. Leland*, 2 Pet., 627; *Satterlee v. Matthewson*, 2 id., 380; *Baltimore & S. R. Co. v. Nesbit*, 10 How., 395; *White Water Valley Co. v. Vallette*, 21 id., 425. It is claimed "that the legislature of Iowa had no authority under the constitution to authorize municipal corporations to purchase stock in railroad companies, or to issue bonds in payment of such stock." In this connection our attention has been called to the following provisions of the constitution of the state:

"ART. 1, § 6. All laws of a general nature shall have a uniform operation."

"ART. 3, § 1. The legislative authority of the state shall be vested in a senate and house of representatives, which shall be designated as the general assembly of the state of Iowa," etc.

"ART. 7. The general assembly shall not in any manner create any debt or debts, liability or liabilities which shall, singly or in the aggregate, exceed the sum of \$100,000, except," etc. The exceptions stated do not relate to this case.

"ART. 8, § 2. Corporations shall *not be created in this state by special laws, except for political or municipal purposes*, but the general assembly shall provide by general laws for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The state shall not, directly or indirectly, become a stockholder in any corporation."

Under these provisions it is insisted: 1. That the general grant of power to the legislature did not warrant it in conferring upon municipal corporations the power which was exercised by the city of Dubuque in this case. 2. That the seventh article of the constitution prohibits the conferring of such power under the circumstances stated in the answer,—debts of counties and cities being, within the meaning of the constitution, debts of the state. 3. That the eighth article forbids the conferring of such power upon municipal corporations by special laws.

All these objections have been fully considered and repeatedly overruled by the supreme court of Iowa. *Dubuque County v. Dubuque & Pacific R. Co.*, 4 Greene, 1; *State v. Bissell*, 4 id., 328; *Clapp v. Cedar County*, 5 Ia., 15; *Ring v. County of Johnson*, 6 id., 265; *McMillen v. Boyles*, 6 id., 304; *McMillen v. County Judge of Lee County*, 6 id., 393; *Games v. Robb*, 8 id., 193; *State v. Board of Equalization of the County of Johnson*, 10 id., 157. The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them unless there be something which takes the case out of the established rule of this court upon that subject.

§ 1368. *When supreme court will not follow decisions of state courts.*

It is urged that all these decisions have been overruled by the supreme court of the state, in the later case of *The State of Iowa v. County of Wapello*, 13 Ia., 390, and it is insisted that in cases involving the construction of a state law or constitution, this court is bound to follow the latest adjudication of the highest court of the state. *Leffingwell v. Warren*, 2 Black, 599, is relied upon as authority for the proposition. In that case this court said it would follow "the latest settled adjudications." Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen states of the Union. Many of the cases in the other states are marked by the profoundest legal ability.

§ 1369. *A contract valid when made, under decisions of state supreme court, not rendered invalid by subsequent change of decision.*

The late case in Iowa, and two other cases of a kindred character in another state, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts, altering the construction of the law." *Ohio Life & Trust Co. v. Debolt*, 16 How., 432.

The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.

§ 1370. *Bonds and coupons are negotiable instruments, and interest and exchange are recoverable.*

Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed. *White v. Vermont & M. R. Co.*, 21 How., 575; *Commissioners of Knox County v. Aspinwall*, 21 id., 539 (§§ 1413-18, *infra*).

We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own states. It is the settled rule of this court, in such cases, to follow the decisions of the state courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice and the law because a state tribunal has erected the altar and decreed the sacrifice. The judgment below is reversed, and the cause remanded for further proceedings in conformity to this opinion.

Judgment and mandate accordingly.

MR. JUSTICE MILLER dissented, holding that the highest court of Iowa had already decided that the legislature had no authority to confer the power in question. (Citing *Stokes v. Scott Co.*, 10 Ia., 166; *State v. County of Wapello*, 13 id., 398; *Shelby v. Guy*, 11 Wheat., 361; *McCluney v. Silliman*, 3 Pet., 277; *Van Rensselaer v. Kearney*, 11 How., 297; *Webster v. Cooper*, 14 How., 504; *Elmendorf v. Taylor*, 10 Wheat., 152; *The Bank v. Dudley*, 2 Pet., 492.) Also that the decision is in conflict with other decisions of the supreme court. (*Shelby v. Guy*, 11 Wheat., 361; *United States v. Morrison*, 4 Pet., 124; *Green v. Neal*, 6 Pet., 291; *Patton v. Easton*, 1 Wheat., 476; *Powell v. Harinan*, 2 Pet., 241; *Leffingwell v. Warren*, 2 Black, 599; *Rowan v. Runnels*, 5 How., 134; *Groves v. Slaughter*, 15 Pet., 449; *Dubuque Co. v. Dubuque & Pac. R. Co.*, 4 G. Greene, 1; *State v. Bissell*, 4 id., 328; *Clapp v. Cedar Co.*, 5 Ia., 15; *Stokes v. Scott Co.*, 10 id., 166, cited.)

COUNTY OF DAVIESS v. HUIDEKOPER.

(8 Otto, 98-104. 1878.)

ERROR to U. S. Circuit Court, Western District of Missouri.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The plaintiff below brought this suit to collect from the county of Daviess, Missouri, the amount of forty-four interest coupons for \$35 each, formerly attached to bonds issued by the county to the Chillicothe & Omaha Railroad Company, to aid in the construction of its railroad. A demurrer to the amended petition was overruled, and final judgment for the amount of the coupons was rendered by the court below, which also certified a division of opinion on points presented. The questions certified are as follows:

First. Whether the bonds for the collection of the interest coupons on which the suit was brought were issued without due authority of law, and are void in the hands of a *bona fide* purchaser for value, because the railroad company to which said bonds were issued, in payment of capital stock by it subscribed, was not created according to law until subsequent to the favorable vote of the qualified voters and the order of subscription.

Second. Whether the former judgment recovered by the plaintiffs in a former suit in this court against the defendant, upon interest coupons from the same bonds again set forth in this suit, estops the defendant from pleading in bar to the merits herein.

The constitution of Missouri (1 Wagn. Stat., 62), sec. 14 of art. 11, provides as follows, viz.: "The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

The general statutes provide (1 Wagn. Stat., 295) how railroad companies may be formed, and further provide (*id.*, 305): "Sec. 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town in, or loan the credit thereof to, any railroad company duly organized under this or any other law of the state: *Provided*, that two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription."

§ 1371. *The validity of county bonds is not impaired as to bona fide holders by the fact that the vote of the people was taken before the organization of the railroad was complete.*

Having paid his money in good faith for the bonds issued by this county, and the interest becoming payable, it is not unnatural that the holder and owner should demand payment of such interest. The subscription by the county to the railroad stock, the receipt and holding of the stock by the county, the assent by two-thirds of the qualified voters of the county that such subscription should be made, the actual issuing of the bonds, and the purchase of the same by the plaintiff below, without knowledge of any objection to them, are conceded. It is said, however, that these things were not done in their proper order; that the vote of the citizens assenting to the subscription was taken before the organization of the railroad company was complete, and that although that act was not under the control or direction of the holder of the bond, but an irregularity of the county, if it is an irregularity, the county is

thereby relieved from the payment of its debts, which would otherwise be not only just and honest but lawful. This is the point that is made in the first of the questions presented by the certificate of the judges. The facts on which this branch of the case rests are these: The articles of incorporation of the road in question, which bear date June 18, 1867, contain the statements required by the statute, giving the length of the road, the amount of the capital stock and the names of the directors, and were subscribed by the subscribers for the amounts indicated. The amount subscribed was not then as large as that required by the statutes of Missouri, to wit, \$1,000 per mile for the length of the road. This sum was, however, obtained as early as the 11th day of July, 1868, when the articles were filed in the office of the secretary of state, and the incorporation became perfect. On the 1st of July, 1869, the county court made its subscription, issued and sold its bonds, and with the proceeds paid for and received the stock. The road was built through the county, and for several years the county levied and collected taxes to pay the interest of the bonds, and did pay the interest for those years.

§ 1372. *Bonds and coupons are negotiable paper; irregularities in issuance do not invalidate.*

The precise question now presented has never been decided in this court, but its determination depends upon principles which are well settled. These bonds are securities which pass from hand to hand with the immunity given by the common law to bills of exchange and promissory notes. The persons who execute and deliver them — the officers of the county court in this instance — are the agents of the municipal body authorizing their issue, and not of the persons who purchase or receive them. If these agents exceed their authority as to form, manner, detail or circumstance, if they execute it in an irregular manner, it is the misfortune of the town or county and not of the purchaser; the loss must fall on those whom they represent and not on those who deal with them. There must, indeed, be power, which, if formally and duly exercised, will bind the county or town. No *bona fides* can dispense with this and no recital can excuse it. Thus, if the constitution or the statute should peremptorily prohibit a municipal body from loaning its credit to or subscribing for stock in a railroad corporation, a subscription or a loan made subsequently to the passage of the act would give no right against the county, although the bond should recite that there was such authority, and the purchaser should pay full value in the belief of its truth. There is no difficulty in appreciating the distinction stated; and we are now to ascertain whether the error we are considering, assuming it to be one, arises from an irregularity in the exercise of an existing power, or whether there is total want of authority to act. The case concedes that the question of subscription to the stock of this very company was submitted to the voters of Daviess county, that two-thirds of the qualified voters of that county assented to the making of that subscription, and that the bonds, the coupons from which are here in suit, were issued pursuant to an order of the county court of Daviess county, made under authority of the constitution and general statutes of the state of Missouri. After admitting that it made a contract with this company to take its stock, and not with some other company, and that the contract with this identical company was authorized with the forms and solemnities set forth, and that it received, and, so far as known, has ever since held and enjoyed, and now holds and enjoys, the profits of the stock of this very company issued for such bonds; and also admitting that when the bonds were so issued and delivered by it, the incorporation had been completed

in form and detail for one year,— can it now be permitted to urge as a defense that such company was not a legally organized corporation when the election was held, and did not become such until after that period?

The Missouri statute already quoted shows that the municipal body, in regard to its privileges, liabilities and responsibilities as a taker and holder of railroad stock, stands like an individual subscriber. Its eighteenth section is as follows: "SEC. 18. Upon the making of such subscription by any county court, city or town, as provided for in the previous section, such county, city or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed, by this chapter or by the charter of the company in which such subscriptions shall be made; and in order to raise funds to pay the instalments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court, or city council, or trustees of such town making such subscriptions, to issue their bonds or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city or town to pay such instalments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in one year in any county, city or town shall not exceed thirty per cent. of the subscription made by such county, city or town."

It shows, also, that it devolved upon the county court, subject to the question of power before stated, to determine whether a subscription had been made, and to raise money for its payment. This included a determination of the questions whether an assent had been given by the voters, and whether a subscription had in fact been made by the county court. It did determine both of these questions in the affirmative, and so certified in the bonds issued by the same authority, and which are now in suit. Under these circumstances, the authorities in this court and in the state of Missouri hold that the decision of the voters and the action of the county court in issuing the bonds in question, and their subsequent action in receiving and retaining their benefits, gave validity to the bonds, and that they are now to be taken as valid instruments. Among these authorities are the following: *Town of Coloma v. Eaves*, 92 U. S., 484, 491 (§§ 1419–20, *infra*); *County of Randolph v. Post*, 93 id., 502 (§§ 915–917, *supra*); *County of Leavenworth v. Barnes*, 94 id., 70 (§§ 1024–26, *supra*); *Commissioners of Douglass County v. Bolles*, id., 104 (§§ 1435–38, *infra*); *Commissioners of Johnson County v. Thayer*, id., 631 (§§ 1030–36, *supra*); *County of Cass v. Johnston*, 95 id., 360 (§§ 901–904, *supra*); *City of St. Louis v. Shields*, 62 Mo., 247; *Smith v. Clark County*, 54 id., 58, 81.

§ 1373. *The perfection of a railroad corporation before the issuance of the bonds renders that issuance valid under the statute of Missouri. Case distinguished.*

These authorities show that if the county had made a contract with the railroad company in April, 1868, it would not have been permitted, under the circumstances stated, to deny it. But here was no contract. It was a simple indication of the pleasure or wish of the voters of the county that aid should be furnished to this railroad. The statute was intended as a guard against hasty action in this respect, and makes no requisition that the corporation shall be so perfected that a *quo warranto* could not reach it. If assent is given to a specified aid to a railroad named, we are of the opinion that a perfection

of the corporation before the subscription is made and the bonds issued is a compliance with the statute. *Ruby v. Shain*, 54 Mo., 207, is cited to the contrary. There are several reasons why that case does not control the one we are considering.

1. The question of the legality of the subscription was never properly reached. Whether the tax which was levied to pay the county subscription for stock was legal or illegal, it was certain that the collector, who had a warrant for its collection valid on its face, and who was the defendant in that suit, was not liable for enforcing it. That an officer in such case is protected by his writ, and that to protect himself he need not even produce the evidence of a judgment, was held as long ago as in *Holmes v. Newcaster*, 12 Johns. (N. Y.), 395, and has been so held from that time to the present. Such, too, is the express holding of the court in *Ruby v. Shain*, and an examination of the merits of the case was unnecessary.

2. It differed from the present case in the fact that not only the township vote of assent, but the subscription to the stock and the issuing of the bonds, all occurred before the organization of the company. The vote was taken in June, 1869, the subscription ordered and the bonds issued on the 9th of November, 1869, while the articles of association were executed on the 10th, and filed with the secretary of state on the 12th of the same month and year. In the present case, the election was held April 7, 1868, the articles were filed July 14, 1868, the subscription made and the bonds dated July 1, 1869. The organization was complete for a year before the subscription was made.

3. In that case the subscription was needed to complete the organization. In this case it was not. The court, in *Ruby v. Shain*, say, "that it is not intended that counties, cities or towns shall, by their subscription, form the basis on which a future corporation is to be erected, a nucleus around which aid is to be gathered from other quarters, to construct roads, but that they may, by their subscriptions or loans, aid corporations already in existence." There is a broad difference between the cases where the subscription is actually made and the bonds are issued in fact after the corporation is complete, and where these things are done while the corporation remains incomplete.

Upon the whole matter, we are of the opinion that the case was well decided. The first question certified is answered in the affirmative, and as that disposes of the entire controversy, no attention need be given to the second question.

Judgment affirmed.

TOWN OF WEYAUWEGA v. AYLING.

(9 Otto, 112-119. 1878.)

ERROR to U. S. Circuit Court, Eastern District of Wisconsin.

STATEMENT OF FACTS.—The bonds in this case were issued under a statute of Wisconsin of 1869, which made it the duty of the proper officers of the town to pay and deliver to the railroad company the bonds voted, and designating the chairman of the board of supervisors and the town clerk as the proper officers. It appeared that the bonds were delivered, and came into the hands of the complainant before maturity and in good faith. The judges were divided in opinion on the following points: (1) Whether the town was estopped to show the true date of the signing of the bonds. (2) Whether the bonds were valid under the circumstances. (3) Whether the recital on the face of the bonds as to the date of the signing estops the town from showing the true date, and that Verke

was not the clerk; and if not, whether the bonds are invalid in the hands of a *bona fide* holder.

§ 1874. *A town having issued its bonds under authority of law is estopped from denying that they were signed on the day of their date.*

Opinion by WAITE, C. J.

The first question certified in this case is answered in the affirmative. The legal voters of the town, by a vote duly taken pursuant to statutory authority for that purpose, directed the issue of the negotiable bonds in controversy. As soon as this vote was given, it became the duty of the chairman of the board of supervisors and the clerk of the town to cause the bonds to be made out and delivered to the railroad company. Such was the requirement of the statute under which the vote of the town was taken. The designated officers had no discretion in the premises.

After the vote an appropriate form of bond and coupons was lithographed and printed, with blanks in the bond for the signatures of the chairman and clerk. As printed, the bonds bore date June 1, 1871. At that time Fenelon was chairman and Verke clerk. The signatures of these officers were lithographed and printed on the coupons. Before the bonds were actually signed by Verke, he had resigned his office and moved out of the town. Another clerk had been appointed and qualified in his place. Apparently to save the expense of a new lithograph and another printing of the bonds, Verke, after going out of office, affixed his signature to those which had been printed. These bonds so signed by Verke and by Fenelon, who actually was chairman at the time, were taken by Fenelon and delivered to the railroad company. This having been done, Ayling, the defendant in error, purchased the bonds to which the coupons sued on were attached, and paid their full value without notice of any claim of defense to their due execution. Under these circumstances, we think the town is estopped from proving that Verke in fact signed the bonds after he went out of office. If Ayling had put himself on inquiry when he made his purchase he would have found, 1, that the town had authority to vote the bonds; 2, that the necessary vote had been given; 3, that at the date of the bonds Verke was clerk and Fenelon chairman; 4, that their signatures were genuine; and 5, that the bonds had actually been delivered to the railroad company by Fenelon, who was at the time chairman. If a bank puts out a note for circulation bearing the signature of one who was in fact president of the bank when the note bore date, no one will pretend that it could be shown as a defense to the note when sued upon by a *bona fide* holder, that the signature of the person purporting to be president was affixed after he went out of office. So if one puts out a note purporting to be signed by himself, but which was in fact signed by another having at the time no authority from him, he cannot prove the forgery or want of authority in the signer as against a *bona fide* holder. The reason is obvious. The bank by issuing the note, and the individual by delivering the paper which purported to be his obligation, adopted what they thus put out as their own, and became bound accordingly.

The same principle applies in this case. There is no pretense that the obligation of these bonds is other or different from that authorized by the voters. So far as the record shows, the town has received and retains the consideration for which they were voted. No bad faith is imputed to any one. It is true the chairman alone made the actual delivery to the railroad company; but the presumption is that what he did was assented to by the clerk in office at the

time. Certainly it could not have been contemplated that, to make a binding obligation, both the chairman and clerk must have been present when the delivery to the railroad company was made; and as the presumption always is, in the absence of anything to the contrary, that a public officer while acting in his official capacity is performing his duty, it must be assumed for all the purposes of this case that the bonds were delivered to the railroad company by the chairman with the assent of the clerk, and, therefore, that they were issued as negotiable instruments by the proper officers of the town. If the fact was otherwise, it was incumbent on the town to make the necessary proof.

It is unnecessary to answer any of the other questions certified, further than has already been done. The answer to the first question is decisive of the case.

Judgment affirmed.

POMPTON v. COOPER UNION.

(11 Otto, 196-204. 1879.)

ERROR to U. S. Circuit Court, District of New Jersey.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is a controversy touching the validity of certain municipal bonds issued by the inhabitants of the township of Pompton, in the county of Passaic, N. J., which came into the hands of The Cooper Union for the Advancement of Science and Art. The latter brought suit on them, and recovered judgment. The case was then removed here. There is no conflict as to the facts. The questions to be considered all involve the effect of the facts as matter of law upon the rights of the parties.

The Montclair Railway Company was incorporated by an act of the legislature of New Jersey, approved March 18, 1867. The sixth section authorized the company to construct a railway from the village of Montclair, in the township of Bloomfield, to the Hudson river, at one or the other of certain designated points, and also to attach a branch to the main stem in the township named, and “to extend the said railway into the townships of Caldwell and Wayne.”

Section 1 of an act approved April 9, 1868, provided that, on the application in writing of twelve freeholders, residents of any township, town or city “along the routes of the Montclair Railway Company, or at the termini thereof,” except the township of Bloomfield, it should be the duty of the circuit judge of the county, within ten days after receiving the application, to appoint three freeholders, residents of such township, town or city, to be commissioners to carry into effect the provisions of the act. They were to hold their offices five years, and until their successors were appointed. The third and fourth sections of the act are also necessary to be considered. Their provisions may be thus summarized and sufficiently presented for the purposes of this opinion. The commissioners were authorized to borrow money, not exceeding in amount twenty per cent. of the valuation of the real estate in such township, town or city, according to the assessment rolls, at a rate of interest not exceeding seven per cent. per annum, to be paid half-yearly, and to execute under their hands and seals bonds therefor in such sums, and payable at such times and places, as they might deem proper; but no bonds were to be issued, or debt contracted, until the written consent of those owning at least two-thirds of the real estate of the township, town or city on the assessment roll, according to the valuation on such roll, should have been obtained. The

consent was to state the amount of money to be borrowed, and that the fund was to be invested in the bonds of the railway company. The signatures of those consenting were to be proved by the oath of one or more of the commissioners. The valuation of the property owned and represented was to be proved by the affidavit of the assessor. The consent and affidavit were to be filed in the office of the clerk of the proper locality. The commissioners were authorized to sell the bonds as they might think proper, but not for less than par. The proceeds were to be invested in the bonds of the railway company issued for the purpose of building and equipping the road, and not otherwise. The commissioners were to subscribe for the purchase of bonds to the amount they were authorized to borrow. By the first section of the supplementary act of March 16, 1869, the railway company was authorized to extend the road from any point upon it to any point in the township of West Milford. By the fourth section it was provided that the operation of the last-named prior act should not be extended to any township, town or city through or to which the road was *not authorized* to be extended before the passage of this act. On the 6th of July, 1868, the proper previous steps having been taken, the judge appointed the commissioners for Pompton township. On the 4th of May, 1870, the commissioners issued bonds to the amount of \$100,000, all of which subsequently came into the hands of the defendant in error. When the bonds were disposed of by the commissioners no route of the road west of Montclair had been surveyed, but it was distinctly proved on the trial that the southeast line of Pompton was then the contemplated and intended southwestern terminus. On the 6th of April, 1870, a survey was filed which commenced at that village and extended to a point between Mead's basin and the Pequannock river, in the southern part of Wayne township. On the following 9th of June another survey was filed, which began at the terminus last mentioned, crossed the line between Wayne and Pequannock townships, then proceeded to the line between Pequannock and Pompton (the latter being a parallelogram), and after traversing Pompton diagonally about two-thirds of its length, crossed its west line into West Milford and thence proceeded in that township to the boundary line between New Jersey and New York. This line was finally adopted and the road was built accordingly. Thus, though Pompton did not get a terminus on its southeast line, as originally contemplated, it got for the same consideration the length of the road within its territory and the extension beyond its limits. The change was obviously beneficial to the township. No ground is disclosed for the slightest imputation of bad faith against any one, touching either the road or the sale of the bonds. It does not appear that the township authorities made the slightest complaint. Doubtless all believed that what was done was best for all concerned.

According to the record the defendant in error is clearly a *bona fide* holder of the bonds. Full value was paid for them, and they were taken underdue without knowledge or notice of any infirmity, if there were any, belonging to them. The learned judge who tried the case below so instructed the jury and properly withdrew the subject from their consideration.

It is objected to the validity of the bonds,— 1. That they could not be competently issued until the route of the road had been surveyed and the termini thus fixed.

2. That no terminus at Pompton was ever so fixed or designated as to be effectual. 3. That, when the route of the road was changed and fixed pursuant to the act amending the charter of the company, the necessary considera-

tion for the bonds became in a vital part impossible or failed, and that the bonds were thereupon void. These several points may well be grouped and considered together.

§ 1375. *Where, under an act authorizing municipal bonds, commissioners are vested with a discretion as to their sale, the decision of such commissioners is conclusive.*

The act under which the bonds were issued must be regarded in the light of the circumstances. At the outset it is material to note that the power of the commissioners was hedged about by checks, limitations and safeguards, with the most careful elaboration. Yet it is nowhere said or intimated when or under what circumstances the bonds should be sold. In these respects there was no restriction. The discretion of those who were empowered and directed to make the sale was left unfettered. The bonds were to be issued to aid the company to complete the road. Such is the language of the act. Without such help the road might not be begun, or, if begun, might not be finished. After the work was done assistance would not be needed. Fraud and abandonment of the enterprise were possible as well after the survey was definitely made as before. Such results touching a work in the hands of persons of known good character were not to be anticipated and could hardly occur. The commissioners being constituted the sole judges as to the points mentioned with reference to parting with the bonds, their decision was conclusive. There could be no appeal and no review. It was a matter with which a *bona fide* purchaser had nothing to do. The phrases "along the route," "or at the termini," have a meaning as plain and clear as that of any other terms the law-makers could have employed. It was expressly declared that the road might go "into" the township of Wayne — which meant to any part of it,—and it was intended that it should stop at the line between Wayne and Pompton. There the two territories came in contact. The boundary of one was the boundary of the other, and to stop at that line made Pompton one of the termini of the road. This brought the case within the category expressly defined by the statute, and justified the action of the commissioners.

§ 1376. *That a town is "along the route," and not a terminus, does not impair the validity of its bonds in the hands of a bona fide holder.*

That the terminus was potential and contemplated was sufficient. It was not required to be fixed or unalterable. We hold, therefore, that the bonds were rightfully issued. That under the act amending the charter, Pompton, instead of being a terminal township, became thereafter a township "along the route" of the road, cannot affect the previously vested rights of a *bona fide* transferee of the securities. It would be a singular result if a larger and better consideration than was contemplated when the bonds were issued should be held to destroy their validity. There was in effect an exchange of obligations between the company and the township, but the motive and object of the latter was the benefit expected to accrue from the road.

There are several things which go strongly to sustain the construction and effect we have given to the act of 1868. The coupons for the half-yearly interest upon the township bonds, and those for the half-yearly interest upon the railroad bonds belonging to the township, were paid to the respective holders to November 1, 1872, inclusive. Up to that time it does not appear that the validity of the township bonds was questioned by any one. There seems to have been entire acquiescence on the part of all concerned, including the township authorities. By the fourth section of the act of 1869 the legislature de-

clared in effect that the *authorized* and not the *actual* routes were those intended by the bonding act of 1868. By the first section of the act of 1874 the office of the commissioners of Pompton township was abolished, and their duties were devolved upon the township committee. One of those duties was to provide the necessary funds in the ways prescribed, and to pay the interest upon the bonds involved in this controversy.

In cases like this, legislative ratification is the equivalent of original authority, and what is clearly implied in a statute is as effectual as what is expressed. 1 Dillon, Mun. Corp., sec. 46; *United States v. Babbit*, 1 Black, 55. Whether this statute was a ratification of the sale of the bonds as made, if such ratification were needed, is a point which the view we take of the case renders it unnecessary to consider. It was certainly a clear recognition of Pompton as one of the townships authorized to issue bonds in aid of the railroad company—a legislative construction entitled to great respect. The bonds of the railroad company held by the commissioners are still in the hands of the township. It does not appear that there has been any offer to return them. In *County of Scotland v. Thomas*, 94 U. S., 682 (§§ 1210–14, *supra*), the county was authorized to issue bonds in aid of the construction of a railroad authorized to be built by the Alexandria & Bloomfield Railroad Company, a Missouri corporation. Pursuant to law, that company became consolidated with an Iowa corporation bearing the name of the Iowa & Southern Railway Company, whereby an important elongation of the road originally authorized was secured. The combined corporations took the name of the Missouri, Iowa & Nebraska Railway Company. The bonds were issued to that company. This court held them to be valid. It was said, in effect, that this conclusion was the result of “a broad and general view” of the facts of the case.

In *County of Callaway v. Foster*, 93 id., 567 (§§ 876–878, *supra*), a statute authorizing the stock of a railroad company to be subscribed for, and bonds to provide the means of paying for it to be issued and sold “by the county court of any county in which any part of said railroad *may be*.” The stock was subscribed and the bonds were issued and sold before the route of the road was surveyed or located. In construing the phrase “*may be*,” this court said: “*May be* what? This expression is incomplete, and is to be construed with reference to the subject matter. If used in a statute where a road already built was the subject matter, it would refer to the presence or existence there of the road. . . . But when used in reference to a railroad not yet built, not located or surveyed, and, indeed, not yet organized, it must have quite a different meaning.” “Upon any reasonable construction it embraces Callaway, which was *one of the possible sites*, and a site ultimately occupied in fact.” The bonds were sustained.

In *County of Ray v. Vansycle*, 96 id., 675 (§§ 1190–93, *supra*), the facts were as follows: In 1860, Ray county, in Missouri, under authority conferred by a statute, and the sanction of its legal voters, subscribed by its county court for the stock of railroad company A., and agreed to issue its bonds in payment. Under an act passed in 1864, and pursuant to a popular vote of the county, company A. transferred all its rights, privileges, property and effects to company B. By an agreement between companies B. and C. and the county court, the subscription of the county for the stock of A. was released, and in consideration of the release the county court subscribed for the same amount of the stock of C., and issued its bonds in payment. By this arrangement the county secured increased railroad facilities, and it still held the certificates of stock. There had

been no offer to return them. The county paid the interest on its bonds continuously for five years. It then repudiated. It was held by this court, 1. That B. was entitled to the bonds of the county by reason of the first subscription. 2. That as against a *bona fide* holder it could not be objected that the qualified voters had not assented to the subscription to C. 3. That the taxpayers were concluded by the act of the county court and by their failure to take action, if it could have availed them, to prevent the transfer from one company to the other. In *County of Schuyler v. Thomas*, 98 U. S., 169, *County of Callaway v. Foster*, and *County of Scotland v. Thomas*, were cited and strongly approved. The analogies of all these cases to the one in hand are too obvious to need comment. If any error or wrong was committed in issuing these bonds, it was the act of the agents of the plaintiffs in error. Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him and not upon the other party. *Hearn v. Nichols*, 1 Salk., 289; *Merchants' Bank v. State Bank*, 10 Wall., 604.

The bonds in question recite on their face that they were issued "*in pursuance of an act of the legislature of New Jersey, approved April 9, 1868, entitled 'An act to authorize certain townships, towns and cities to issue bonds, and to take the bonds of the Montclair Railway Company.'*" In *Orleans v. Platt*, 99 U. S., 676 (§§ 1363-66, *supra*), this court said: "The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray v. Lardner*, 2 Wall., 110 (§§ 1840-42, *supra*). This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. *Mercer County v. Hackett*, 1 id., 83 (§§ 1409-12, *infra*); *San Antonio v. Mehaffy*, 96 U. S., 312; *County of Moultrie v. Savings Bank*, 92 id., 631 (§§ 872-875, *supra*); *Moran v. Commissioners of Miami County*, 2 Black, 722 (§§ 1439-42, *infra*); *Knox v. Aspinwall*, 21 How., 539 (§§ 1413-18, *infra*); *Royal British Bank v. Turquand*, 6 Ell. & Bl., 325." These rules are the settled law of this court, and they are decisive of the case in hand. The constitutional objection was not taken in the court below; but aside from this, we are of opinion that it is without validity. It would be supererogatory to discuss the minor points set forth in the assignment of errors to which we have not specifically adverted. They are all covered and concluded by what we have said.

Judgment affirmed.

JUSTICES FIELD and BRADLEY dissent.

CITY OF LEXINGTON v. BUTLER.

(14 Wallace, 282-297. 1871.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Subscription to the stock of the Lexington & Big Sandy Railroad Company was made by the corporation defendants to the amount of \$150,000, and on the 15th of October, 1853, they, as the municipal corporation of Lexington, issued one hundred and fifty bonds, each for \$1,000, sealed with the corporate seal and signed by the mayor and clerk of the corporation. By the terms of the bonds, they are payable to the railroad company,

or order, at the Bank of America, in thirty years from date, with interest semi-annually, at the rate of six per centum per annum, also payable at the same bank in the city of New York. Interest warrants were annexed to each bond, whereby the municipal corporation undertook and promised to pay to bearer the several instalments of interest provided in the bonds as the same matured and became payable. Pursuant to that arrangement, the railroad company became the lawful owners and holders of the whole of those bonds, and they, as such holders and owners, indorsed the bonds in blank and transferred the same to divers persons or corporations as the means of borrowing money to construct their railroad, and the plaintiff in that way, as he alleges, became the purchaser and owner of four of those bonds with the unpaid interest warrants annexed. Payment of the interest being refused, the plaintiff instituted the present suit in the state court to recover the amount of the interest overdue, as more fully appears in the petition or declaration filed in the state court where the suit was commenced. Service was made and the defendants appeared, and, on their motion, the cause was continued. Subsequently the plaintiff filed a petition and affidavit for the removal of the cause into the circuit court of the United States for trial, alleging, as the ground of the application, that he had reason to believe, and did believe, that from prejudice and local influence he would not be able to obtain justice in the state court, and the applicant, having given bond as required by law, the cause was removed into the circuit court of the United States for that district. 14 Stats. at Large, 559.

Two special pleas were filed by the defendants in bar of the action:

I. That they were not liable to pay either the bonds or the interest on the same, because the conditions precedent to the right of the corporation to subscribe for the stock of the railroad company and to issue the bonds were never fulfilled; that the conditions annexed to the right, as enacted by the legislature, were that the proposition to subscribe should be submitted to the qualified voters of the corporation, and that it should be approved by a majority of the persons voting on the question; that three conditions were embodied in the proposition as submitted to the voters, as specifically set forth in the plea; that the proposition, as submitted, did not authorize a subscription unless a million of dollars were previously subscribed by other parties; that other parties not having subscribed that amount the authorities of the corporation refused to make the subscription, and that the state court, on the application of the railroad company, issued a *mandamus* and compelled the authorities of the corporation to make the subscription and issue the bonds; that the defendants appealed to the court of appeals, where the judgment of the subordinate court was reversed, the court of appeals holding that the corporation had no authority to subscribe for the stock or to issue the bonds until one million of dollars had been subscribed by other parties; that the action was thereupon re-docketed and a rule laid upon the railroad company to redeliver the bonds to the defendants to be canceled; that the railroad company in the meantime deposited forty-eight of the bonds with an agent with directions to sell the same for their benefit; that before the bonds were negotiated or transferred they, the defendants, obtained an injunction and an order of court that the same should be deposited with a receiver of the court to be sold, and that the proceeds should be applied under the order of the court, and the defendants allege that the action is still pending and that the order of the court was never obeyed; that the bonds described in the declaration are a portion of

those bonds, and that the plaintiff, when the bonds in suit were transferred to him, well knew of the pendency of said actions and of the judgments and orders therein, and that the bonds had been issued under and by virtue of said writ of *mandamus*.

II. That the cause of action did not accrue to the plaintiff within five years next before the action was commenced.

To the first special plea of the defendant the plaintiff filed a replication, in which he denied that he had any knowledge, notice or information whatever, before or at the time the bonds were transferred to him, of the pendency of said supposed actions, or any or either of them, or of the supposed judgments or orders in those actions, or that said bonds had been issued under or by virtue of the said writ of *mandamus*, in manner and form as the defendants have alleged, and tendered an issue, and the defendants demurred to the replication and the plaintiffs joined in demurrer. On the other hand the plaintiffs demurred to the second plea of the defendants and the defendants joined in demurrer, so that both pleas terminated in an issue of law for the decision of the court; and the court overruled the demurrer of the defendants to the replication of the plaintiff and sustained the demurrer of the plaintiff to the second plea of the defendants, and gave judgment for the plaintiff in the sum of \$3,630.06, being the amount of the debt demanded in the declaration. Dissatisfied with the judgment of the court, the defendants sued out a writ of error, and removed the cause into this court.

Three errors are assigned by the original defendants: (1) That the court erred in rendering judgment for the plaintiff, as the court had no jurisdiction of the case. (2) That the court erred in overruling the demurrer of the defendants to the replication of the plaintiff filed to their first special plea. (3) That the court erred in sustaining the demurrer of the plaintiff to the second plea of the defendants.

Jurisdiction of the case is denied by the defendants, because, as they insist, the suit is founded on a cause of action which could not properly be removed from the state court into the circuit court, where the judgment was rendered, but the objection is not well founded, as will be seen by reference to the twelfth section of the judiciary act and the amendatory act under which the removal in this case was made. Where a suit is commenced in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of \$500, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending. Authority to remove such a suit is given by that act to the plaintiff as well as to the defendant, but the further provision is that the party desiring to exercise the privilege must offer good and sufficient surety that he will enter in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in said suit, and that he will do such other appropriate acts as are required by law to be done for the removal of a suit from a state court into a federal court. 14 Stat. at Large, 559.

Evidence that the plaintiff complied with those conditions, it is conceded, is

exhibited in the record, but the precise objection is that the cause of action is not one cognizable in the circuit court under any circumstances, and reference is made to the eleventh section of the judiciary act to support that proposition. By that section it is provided that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other *chose in action* in favor of an assignee, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange.

§ 1377. *Where bonds and annexed coupons are indorsed to bearer by the original obligees, the eleventh section of the judiciary act does not apply.*

All of the bonds were made payable to the order of the railroad company, and each was assigned by a writing on the back of the instrument to bearer by the company, and the payment of principal and interest was guaranteed by the obligees in the bond. Neither bonds of the kind nor the coupons annexed, where they are made payable to bearer or are indorsed to bearer by the original obligees or payees, are regarded as falling within the prohibition of the eleventh section of the judiciary act, as they pass from one holder to another by delivery without any formal assignment, as has been held by this court in several cases, to which reference is made for the reasons upon which the rule is founded. *White v. Vermont, etc., R. Co.*, 21 How., 576; *Thomson v. Lee County*, 3 Wall., 331 (§§ 1669-72, *infra*).

§ 1378. *Suits may be removed from a state court into the circuit court which could not be properly commenced in the circuit court.*

Suppose, however, the rule is otherwise, still the objection must be overruled, as the suit was not originally commenced in the circuit court. Suits may properly be removed from a state court into the circuit court in cases where the jurisdiction of the circuit court, if the suit had been originally commenced there, could not have been sustained, as the twelfth section of the judiciary act does not contain any such restriction as that contained in the eleventh section of the act defining the original jurisdiction of the circuit courts. Since the decision in the case of *Bushnell v. Kennedy*, 9 Wall., 387, all doubt upon the subject is removed, as it is there expressly determined that the restriction incorporated in the eleventh section of the judiciary act has no application to cases removed into the circuit court from a state court, and it is quite clear that the same rule must be applied in the construction of the subsequent acts of congress extending that privilege to other suitors not embraced in the twelfth section of the judiciary act. 1 Stats. at Large, 79. Such a privilege was extended by the twelfth section of the judiciary act only to an alien defendant, and to a defendant, citizen of another state, when sued by a citizen of the state in which the suit is brought; but the privilege was much enlarged by subsequent acts, and the act in question extends it to a plaintiff as well as to a defendant, where the controversy is between a citizen of the state where the suit is brought and a citizen of another state, if the matter in dispute exceeds the sum of \$500, exclusive of costs, which shows that the jurisdiction of the circuit court in this case was beyond controversy.

§ 1379. *Circumstances under which non-compliance with conditions did not vitiate bonds and coupons in the hands of bona fide holders.*

III. Express authority to subscribe for the stock of the railroad company, and to issue the bonds in payment for the same, was conferred upon the corporation defendants by the twenty-eighth section of the act incorporating the railroad company, subject to the conditions therein prescribed, that the propo-

sition to subscribe for the stock should be submitted to the qualified voters of the corporation, and the same section points out the steps to be pursued by the proper authorities to take the sense of the voters upon the subject. Authority was conferred by the legislative act upon the corporation defendants to issue bonds to the amount of \$150,000, and the plea alleges that, by virtue thereof, they issued one hundred and fifty bonds, each of \$1,000, payable in thirty years from date, with coupons or interest warrants annexed providing for the payment of the interest semi-annually at the rate of six per centum per annum. They bear the corporate seal of the city and are signed by the mayor, and are countersigned by the clerk, each bond containing on its face a certificate that it was issued in part payment of the subscription of \$150,000 by the city of Lexington to the capital stock of the railroad company, by order of the mayor and council of said city, as authorized by a vote of the people taken in pursuance of the before-mentioned act of the general assembly of the state. Session Acts of Ky., 1852, p. 786. Issued by authority of law, as the bonds purport to have been, and being, by the regular indorsement thereof, made payable to bearer, they lawfully circulated from holder to holder by delivery, and the plaintiff, having purchased four of the number in market overt, became the lawful indorsee and holder of the same, together with the coupons annexed, and, the interest secured by the coupons being unpaid, he instituted the present suit to recover the amount. Evidently, the *prima facie* presumption in such a case is that the holder acquired the bonds before they were due, that he paid a valuable consideration for the same, and that he took them without notice of any defect which would render the instruments invalid. Impliedly the plea admits that the bonds were purchased before they were due, and that the plaintiff paid a valuable consideration for the same; but the defendants allege that he took the same with notice of the irregularities in issuing the same, as set forth in the plea, and they rely on those allegations as a complete defense to the action; but the replication traversed the averment of the notice and tendered an issue to the country, and the defendants, by demurring to the replication, confessed that the allegations of the plea in that behalf were untrue, and that the plaintiff was the *bona fide* holder of the bonds without notice of the alleged defects in the inception of the instruments.

Coupons attached as interest warrants to bonds for the payment of money, lawfully issued by municipal corporations, as well as the bonds to which they are attached, when they are payable to order and are indorsed in blank, or are made payable to bearer, are transferable by delivery and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes. Holders of such instruments, if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the defense of prior equities between original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments. *Moran v. Miami Co.*, 2 Black, 722 (§§ 1439-42, *infra*); *Mercer County v. Hackett*, 1 Wall., 83 (§§ 1409-12, *infra*).

§ 1380. *Where a corporation has power to issue negotiable securities a bona fide holder may presume them issued under proper circumstances.*

Admitted, as it is, that the defendant corporations possessed the power to subscribe for the stock and to issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that

they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. *Gelpcke v. Dubuque*, 1 Wall., 203 (§§ 1367-70, *supra*); *Knox Co. v. Aspinwall*, 21 How., 539 (§§ 1413-18, *infra*); *Supervisors v. Schenck*, 5 Wall., 784 (§§ 1683-86, *infra*); *Bissell v. Jeffersonville*, 24 How., 299 (§§ 1449-50, *infra*).

§ 1381. *A suit upon a coupon is not barred unless the lapse of time will also bar suit on the bond.*

IV. Actions on simple contracts are barred by the limitation law of that state unless commenced within five years next after the cause of action accrued, and the second plea was filed as a bar to the action under that section of the statute of limitations, but the bonds described in the declaration are specialties not falling within that section of the statute. On the contrary, suits upon bonds may be maintained if commenced at any time within fifteen years next after the cause of action accrued; and it is well settled law that a suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a suit upon the bond, as the coupon, if in the usual form, is but a repetition of the contract in respect to the interest, for the period of time therein mentioned, which the bond makes upon the same subject, being given for interest thereafter to become due upon the bond, which interest is parcel of the bond and partakes of its nature, and is not barred by lapse of time except for the same period as would bar a suit on the bond to which it was attached. 2 Rev. Stat. of Ky., 126 and 127; *The City v. Lamson*, 9 Wall., 483 (§§ 1730-34, *infra*). Coupons are substantially but copies of the stipulation in the body of the bond in respect to the interest, and are so attached to the bond that they may be cut off by the holder as matter of convenience in collecting the interest, or to enable him to realize the interest due or to become due by negotiating the same to bearer in business transactions without the trouble of presenting the bond every time an instalment of interest falls due. For these reasons we are of the opinion that the ruling of the circuit court was correct.

Judgment affirmed.

COMMISSIONERS OF MARION COUNTY v. CLARK.

(4 Otto, 278-288. 1876.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Power is vested by law in the constituted authorities of counties and other municipal corporations to subscribe for and take stock in any railway company duly organized under the law of the state or territory, or to loan the credit of the municipality to such a railroad company, subject to the condition that the majority of the qualified voters of the same, voting at the election, shall, at a regular or a special election to be held therein, first assent to the proposal for such subscription; and the provision is that it shall be the duty of the municipal authorities, when the terms of the proposal are so approved, to make subscription to the stock of the railway company. Laws Kansas, 1869, 108. Sufficient appears to show that the railway company became duly incorporated for the purpose of constructing a railway from the northern to the southern line of the state through Davis, Marion and other counties named in the certificate of incorporation. Tax-payers and citizens of

the county of Marion petitioned the county commissioners of the county to submit a proposition to the qualified voters of the county to subscribe for two thousand shares of \$100 each of the capital stock of the railway company, to be paid for in thirty-years seven per cent. bonds of the county. Pursuant to the prayer of those petitioners, the county commissioners submitted that question to the qualified voters of the county, at a special election held at the time and place appointed in the order of the county commissioners; and it appears by the record that the election was duly held at the time and place appointed, and that a majority of the votes cast at the election were in favor of the subscription by the county for two thousand shares of the capital stock of the railway company.

By the terms and conditions of the proposition submitted and adopted, the stock to be subscribed was to be paid for in the bonds of the county, payable thirty years after their date, with annual interest at the rate of seven per cent. per annum; and the proposal was that the bonds should be delivered to the railway company as follows: 1. That, on the completion of the grading of the railway from the northern line of the county to Marion Centre, one-half of the bonds should be due and deliverable under the contract. 2. That, upon the completion of the railway from Marion Centre to the village of Peabody, other bonds to the amount of \$75,000 should be due and deliverable as a second instalment. 3. That, upon the completion of the railway to the south line of the county, the residue of the stipulated amount of the bonds should be due and deliverable.

Due canvass of the qualified votes cast at the election was made by the county commissioners, and they made the proper entry in their records that the subscription of the stock was then and there made by their board for and in behalf of the county; and it appears that the board did then and there elect one of their number to make the subscription, and that the member so elected entered the same in the books of the railway company. Beyond all doubt, the subscription was legally made; and it is not controverted that the railway company graded their line of railway from the north line of the county to Marion Centre, and that the authorities of the county executed and delivered to the railway company the bonds of the county to the amount of \$100,000, in pursuance of the terms of the subscription, with coupons attached for the payment of interest at the rate of seven per cent. semi-annually.

Purchases of the bonds with coupons annexed to a large amount were made by the plaintiff from the First National Bank of Junction City, where they were deposited for sale. Payment of the interest coupons being refused, the plaintiff, as the owner and holder of the same, instituted a suit in the circuit court to recover the amount. Two other suits were subsequently instituted by him for a similar purpose; and the three suits in the course of their prosecution were consolidated, the claim of the plaintiff being for the amount of one hundred and ninety-four coupons, each for the sum of \$35. Service was made, and the defendants appeared and set up the several defenses exhibited in the answer. Special reference to the separate defenses as set up in the answers may be omitted, as the questions to be re-examined sufficiently appear in the bill of exceptions. Questions of fact were submitted to the jury; and the transcript shows that the verdict and judgment were for the plaintiff, in the sum of \$6,703.54, and that the defendants excepted to the rulings and instructions of the court.

Two thousand shares of the stock were subscribed; but the bonds were issued

in shares of \$1,000, with interest coupons attached. On the trial of the cause, the plaintiff, to maintain the issue on his part, offered one of the bonds in evidence, with an overdue coupon attached; and the defendants objected to its admissibility, upon three grounds: 1. Because it was signed only by the chairman of the county commissioners. 2. Because it was made due and payable thirty years and twenty-seven days after date. 3. Because the interest coupons attached provide for the payment of interest semi-annually instead of annually. But the court overruled the objections, and the bond with the coupon attached was admitted, subject to the objections of the defendants. Coupons of a similar character, to the number of one hundred and ninety-four in all, were also introduced in evidence by the plaintiff, subject to the same objections.

Exceptions were duly taken by the defendants to the rulings of the court in admitting the bond and coupons, and the plaintiff rested his case in the opening. Evidence was then introduced by the defendants, consisting, in the first place, of the deposition of the plaintiff and a certified copy of the record of a suit previously instituted in the county court to cancel the bonds issued by the county, and to restrain the First National Bank from transferring the same to the railway company. They also introduced a copy of the proposition submitted to the qualified voters of the county to subscribe for the capital stock of the railway company, in payment for which the bonds in question were executed and delivered, to which reference has already been made; but it also provides that, before any county bond should be issued and delivered, the railway company shall execute to the county a good and sufficient bond that the company will complete the railway as therein represented and proposed.

Before the bonds were issued and delivered by the county the railway company did execute a bond to the county in the sum of \$200,000, conditioned that the company should fully complete and stock the railway, and put the same in running order, as required in the recorded conditions of the subscription. Both parties agree that bonds to the amount of \$100,000, and no more, were issued by the county and delivered to the company; but the defendants insist that the authorities of the county were induced to issue and deliver the same by the misrepresentation and fraud of the railway company. Two suggestions in that regard are exhibited in the answer and in the assignment of errors: 1. That the railway company, when they applied for the bonds, concealed from the authorities of the county the fact that the company had been reincorporated with an amended charter. 2. That the company, when they applied for the bonds, falsely and fraudulently represented that the sureties were good for the amount of the bond, and the defendants introduced evidence tending to show that the sureties were insolvent.

They also gave evidence tending to show that the charter of the company was amended, and the nature and extent of the amendment made, before the company applied for the bonds, and that they gave no notice to the authorities of the county of the meeting of the directors of the company when those amendments were adopted.

Three other defenses set up in the answer should be briefly noticed: 1. That the bonds were illegal, because issued for a longer time than thirty years. 2. That they were illegal, because the interest is payable semi-annually instead of annually, as stipulated in the proposition submitted to the qualified voters. 3. That the plaintiff is not a *bona fide* holder of the bonds, because he did not pay value for the same before they became due, without knowledge of the facts

set up in these defenses; all of which is expressly denied by the plaintiff in his reply to the answer.

Instructions were given by the court to the jury in substance and effect as follows: 1. That the plaintiff, when he introduced the coupons in evidence, made out a *prima facie* case. 2. That there is no evidence to go to the jury to show that the First National Bank had notice at or prior to the purchase of the bonds, of the fraudulent character of the representations made by the railway company which induced the authorities of the county to accept the bond given by the company to complete the railway, as stipulated in the proposition submitted to the qualified voters of the county. 3. That if the bank gave value for the bonds and purchased them before due, without notice of the fraud set up and relied on by the county in respect to the bond given in evidence, and sold the bonds in suit to the plaintiff, he is entitled to recover on the bonds, though he had notice when he obtained them that the county claimed they were fraudulent, and that a suit was pending contesting their validity, the record of which had been introduced in evidence. 4. That the amendment of the charter of the railway company is no defense, if the bonds in suit were purchased by the bank before due and for value.

Seasonable exceptions were taken by the defendants to the several instructions given to the jury and to the rulings of the court in admitting and excluding evidence in opposition to the objections made by the defendants, and they sued out a writ of error, and removed the cause into this court. Provided the bond was properly admitted in evidence, it is too plain for argument that the first instruction is entirely correct, and the better opinion is that the exception to it was only taken to exclude the conclusion that the objections previously made to the admissibility of the bond were not waived.

§ 1382. *County bonds signed only by the chairman of the county board are valid.*

I. All of the bonds recite on their face that the county has caused the same "to be signed in their behalf by the chairman of the board of county commissioners, attested by the county clerk, and the seal of said county affixed." They bear date the 3d of September, 1872, but they were not issued and delivered until the 4th of November following. Instruments of the kind must be tested in that regard by the law of the jurisdiction where they are executed; and by the law of the state in force at that time it is provided that "such bonds, if issued by a county, shall be signed by the chairman of the board of county commissioners, and be attested by the county clerk," which is all that need be said in response to the first objection. Laws of Kansas, 1872, sec. 2, p. 111; *Thayer v. Montgomery County*, 3 Dill., 389; *Marcy v. Township of Oswego*, 92 U. S., 637.

§ 1383. *Time to run, from what computed.*

Enough has already been remarked to show that the second objection to the admissibility of the bond is without merit, as there is no excess in time beyond thirty years if the computation be made, as it should be, from the time the bonds were actually executed, issued and delivered. Laws Kansas, 1872, sec. 2, p. 111.

§ 1384. *Interest payable semi-annually.*

Where a municipal corporation has power to borrow money, they may make the principal and interest payable when they please, which is a sufficient answer to the third objection. *Meyer v. Muscatine*, 1 Wall., 391 (§§ 921-925, *supra*). Viewed in the light of these suggestions, it is clear that the bond was

properly admitted in evidence, and that the exception to the first instruction given to the jury must be overruled.

§ 1385. *When the court should submit a case to the jury.*

II. Matters of fact are involved in the exception to the second instruction. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. *Ryder v. Wombwell*, Law Rep., 4 Exch., 39. Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule; to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Law Rep., 2 Priv. Council Apps., 335; *Improvement Co. v. Munson*, 14 Wall., 448; *Pleasants v. Fant*, 22 id., 120; *Parks v. Ross*, 11 How., 373; *Merchants' Bank v. State Bank*, 10 Wall., 637; *Hickman v. Jones*, 9 id., 201. Apply that rule to the question before the court, and it is clear that the ruling of the circuit court was correct, as there is no evidence reported in the transcript which would have warranted the jury in finding the issue for the defendants. *Jewell v. Parr*, 13 C. B., 916; *Toomey v. Railway*, 3 C. B. (N. S.), 150; *Wheelton v. Hardisty*, 8 Ell. & Bl., 232; *Schuchardt v. Allens*, 1 Wall., 369; *Grand Chute v. Winegar*, 15 id., 369.

§ 1386. *A purchaser of bonds, with notice of fraud in their inception, from a bona fide holder, can recover thereon.*

III. Due exception was also taken to the third instruction, which presents a question of commercial law. Standard authorities show that, where a negotiable instrument is originally infected with fraud, invalidity or illegality, the rule is, that the title of the original holder being destroyed, the title of every subsequent holder which reposes on that foundation, and no other, falls with it. *Byles on Bills*, p. 118. Where the theory that the plaintiff paid value for the instrument depends solely upon the *prima facie* presumption arising from the possession of the instrument, the defendant may, if the pleadings admit of such a defense, prove that the instrument originated in illegality or fraud; and the rule is, if he establishes such a defense, that a presumption arises that the subsequent holder gave no value for it, and it is also true that such a presumption will support a plea that the holder is a holder without consideration, unless the presumption is rebutted by proof that the plaintiff paid value for the instrument, in which event the plaintiff is still entitled to recover. *Fitch v. Jones*, 5 Ell. & Bl., 238; *Smith v. Braine*, 16 Q. B., 244; *Hall v. Featherstone*, 3 Hurlst. & N., 287; 2 Pars. on Bills & Notes, 438. But the rule is different when the question is whether the indorsee and holder had notice of the prior equities between the antecedent parties to the instrument. Holders of such instruments, under such circumstances, are not obliged to show that they paid value for the instrument until the other party has clearly proved that the consideration was illegal, or that it was fraudulent in its inception, or that it has been lost or stolen before it came to the possession of the holder. *Wheeler v. Guild*, 20 Pick., 551; *Collins v. Martin*, 1 Bos. & Pull., 648; *Miller v. Race*, 1 Burr., 459; *Peacock v. Rhodes*, 2 Doug., 632. Possession, even without explanation, is *prima facie* evidence that the holder is the proper owner or lawful possessor

of the instrument; and the settled rule is, that nothing short of fraud—not even gross negligence—is sufficient to overcome the presumption and invalidate the title of the holder, as inferred from his actual custody of the instrument. *Goodman v. Harvey*, 4 Ad. & Ell., 870; *Goodman v. Simonds*, 20 How., 367 (BILLS AND NOTES, §§ 420–425); *Uther v. Rich*, 10 Ad. & Ell., 784; *Arbounin v. Anderson*, 1 Ad. & Ell. (N. S.), 498.

None of these propositions can be controverted; and it follows that where the first indorsee purchases the instrument before due and pays value, without notice of any prior equities, the second indorsee holding under the first takes a good title, even though he had notice of such prior equities, if he purchased the instrument in the regular course of business before it became due, for the reason that he took a new and independent title under another indorser. *Bailey v. Bidwell*, 13 Mees. & W., 15. Notice of such prior equities cannot affect the title of the second holder, if he acquired title from a prior holder who had no such knowledge. *Byles on Bills* (5th Am. ed.), 118; *Story on Notes*, sec. 196; *Story on Bills*, sec. 220. Suffice it to say, without pursuing the inquiry, the court is unhesitatingly of the opinion that the exception to the third instruction must also be overruled.

§ 1387. *The amendment of a railroad charter affords no defense upon county bonds issued in payment for stock as against a bona fide holder.*

IV. Proof was offered by the defendants to show that the charter of the railway company was amended, subsequent to the subscription of the stock, so as to include branches four hundred and fifty miles in length, in addition to the original line, without the knowledge or consent of the county commissioners or of the directors of the railway company resident in the county; but the plaintiff objected to the evidence, and it was excluded by the court; to which ruling the defendants then and there excepted, which presents the same question as that which arises from the exception taken to the fourth instruction given to the jury, as follows: that the amendment of the charter is no defense to the action if the bonds were purchased by the bank before due and for value. Counties, if duly organized under the law of the state, are certainly vested with the power to subscribe for stock in a railway company, and to issue the bonds of the county to pay for such subscription. Suppose that is so, still it is insisted by the defendants that the bonds delivered to the railway company in this case impose no pecuniary obligation upon the county, in consequence of the defects and irregularities in the proceedings of the municipal authorities, and the frauds and misrepresentations of the officers and agents of the railway company. In conducting the defense at the trial the defendant proceeded upon the ground that the plaintiff had knowledge of the supposed defects, irregularities, frauds and misrepresentations; but the finding of the jury, under the instructions of the court, negatives every such imputation, and shows that the plaintiff is a *bona fide* holder of the instruments, having purchased the same in the usual course of business before due and for value. That such is the legal effect of the verdict cannot be doubted; and it appears by the recital of the bonds that they were issued in payment for two thousand shares of the capital stock of the railway company subscribed by the county, in pursuance of an order of the county commissioners, made and entered in their minutes.

§ 1388. *When the recitals in county bonds are conclusive in favor of a bona fide holder.*

Bonds of the kind executed by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the

legislature, are valid commercial instruments, and, if purchased for value in the usual course of business before they are due, give the holder a good title, free of prior equities between antecedent parties, to the same extent as in case of bills of exchange and promissory notes. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications; but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity to the prescribed regulations and pursuant to the required conditions and qualifications, proof that any or all of the recitals are incorrect will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulations, conditions or qualifications which it is alleged were not fulfilled. *St. Joseph Township v. Rogers*, 16 Wall., 659 (§§ 1674-77, *infra*); *Town of Coloma v. Eaves*, 92 U. S., 484 (§§ 1419-20, *infra*). Other cases, too numerous for citation, have been decided by this court to the same effect, but suffice it to say that we are all of the opinion that there is no error in the record.

Judgment affirmed.

COUNTY OF MACON v. SHORES.

(7 Otto, 272-279. 1877.)

ERROR to U. S. Circuit Court, Western District of Missouri.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The declaration in this case covers a hundred and eleven printed pages. Each count is upon a coupon averred to have been detached from a bond for \$1,000, issued by the county of Macon on the 2d of May, 1870, and payable to the Missouri & Mississippi Railroad Company or bearer, at the National Bank of Commerce, in the city of New York, on the 2d day of May, 1890, with interest at the rate of eight per cent. per annum, to be paid semi-annually on the presentation of the coupons attached. It is further averred that the bond was issued pursuant to the orders of the county court of Macon county, in payment of the subscription to the stock of the railroad company, and was authorized by the act of the general assembly of the state, entitled "An act to incorporate the Missouri & Mississippi Railroad Company, approved February 20, 1865," and that the bond so recites on its face. It is also alleged that the defendant paid the interest on the bond for the year 1870, and that the plaintiff is the holder and bearer of the coupon for value. There are other averments which show the liability of the defendant and make the count good. The further counts are upon coupons taken from other bonds of the same issue. The counts are all alike *mutatis mutandis*.

The defendant filed a multitude of pleas. It is not necessary particularly to advert to any of them. Upon the trial the defendant took an elaborate bill of exceptions. Our remarks will be confined to the errors assigned.

§ 1389. *Evidence in addition to presumption of law competent.*

The plaintiff had a right to prove that he was a *bona fide* holder of the coupons. The petition averred the fact. It was denied by the answer. It is true the presumption of law, *prima facie*, was that the plaintiff was such holder. But if he chose to meet the issue by direct affirmative proof, it was clearly competent for him to do so.

§ 1390. *It is not competent to show fraud in the issuance of bonds as against a bona fide holder.*

The testimony tending to show fraud and irregularities touching the issuing of the bonds and in disposing of them was properly rejected. The plaintiff being a *bona fide* holder of the coupons, it was incompetent to affect his rights. He could not be expected to know, and was not bound to know, the facts sought to be established. So far as the testimony respected the action of the county court, it was liable to the further objection that a court of record can speak, and its doings can be shown, only by the record. None of the evidence offered was of this character. Irrelevant and incompetent testimony should always be carefully excluded, because the tendency of both is to mislead and confuse the minds of the jury, and thus defeat the ends of justice.

§ 1391. *It is not competent in a collateral proceeding to impeach the validity of a charter.*

The objection that the corporation was not organized within the time limited by the charter is unavailing. It is in effect a plea of *nul tiel* corporation. In *Kayser v. Trustees of Bremen*, 16 Mo., 88, the supreme court of the state said: "It cannot be shown in defense to a suit of a corporation that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or non-user. Advantage can only be taken of such forfeiture by process on behalf of the state instituted directly against the corporation for the purpose of avoiding its charter; and individuals cannot avail themselves of it in collateral suits until it be judicially declared." See, also, *Smith v. County of Clarke*, 54 Mo., 58, which is to the same effect. This case being a Missouri case, these authorities are conclusive. *Olcott v. Bynum*, 17 Wall., 44. The learned counsel for the plaintiff in error could hardly have been serious in insisting that proof that the road authorized by the charter to be built "was a wild and visionary enterprise," and that meetings of tax-payers denouncing the issuing of the bonds was competent in the case as it stood for any purpose. No further remark upon the subject is necessary. The proceedings in *Newmeyer v. Missouri & Mississippi R. Co.*, reported in 52 Mo., 81, offered in evidence, decided nothing finally. (a) The bill of the complainants was demurred to by the defendants. The demurrer was overruled, and the case remanded to the lower court. Whatever the result, it could not affect the rights of a *bona fide* purchaser of the bonds and coupons without notice.

§ 1392. *The constitution of Missouri of 1865 operated only prospectively on county subscriptions and county bonds.*

The objection claimed to arise from the constitution of 1865 is without foundation. (b) That instrument took effect on the 4th of July, 1865, and the act of incorporation on the 20th of February of that year. The constitution looked entirely to the future. Its language is: "The general assembly shall not authorize," etc., . . . "unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." Const. Mo., sec. 14, art. 11. The act was in the past. The constitution, therefore, had no effect upon it. This point has been so decided by the supreme court of Missouri and by this court, following the adjudication of that tribunal. *State of Missouri v. Macon County Court*, 41 Mo., 453; *State*

(a) The averment in the answer was to the effect that a suit had been commenced by tax-payers, against the county court and the company, for the purpose of annulling the subscription, and that it was pending and undetermined when plaintiff bought the bonds.

(b) Under the constitution of 1865 a municipality could not loan its credit without the assent of two-thirds of the qualified voters.

v. Greene County, 54 id., 540; *County of Henry v. Nicolay*, 95 U. S., 619 (§§ 889–892, *supra*). The thirteenth section of the charter authorized the county court to subscribe and issue the bonds. No limit is prescribed either as to the time or amount of the subscription.

The court instructed the jury to find for the plaintiff. It appears that the evidence is all in the record. The plaintiff had shown a clear right to recover. The defendant had shown no defense. There was no question for the jury to pass upon. Under these circumstances, it is always competent for the court to instruct accordingly, and it is not error to do so. *Merchants' Bank v. State Bank*, 10 Wall., 604; *Railroad Co. v. Jones*, 95 U. S., 439.

§ 1393. *County bonds are in a commercial sense negotiable paper.*

This court has repeatedly held that where a corporation has power under any circumstances to issue such securities, the *bona fide* taker has a right to presume they were issued under circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity, in the hands of the holder, than any other commercial paper. *Supervisors v. Schenck*, 5 Wall., 772 (§§ 1683–86, *infra*).

§ 1394. — *conclusiveness of official action.*

The function of making the subscription and issuing the bonds was confided to the county court. They had jurisdiction over the entire subject. They were clothed with the power and duty to hear and determine. The power was exercised and the duty performed. In this case, as it is before us, the result is conclusive, and the county is estopped to deny that such is its effect. *Lynde v. The County*, 16 Wall., 6 (§§ 1051–55, *supra*). Where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong rather than by a stranger. *Hern v. Nichols*, 1 Salk., 289; *Merchants' Bank v. State Bank*, *supra*. In *Steamboat Co. v. McCutcheon*, 13 Penn. St., 13, the company, which was a corporation, had occupied for a term agreed upon, as an office, premises belonging to the other parties. When sued for the rent the corporation set up as a defense that the contract was *ultra vires*, and claimed exemption from liability upon that ground. Coulter, J., in the opinion of the court affirming the liability, said: "Some things lie too deep in the common sense and common honesty of mankind to require either argument or authority to support them, and this, I think, is one of them."

Judgment affirmed.

STEWART *v.* LANSING.

(14 Otto, 505–512. 1881.)

ERROR to U. S. Circuit Court, Northern District of New York.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This was a suit by John J. Stewart to recover the interest due on coupons which matured July 1, 1872, January 1, 1873, January 1, 1874, July 1, 1874, January 1, 1875, July 1, 1875, January 1, 1876, and July 1, 1876. They were attached to seventy-five bonds of \$1,000 each, purporting to have been issued by the town of Lansing, under the authority of a statute of New York, passed May 18, 1869, to permit municipal corporations to aid in the construction of railroads. The defense, stated generally, was that the bonds had been issued without authority of law. At the trial, after the testimony on both sides was in, the court instructed the jury to find a verdict for the town, which was done, and judgment entered accordingly. This ruling furnishes the principal ground of error assigned here.

The testimony is all set out in the bill of exceptions. The undisputed facts are that the county judge of Tompkins county, within which the town is situated, assuming to act under the authority of that statute, rendered, March 21, 1871, a judgment appointing commissioners to execute bonds of the town, to the amount of \$75,000, and invest them in the capital stock of the Cayuga Lake Railroad Company. On the 27th of the same month, at the instance of the opposing tax-payers of the town, a writ of *certiorari*, directed to the county judge, was issued from the supreme court of the state for a review of this judgment. This writ was, at or about its date, served on the judge, who, on the 1st of September, made his return thereto, sending up, as required by law, a transcript of the record of the proceedings before him which were brought under review. Of this writ, and what was done thereunder, both the commissioners appointed by the judge and the railroad company had full notice; but the commissioners, on or about the 14th of October, 1871, executed the bonds which had been authorized, payable to bearer on the 1st day of January, 1902, with coupons for semi-annual instalments of interest attached, and delivered them to the company in exchange for seven hundred and fifty shares of its capital stock. At the same time the commissioners took from the company a bond of indemnity to save them harmless from all costs, liabilities or expenses on account of what had been done. The bonds, as soon as delivered, were taken by the company to New York and there pledged as collateral security for money borrowed. On the 27th of May, 1872, the supreme court in general term reversed and in all things held for naught the judgment of the county judge appointing commissioners and authorizing the issue of the bonds. This judgment of the supreme court still remains in force.

On the 26th of November, 1872, the company arranged with Elliott, Collins & Co., a banking firm in Philadelphia, for the money to take up the bonds in New York, and they again pledged the bonds to that firm as security for the advances made. On the 8th of February, 1873, this debt to Elliott, Collins & Co. was paid, and they parted with the bonds. The entire testimony as to what took place at this time is as follows: William Elliott, the senior member of the firm, examined as a witness, said: "We did not sell the bonds at all. The bonds, on the 8th of February, 1873, we parted with. The cash we received on parting with them was \$54,337.50. I have never seen any of the bonds since. The loan negotiated by us was paid in this way. Up to this time the loan had not been paid. It was paid by this money." On cross-examination he said: "I cannot tell through whom personally we received the bonds. Think we received them by express. They were negotiated by Mr. Delafield, either personally or by letter. All our transactions with that company have been done through Mr. Delafield. . . . I am not acquainted with John J. Stewart, the plaintiff in this action. I do not know where he lives, or in what state he lives. Neither myself or my banking firm ever had any transactions with him to my knowledge." This testimony was taken on behalf of the plaintiff, by deposition, on the 18th of July, 1876.

Afterwards, on the 18th of August in the same year, another deposition of the same witness was taken in behalf of the plaintiff. In this deposition, looking at Exhibit D, which was as follows:

PHILADELPHIA, February 8, 1873.

<i>Cayuga Lake R. R. Co.</i>	
75,000 Town of Lansing bonds.....	\$54,387 50
Notes March 29, \$50,000; 49 days' interest, \$408.83.....	49,591 67
Credit Cayuga Lake.....	\$4,745 88

he said: "This is a statement of the sale of said town of Lansing bonds by the firm of Elliott, Collins & Co. The sale was made at the time it bears date, February 8, 1873; it was made out and sent to the Cayuga Lake R. R. Co. at that date. I said in my previous examination that we did not sell the bonds in question. I intended by that to say that we did not make the negotiation for the sale of them, but they passed through our hands, on terms which were agreed on by others. The price at which they were sold we were consulted about, and our advice asked. We received the money and delivered the bonds on that day." On cross-examination he said: "I do not wish to change, but merely explain my testimony given at the previous examination. Exhibit D is in the handwriting of my son, who generally makes out the accounts, Adolphus William Elliott. He is still living in this city. To my present recollection, the first time I saw Exhibit D is to-day. I have no recollection of ever having seen it before. The statement first credits the Cayuga Lake R. R. Co. with \$54,337.50, under date of February 8, 1873, that being the avails of the bonds. . . . It was sent to the Cayuga Lake R. R. Co. at the time, as I have stated before. I have no personal knowledge of Mr. Stewart; I mean the Mr. Stewart who is plaintiff in this action. I have no personal knowledge of any business transaction whatever between myself or my house and Mr. Stewart. I have no personal knowledge whether these bonds ever passed into the hands of Mr. Stewart, the plaintiff in this action, nor whether he ever paid anything for them. Somebody paid for them and we got the money."

Talmadge Delafield, the treasurer of the company, a witness called on the part of the plaintiff, testified that Elliott, Collins & Co. held the bonds after the transfer to them until February 8, 1873, when they rendered an account of the sale. On cross-examination he said, "I have no personal knowledge of the sale of the bonds. Never saw Mr. Stewart; don't know that there is such a man. I have never corresponded with him, nor he with me. Whatever occurred between them and him was entirely without my knowledge."

On the 30th of May, 1874, a suit was brought in the name of Stewart, the present plaintiff in error, in the circuit court of the United States for the northern district of New York, to recover the coupons due July 1, 1873, averring his ownership thereof. On the 20th of July, 1872, Manassah Bailey brought suit in the same court to recover the coupons of July 1, 1872. In each of the suits the defenses were that the bonds and coupons were issued without the authority of law, and that the plaintiffs respectively were not *bona fide* holders. The suits were tried together, and upon the same evidence, so far as applicable. In both cases it was decided that the bonds were invalid, and in that of Bailey judgment was given for the defendant, because it had not been satisfactorily shown that he was a *bona fide* holder. In the Stewart case, however, the court used this language in its opinion: "The suit of Stewart differs from the one by Bailey, in that it appears that the bonds were pledged as collateral in February, 1873, to Elliott, Collins & Co., of Philadelphia, and sold by them after consultation with the officers of the railroad company. Elliott, Collins & Co. were holders for value before maturity, and their sale to satisfy the pledge conveyed their title to the purchaser. Whether the plaintiff was the purchaser from them directly or not is not clear; but, however this may be, he succeeds to all the rights of Elliott, Collins & Co., and occupies the position of a *bona fide* purchaser. As against a *bona fide* holder of the coupons, none of the defenses interposed are tenable." Acting on this principle, the court gave judgment in favor of Stewart for the coupons he held.

Upon the trial of the present action, the record of the first Stewart judgment was given in evidence, and the counsel for the plaintiff, who had also been counsel for Stewart and Bailey in the former suits, was examined as a witness. He testified that, after the judgment against Bailey, he gave the coupons sued for in that action to a Mr. Tryon, in New York. He was unable to say from whom he got them back, nor when. Neither did he tell from whom he got the bonds and coupons which were used in evidence at the present trial. As between the railroad company and the town, the judgment of the supreme court reversing and annulling the order of the county judge invalidated the bonds. If the bonds had not been delivered before, they could not have been afterwards. The judgment of reversal was equivalent, between these parties, to a refusal by the county judge to make the original order.

§ 1395. *The holder of negotiable paper, fraudulently or illegally issued, in order to recover, must prove that he is a bona fide holder for value. (a)*

The next inquiry is whether, on the evidence, Stewart occupied in this suit a better position than the town. That depends on whether the testimony was such as to make it the duty of the court to submit to the jury, under proper instructions, the determination of the question whether he was, in a commercial sense, the *bona fide* holder of the coupons sued for. It is an elementary rule that, if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper, under such circumstances, is not enough. *Smith v. Sac County*, 11 Wall., 139 (§§ 1465, 1466, *infra*).

§ 1396. *The holder of coupons, detached, must establish his ownership of them.*

Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a *bona fide* holder before he could recover. This, it is contended, was conclusively established by the judgment in the suit on the coupons of July, 1873. The issue in that case was as to the ownership of those coupons, and did not necessarily involve an ownership of the bonds. We have often held that coupons detached from bonds are negotiable instruments, and capable of separate ownership and transfer. *Clark v. Iowa City*, 20 Wall., 583. While the court, in its opinion when rendering the former judgment, used language broad enough to cover the bonds, this language must be confined in its effect to the issues on trial, that is to say, the ownership of the coupons alone. In *Cromwell v. County of Sac*, 94 U. S., 351, it was distinctly held that a determination in one action that a plaintiff was not an owner for value of certain coupons sued on did not estop him from proving, in another action, that he was such an owner of other coupons detached from the same bonds. The proposition in this case is but the converse of that.

This makes it necessary to inquire whether, upon the testimony, the burden of establishing a *bona fide* ownership was so far overcome at the trial as to make it improper for the court to take that question from the jury. The testimony is noticeable rather for what is omitted than for what was introduced. It would seem to have been easy to prove the exact facts as to the "parting with" the bonds by Elliott, Collins & Co. Although the bonds had been pledged in New York before, Elliott, Collins & Co. took them from the company, not from the New York holders. The company negotiated the loan from them, and, on taking up the bonds in New York, made a new pledge.

(a) *Stewart v. Town of Lansing*, * 15 Blatch., 281, affirmed.

This was all done after the judgment of the supreme court upon the *certiorari*. In the former suit a judgment had been secured only by proving a *bona fide* ownership in the plaintiff. Notice of the necessity of establishing the same fact in this case was, therefore, given the plaintiff and his counsel. Acting on this notice, the same counsel who appeared in the former case went to Philadelphia to get the necessary testimony. He called on the senior member of the firm of Elliott, Collins & Co., and took his deposition. In this deposition it was clearly shown that although that firm had "parted with" the bonds, and got some money when they did so, which was put to the credit of the company, they did not sell the bonds. That was done, if done at all, by some one else. Not satisfied with this testimony, the same counsel went again to Philadelphia to make another effort. He took with him a paper he had found in the handwriting of the junior member of the firm, now known as Exhibit D. Instead of examining the junior partner, he went again to the senior partner, who evidently knew but little personally about the transaction, and stopped with him, although it appears that the witness who made out the exhibit was then in the city, and it was again stated that the sale was not negotiated by the firm, but that the bonds only passed through their hands under terms which had been agreed on by others. Who those others were is not stated. Neither the actual purchaser nor his representative in the negotiation was named. Stewart, the plaintiff, was not known to any of the witnesses examined. No one had ever seen him. His counsel, though examined as a witness, gave no information in respect to him, and was also unable to tell from whom the Bailey coupons were received. It is by no means certain from the testimony whether such a man as the plaintiff is actually in existence. Even the witness Elliott was not asked whether he knew of the decision of the supreme court when his firm took the bonds. The sale, if actually made, was at an enormous discount. Although the Bailey coupons are included in this suit, another action for their recovery was pending at the time Elliott, Collins & Co. parted with the bonds, in which the same defenses now relied on were set up. The counsel now appearing for the present plaintiff was also the counsel for Bailey in that action, and for the railroad company when the bonds were got from the commissioners. It would have been apparently so easy to make the necessary proof, if it could have safely been done, that we are unable to account for its absence except on the theory that a disclosure of the whole truth would be fatal to a recovery.

§ 1397. *Circumstances under which it is not error to take the case from the jury.*

While it would not, perhaps, have been improper for the court, in the exercise of its rightful discretion to leave the case to the jury on the evidence, we cannot say it was error not to do so. In *Pleasants v. Fant*, 22 Wall., 116, it was held that "if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence was not sufficient to warrant" a particular verdict, the jury might be so instructed. *Railroad Co. v. Fraloff*, 100 U. S., 24; *Oscanyan v. Arms Co.*, 103 id., 261. This case, in our opinion, comes under that rule. The record in the Bailey suit was certainly admissible in evidence upon the issue as to the *bona fide* ownership of the coupons of July, 1872. Without, therefore, considering any of the other questions presented for our consideration, on the argument, the judgment is affirmed.

McCLURE v. TOWNSHIP OF OXFORD.

(4 Otto, 429-433. 1876.)

ERROR to U. S. Circuit Court, District of Kansas.

§ 1398. *Legislative authority essential to municipal subscription to corporate stock.*

Opinion by WAITE, C. J.

A municipality must have legislative authority to subscribe to the capital stock of a bridge company before its officers can bind the body politic to the payment of bonds purporting to be issued on that account. Municipal officers cannot rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of such a subscription. If they do, the bonds they issue will be invalid in the hands of all that cannot claim protection as *bona fide* holders.

§ 1399. *Of what dealers in municipal bonds must take notice.*

To be a *bona fide* holder, one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements.

§ 1400. *Town bonds which recite that they are issued pursuant to an election held before the law authorizing them went into effect are void upon their face.*

The statute under which the bonds now in question were issued, and which is referred to in the bonds, though passed and approved March 1, 1872, was not by its terms to go into effect until after its publication in the "Kansas Weekly Commonwealth." Of this every purchaser of the bonds had notice, because it was part of the statute he was bound to take notice of. A purchaser would, therefore, be put upon inquiry as to the time of the publication, and by reasonable diligence could have ascertained that this did not take place until March 21. This being the case, the law charges him with knowledge that the statute did not go into effect until that date. The statute further provided that no bonds could be issued under its authority until the question of their issue had been submitted to the legal voters of the town at an election, of which thirty days' notice had been given, and at which a majority of the votes should be in favor of the measure. These bonds bore date April 15, 1872, and, pursuant to the express requirements of the act, contained a statement of the purpose for which they were issued, a reference to the act under which they were issued, and the result of the vote of the inhabitants on the question of their issuance, which is stated to have been taken April 8, 1872. No valid notice of an election could be given until the act went into effect, because until then no officer of the township had authority to designate the time or place of holding it. These bonds, therefore, carried upon their face unmistakable evidence that the forms of the law under which they purported to have been issued had not been complied with, because thirty days had not elapsed between the time the law took effect and the date of the election. If a purchaser may be, as he sometimes is, protected by false recitals in municipal bonds, the municipality ought to have the benefit of those that are true.

§ 1401. *The holder of coupons, which refer to the bonds to which they belong, is chargeable with notice of all the bonds contain.*

This suit was brought upon coupons detached from the bonds purchased by the plaintiff in error before maturity, but upon their face they refer to the bonds, and purport to be for the semi-annual interest accruing thereon. This puts the purchaser upon inquiry for the bonds, and charges him with notice of all they contain. This disposes of the case. As the declaration sets out a copy of the bonds with all the recitals, and the recitals show that the bonds were irregularly issued and not binding upon the township, it follows that the declaration does not set forth a good cause of action against the defendant, and that the demurrer was properly sustained. This is in accordance with the decision of the supreme court of Kansas, in *George v. Oxford Township*, 16 Kan., 72. Under these circumstances it is unnecessary to consider any other of the questions which have been certified here.

Judgment affirmed.

BROOKLYN v. INSURANCE COMPANY.

(9 Otto, 362-371. 1878.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—The town of Brooklyn, in Illinois, issued certain bonds in aid of a railroad that was expected to be built, running through the town, but which was not so built. Upon being sued on the coupons, the town pleaded (1) the general issue; (2) that the notice of the election expressly stated that the bonds were on condition that the road should pass through Brooklyn, and that the railroad officials deceived the officers of the town, and thereby obtained the bonds; (3) that the plaintiff was not a *bona fide* assignee of the coupons in suit before maturity, etc.; (4) that the railroad officials and the town officers, by fraud and collusion, got the bonds issued without proper assurances that the road should be built in conformity with the agreement; (5) that plaintiff's action is barred by a decree of an Illinois court, in which the bonds were declared invalid, the plaintiff being, as alleged, a party to the suit, under the description of the "unknown owners of certain bonds," etc., there having been publication directed to such owners. To the second, fourth and fifth pleas the plaintiff demurred, and joined issue on the first and third. The demurrers were sustained, and the jury found the issue for the plaintiff.

Opinion by MR. JUSTICE HARLAN.

The questions presented for consideration upon this writ of error seem to have been concluded by the former decisions of this court.

§ 1402. *The holder of bonds is not chargeable with notice of the precise form or terms of a subscription, whether absolute or conditional.*

The facts set out in the second plea do not constitute a defense to this action. It is not averred in that plea that the insurance company had, at the time it purchased the coupons in suit, any knowledge or actual notice of the special conditions embodied in the election notice, and repeated in the formal subscription of May 23, 1870. Nor is it therein alleged that the bonds to which these coupons were originally attached contained recitals indicating that the subscription had been voted and made upon any conditions whatever. The defendant in error was undoubtedly bound to take notice of the provisions of the statute under which the bonds had been issued. But it was under no legal obligation

to inquire as to the precise form or terms of the subscription, whether it was absolute or only conditional.

Had the insurance company, before consummating its purchase of the coupons, examined the act incorporating the Chicago & Rock River Railroad Company, it would have ascertained: 1st. That the statute made no provision for conditional subscriptions. 2d. That upon the approval by a majority of the legal voters of any incorporated city, town or township, along or near the route of the road, at an election called and held for such purpose, in the mode prescribed by law, it was made, by the express words of the statute, the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor of such township, to make the subscription voted for, receive certificates therefor, and execute to the company bonds of the required amount, bearing interest, payable annually, and signed by such president, executive officer or supervisor, and attested by the clerk of the municipality in whose name the bonds were issued. 3d. That, within ten days after the approval of a subscription by popular vote, it was the duty of the clerk to transmit to the county clerk a statement of the vote given, the amount voted, and the rate of interest to be paid; and, within like period, after bonds were issued, to file with the county clerk a certificate showing the amount and number of bonds issued, and the rate of interest to be paid. If it be suggested that the statement thus directed to be transmitted to and filed with the county clerk would inform the purchaser whether the subscription was conditional or absolute, a sufficient response is, that such statement might have been in conformity with the letter of the statute without setting forth the precise nature of the subscription. But a conclusive answer is, that there is no averment that any such statement was prepared, transmitted or filed, or, if filed, that it indicated the conditional nature of the subscription, by reference either to the election notice or to the formal subscription of May 27, 1870. The plea shows that "the town and the citizens" (to adopt the language of the plea) were assured by the agents and representatives of the railroad company that the latter intended, in good faith, to perform the special conditions annexed to the subscription, and that all rumors to the contrary were without just foundation. These assurances were credited, and, in reliance upon them, the supervisor and clerk executed and delivered the bonds, knowing, at the time, that the conditions imposed by popular vote, as well as by the terms of the subscription, had not been complied with. Thus was faith in the promises of a railroad company substituted for a contract which, had the town stood upon it, would either have secured the construction of the road, as contemplated, or guarded its people against a burden which has been imposed upon them through the fraudulent conduct of railroad officials, and the violation, by its own officers, of the trust committed to them. By the act of the town's constituted authorities, who, by the statute, had the right, under certain circumstances, to execute and deliver the bonds and coupons, the railroad company was enabled to put them upon the money market in advance of the construction of the road. It is now too late for the town to claim exemption, as against *bona fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice either from the statute or otherwise. The remedy of the city is against the railroad company and its own unfaithful officers, who, it is alleged, were in fraudulent combination with the company.

For the reasons already stated, the fourth plea must also be held to be insufficient. The bonds were signed by the officers designated for that purpose by the charter of the railroad company, and, after the vote and subscription, it does not seem to have been necessary that the board of auditors or other corporate authorities of the town should have participated in their issue and delivery.

§ 1403. *A proceeding wholly in personam against holders of negotiable paper cannot affect non-resident holders who are proceeded against only by constructive service.*

The fifth plea is radically defective. The suit commenced and determined in the circuit court of Lee county was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons which had been issued in the name of the town, and delivered to the railroad company. Upon principle and authority, no decree therein rendered could bind any one not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever. *Pennoyer v. Neff*, 95 U. S., 714, and authorities there cited.

We come now to consider the remaining assignment of error, viz., that the court erred in rendering judgment upon the verdict. This objection rests upon the ground that although there were two issues to try,—those arising under the first and third pleas,—the jury were sworn to try “the issue,” and found only “the issue” for the defendant in error.

§ 1404. *An objection that the jury only tried the “issue,” there being two issues, must be made in the trial court.*

We observe, from the record, that after the demurrer to the second, fourth and fifth pleas was sustained, the city failed to appear, by attorney, at the trial before the jury. After verdict, a motion was entered to set aside the verdict and judgment and grant a new trial. But no written grounds were filed in support of the motion. Nor did the city appear at the hearing of the motion, and urge any reason for its being granted. It was, consequently, denied, and, in this court for the first time, specific objection is made that the jury were sworn to try, and, in fact, tried but one issue, and that it is impossible from the orders of the court to say what issue was tried. We decline to consider the objection. If the attention of the court below had been called to this matter, the objection might have been obviated. There is no bill of exceptions showing to what point the evidence was directed, and we will assume, under the circumstances of the case, that all the issues were tried which were presented in due form for trial, or which the parties desired to be disposed of. *Laber v. Cooper*, 7 Wall., 565. Our conclusion is that no error was committed in the court below.

Judgment affirmed.

MR. JUSTICE BRADLEY did not sit in this case.

DRAPER v. SPRINGPORT.

(14 Otto, 501-504. 1881.)

ERROR to U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—The action below was brought by Draper against the town of Springport, to recover the amount of certain interest coupons an-

nexed to certain instruments called bonds of the town of Springport, issued in payment of stock of the Cayuga Lake Railroad Company. One defense was that the bonds had no seals affixed to the signatures of the town commissioners. For this defect the court below gave judgment for the defendant, a jury having been waived by the parties. Other defenses were set up on the trial, but were overruled by the court. These were: 1st. That on a *certiorari* (to which the plaintiff was not a party) the proceedings of the town commissioners, which resulted in the issue of the bonds, were set aside. 2d. That there was no sufficient consent of tax-payers of the town to authorize the commissioners to subscribe for the stock of the railroad company. 3d. That many of those tax-payers who did subscribe revoked their consent before the commissioners acted, which reduced the number of those consenting below that required to give the commissioners power to act.

§ 1405. *A municipal corporation, authorized to issue bonds for a specific purpose, is bound to a bona fide holder for value, upon obligations otherwise pursuant to authority, but not under seal.*

Without expressing any opinion as to the sufficiency of the defenses which were overruled, we are of opinion that the ground on which the court below dismissed the petition was insufficient. It related merely to a matter of form, and not to the substance of the transaction. The statute under which the bonds (so called) were issued was passed April 14, 1869, and was entitled "An act to facilitate the construction of the Cayuga Lake Railroad, and to authorize the town of Springport, Cayuga county, to subscribe to the capital stock thereof." The first section authorized the county judge to appoint, under his hand and seal, three freeholders of the town, as commissioners to carry into effect the purposes of the act. These commissioners were duly appointed and qualified. The second section of the act was as follows:

"SEC. 2. It shall be lawful for the said commissioners to borrow on the faith and credit of the said town such sum of money as the tax-paying inhabitants shall fix upon by their assent in writing, not exceeding in amount ten per cent. of the assessed valuation of the real and personal property of said town as shown by the assessment roll for the year 1868, for said town, at a rate of interest not exceeding seven per cent. for a term not exceeding thirty years, and to execute bonds therefor under their hands and seal.

"The bonds so to be executed may be in such sums and payable at such times and places, not exceeding thirty years, and in such form as the said commissioner or commissioners and their successors may deem expedient: *Provided, however*, that the powers and authority conferred by this section shall only be executed upon the condition that the consent shall first be obtained in writing of the majority of the tax-payers of said town owning more than one-half of the taxable property of said town assessed and appearing upon the assessment roll of the year 1868, which consent shall be proved or acknowledged in the same manner as conveyances of real estate are proved or acknowledged, or proved by a subscribing witness, who shall swear, in addition to the ordinary form of affidavits of subscribing witnesses, that the party assenting informed the witness that he knew the contents thereof.

"The proof required to show that a majority of the taxable inhabitants representing a majority of the taxable property of the town have given their consent required by this section shall be by the affidavit of the assessors or a majority of them of said town, which affidavit, consent and acknowledgment shall be filed in the town and county clerk's office of the said county, with a

copy of the assessment roll of the year 1868, and it shall be the duty of the said assessors, and they are hereby required, to make such affidavit whenever the said consent shall be obtained, on or before the 1st day of January, 1870."

(The time of obtaining consents was extended by the act of April 1, 1870, to April 1, 1871.)

"A certified copy of such affidavit, consent and acknowledgment shall be presumptive evidence of the facts therein contained, and shall be admitted in any court of this state, or before any judge or justice thereof."

Section 3 authorized the commissioners in their discretion to dispose of the bonds to anybody at not less than par, and directed that the money raised by the sale of bonds should be invested in the stock of the Cayuga Lake Railroad Company, and that the said money should be used and applied in the construction of said railroad, beginning at the north end as aforesaid, and its buildings and appurtenances, and for no other purpose whatever. It was further enacted that the commissioners might subscribe for the stock of the company for the amount consented to, and might purchase the stock, receive certificates, and the town should thereby acquire all the rights and privileges of other stockholders, might participate in meetings of stockholders, and be eligible as directors.

Section 20 authorized the commissioners to exchange the bonds at par, and issue them directly to the railroad company, receiving therefor the stock of the company. On the 23d of March, 1871, the three assessors of the town made an affidavit in accordance with the act, stating the facts necessary to enable the commissioners to proceed. The commissioners thereupon subscribed for one thousand shares of the capital stock of the railroad company, of \$100 each, and issued the bonds in question in payment thereof. The plaintiff purchased the coupons on which the suit was brought in the ordinary course of business, in good faith, and for a valuable consideration.

It is apparent from the law that the substantial thing authorized to be done on behalf of the town was, to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock, and issuing the obligations of the town in payment thereof. The technical form of the obligations was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without a seal, was merely a directory requirement. The town, indeed, had no seal; and the individual seals of the commissioners would have had no legal efficacy; for the bonds were not their obligations, but the obligations of the town; and their seals could have added nothing to the solemnity of the instruments. The fundamental authority contained in the law is found in the first three lines of the second section: "It shall be lawful for the said commissioners to borrow on the faith and credit of the said town such sum of money as the tax-paying inhabitants shall fix upon by their assent in writing." The commissioners executed this authority in the form allowed by the statute, namely, by a direct purchase of the stock with the bonds issued. They might have sold the bonds for money, and paid the money for the stock. Had they done this, the town would have been liable to pay the money borrowed, even if the obligations given for it had been void. Where the transaction has nothing in it of *malum in se*, and the parties are not *participes criminis* in a violation of law, money had and received by one from the other in good faith, may be recovered even though the security given therefor be void for some technical defect or illegality. This matter was sufficiently discussed in the case of *Thomas v. City*

of Richmond, 12 Wall., 349, and was very ably considered in *Oneida Bank v. Ontario Bank*, 21 N. Y., 490. The fact that the stock was taken directly in exchange for the bonds, instead of selling the latter for money and investing in stock, can make no material difference in the nature of the transaction. It is equally the case of value lawfully received for an innocent obligation, whether valid or invalid, given therefor. If valid, a recovery may be had on it; if invalid, a recovery may be had upon the original consideration. We cannot agree with the courts of the state, that the form of a seal was an essential part of the transaction.

§ 1406. *Quære: Whether the absence of a seal to a municipal bond is notice of irregularity to the holder?*

Whether the deviation from the directions of the statute, in the form of the obligations, may not have the effect of notice to the holder, sufficient to allow the other defenses to be set up, is a question which it is unnecessary at this time to decide. It may admit of much consideration. Judgment reversed, with directions to award a *venire de novo*.

CARRIER v. TOWN OF SHAWANGUNK.

(Circuit Court for New York: 10 Federal Reporter, 220-223. 1882.)

Opinion by SHIPMAN, D. J.

STATEMENT OF FACTS.—This is an action at law to recover the amount due upon sundry bonds for \$2,400 issued by the town of Shawangunk, and payable to bearer. The bonds recited that they were issued in pursuance of the act which is hereafter mentioned, and by duly appointed commissioners. The second section of chapter 880 of the session laws of 1866 provided that it should be lawful for the commissioners appointed by the county judge, upon the application of twelve freeholders, residents of the town, to borrow on the faith and credit of the town such sum of money as the tax-paying inhabitants of the town should fix upon by their assent in writing, not exceeding a specified percentage of the assessed valuation of the property of the town for the year 1865:

“Provided, however, that the powers and authority conferred by this section shall only be exercised upon the condition that the consent shall first be obtained in writing of such number of the tax-payers of such town, their heirs, or legal representatives, appearing upon the last assessment roll for the year 1865, as shall represent a majority of the taxable property of such town; proof of which shall be by the acknowledgment or proof thereof as required for deeds of real estate filed in the town and county clerks’ offices of the respective counties, and annexed to a copy of the assessment roll of the town for 1865.”

For the purpose of showing that the plaintiff, whether a purchaser for value or not, had the title and rights of a *bona fide* holder, because he was the successor of the Dime Savings Bank, which was a purchaser for value before maturity, and without notice of any claim of non-liability on the part of the town, the plaintiff proves by the attorney of the bank, that before the purchase and before maturity he investigated whether the consent of the town to the issue of the bonds had been obtained as prescribed by the act. Before the examination he had never heard of any claim on the part of the town, or its officers, that the bonds were invalid. He examined a certified copy of the consent and assessment rolls of the town, and ascertained that the majority of the persons

upon the assessment list had signed the petition or consent to the bonding of the town, and that the consents represented a majority of the property of the town, and that these facts had been certified to by the proper officers. The witness testified: "I carefully added up and reviewed the additions already added up, proved the figures, and found them correct. I counted the names for myself, and I read the certificate. It was the county clerk's of Ulster county. . . . I ascertained that all the names on the consent roll were on the assessment roll, and checked them off and added up the amount of the property."

The result of the investigation was reported to the bank, which thereupon bought a large amount of the bonds for ninety per cent. of their par value. The certified copy was delivered to the bank, and was thereafter mislaid and lost. It was not claimed by the defendant that the bank had any actual notice of any alleged invalidity of the bonds, but the defendant, after the plaintiff had rested, offered a certified copy of the consent roll of the town, in pursuance of which the bonds were authorized to be issued, together with a certified copy of the assessment roll of the town for the year 1865, to show that the consent of the majority in value of the tax-payers was not obtained, and insisted "that the bank must stand or fall by the roll as it in fact was, not by any mistaken interpretation of it by its attorney; that it was not a *bona fide* holder without notice, because it had undertaken to investigate the matter, and did not rely on the face of the security."

The court excluded the evidence, to which ruling the defendant excepted, and a verdict having been subsequently directed for the plaintiff, filed a bill of exceptions and a motion for new trial. The question in regard to the exclusion of the certified copies of the consent and assessment rolls, for the purpose for which they were offered, was the only one which was argued by the defendant. It will be observed that these rolls were not offered either upon cross-examination of the attorney or as independent evidence to show that he had actual notice of any defect in the number of consents, or that he would have had notice if he had exercised reasonable diligence; but they were offered upon the alleged ground that, inasmuch as the bank's attorney had examined certified copies, it therefore could not be a *bona fide* purchaser, if a comparison of the consent roll with the assessment roll would show that the consent of a majority in value had not been obtained, although diligent scrutiny, at the time of the purchase, did not disclose the alleged fact.

§ 1407. *One who investigates the authority under which municipal bonds are issued is not chargeable with notice of defects for that reason.*

The defendant's proposition was that the purchaser before maturity of municipal bonds, payable to bearer, is not a *bona fide* holder if he undertakes to investigate the validity of the bonds which he proposes to buy, and investigation would have revealed to him a defect, although it was not disclosed by diligent examination, and that such purchaser is charged with notice of all that a complex record might show, although it is not claimed that he had notice of any defect in the bonds, and it is clear that diligent scrutiny of the copies of the public record which were furnished to him did not disclose any suggestion of such defect. No such artificial rule in regard to notice has been established. It is true that purchasers of municipal bonds are charged with notice of the laws of the state which authorized the issue, and of a want of power in the municipality or its officers to execute or issue the bonds. In this case, it is fairly to be gathered from the statute that the commissioners were invested with power to decide whether the proper number of tax-payers had consented,

and whether, therefore, the condition precedent had been complied with, and their recitals in the bonds, when held by a *bona fide* purchaser, are conclusive. *Township of Coloma v. Eaves*, 92 U. S., 484 (§§ 1419-20, *infra*); *Humboldt v. Long*, 92 U. S., 642 (§§ 1451-53, *infra*); *Walnut v. Wade*, 103 U. S., 683. Knowledge, by the purchaser of municipal bonds before maturity, of their invalidity, when there are no marks of infirmity on the face of the instrument, and there is no want of power in the municipality or its officers to execute and issue the bonds, is a question of fact.

§ 1408. *Effect of recital appearing on face of bond.*

It being admitted that the purchaser before maturity, for value, had no actual notice or suspicion of any defect, and the bonds in substance reciting compliance with the condition precedent which was required by the statute, the arbitrary rule claimed by the defendant, which declares that he did have constructive notice of a defect, does not exist. The motion for a new trial is denied, and the stay of proceedings is vacated.

MERCER COUNTY v. HACKET.

(1 Wallace, 83-97. 1868.)

STATEMENT OF FACTS.—An act of Pennsylvania, of 1852, authorized subscriptions to the stock of a certain railroad company on the following conditions: (1) Subscriptions to be made by the county commissioners, after the amount shall have been designated, advised and recommended by a grand jury of the county. (2) The bonds not to be sold by the company at less than par. (3) That the acceptance of this act by the company should also be deemed an acceptance by it of the provisions of another act fixing the gauges of railroads in Erie county.

In a suit by a *bona fide* holder, the county offered to prove: (1) That no recommendation was made by a grand jury as required by the act, but the jury signed a paper, stating that they "would recommend" a subscription, etc., not exceeding \$150,000 in amount. (2) That the company refused to accept the provisions of the act fixing the gauges of railroads. (3) That the bonds were paid out by the company at less than par.

Opinion by MR. JUSTICE GRIER.

The bonds declare on their face that the faith, credit and property of the county are solemnly pledged, under the authority of certain acts of assembly, and that in *pursuance* of said act the bonds were signed by the commissioners of the county. They are on their face complete and perfect; exhibiting no defect in form or substance; and the evidence offered is to show the recitals on the bonds are not true; not that no law exists to authorize their issue, but that the bonds were not made "in pursuance of the acts of assembly" authorizing them.

§ 1409. *Where municipal bonds on their face import compliance with the law, a bona fide purchaser need not look further.*

We have decided in the case of *Commissioners of Knox County v. Aspinwall*, 21 How., 545 (§§ 1413-18, *infra*), that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but *after* the authority has been executed, the stock subscribed, and the bonds issued and in the hands of inno-

cent holders, it would be too late, even in a direct proceeding, to call it in question. The case of *Mercer County v. The Railroad*, 27 Penn. St., 389, has been cited as governing this case. But on examination it will be found not to contradict the doctrine we have just stated. That was a bill in equity praying an injunction against the issuing of a portion of the bonds *not yet delivered over to the company*, or negotiated by them. It charged that the commissioners had not pursued the conditions, limitations and restrictions of the act that authorized their issue; that, by the act, "all such subscriptions shall be made *after and not before* the amount of such subscriptions shall have been *designated, advised and recommended by a grand jury*," whereas the grand jury only "*recommended* that the commissioners of Mercer county subscribe to the capital stock of the Pittsburgh & Erie Railroad, to such amount and under such restrictions as may be required by the act of assembly, by authorizing them to subscribe, to an amount not exceeding \$150,000." The bill charged also most gross frauds perpetrated by the company, which fully justified the decree of the court, without resorting to the very ingenious and rather astute criticism of the phraseology of the grand jury. It is true they *recommend* only, and have not used the words "designate and advise" a subscription not to exceed \$150,000. It would require no great latitude of construction to treat this, as the commissioners might justly do, as a substantial compliance with the act. But it would be contrary to good faith and common justice to permit them to allege a newly discovered construction of an equivocal power, after they have sold the bonds, and they have passed (as is admitted in this case) into the hands of *bona fide* purchasers for value. It is proper to state that the construction given has the assent of only two of the judges of that learned court, so that it has not the force of precedent even if it applied to this case. But it is due also to them to say that they intimate no opinion as to how far the reasons given for enjoining the further issue of the bonds ought to affect their validity in the hands of "innocent holders."

The proviso to the act authorizing the subscription declares "that the acceptance of this act shall be deemed also an acceptance of the provisions of the act passed the 11th day of May, 1851, entitled 'An act fixing the gauges of railroads in the county of Erie.'" Now it is very plain that the acceptance of the bonds authorized by this act operated *per se* as an acceptance of the gauge law. It needed no resolution of the railroad corporation on their minutes. They were estopped by law after receipt of the bonds, until they were afterwards released by statute from the condition. But if that were not sufficient, it may be stated as a matter of history, that on the 24th of December, 1851, the stockholders passed a resolution "accepting and agreeing to be bound by the provisions of the act aforesaid, being an act fixing the gauge of railroads in Erie county." This fact, though overlooked in the case last mentioned, was afterwards brought to the notice of the same court, on the trial of a subsequent cause between the same parties. As any subsequent resolution of the railroad company refusing compliance with this condition annexed by statute to their acceptance of the county subscriptions would be fraudulent and void, the court did not err in refusing to admit the evidence offered, or to permit the defendants to prove that the recitals of their bonds were untrue.

§ 1410. *Municipal bonds are negotiable instruments.*

2. Can evidence of the fraud practiced by the railroad company to whom these bonds were delivered, and by whom they were paid to *bona fide* holders for value, or the fact that they were negotiated at less than their par value, be

received to defeat the recovery of the plaintiff below? This species of bonds is a modern invention, intended to pass by manual delivery and to have the qualities of negotiable paper, and their value depends mainly upon this character. Being issued by states and corporations they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court (*White v. Vermont R. Co.*, 21 How., 575), but of nearly every state in the Union, is well known and admitted.

But we have been referred to the case of *Diamond v. Lawrence County*, 37 Penn. St., 353, for a single decision to the contrary. The learned judge who delivered the opinion of the court in that case says, "We will not treat these bonds as negotiable securities. *On this ground we stand alone. All the courts, American and English, are against us.* We know the history of these municipal and county bonds, how the legislature, yielding to popular excitement about railroads, authorized their issue; how grand jurors and county commissioners and city officers were moulded to the purposes of speculators; how recklessly railroad officers abused the overwrought confidence of the public, and what burdens of debt and taxation have resulted to the people,—a moneyed security was thrown upon the market by the paroxysm of the public mind," etc.

§ 1411. *Supreme court will not follow decisions of state courts on questions of commercial law.*

If this decision of that learned court was founded on the construction of the constitution or statute law of the state, or the peculiar law of Pennsylvania as to titles to land, we would have felt bound to follow it. But we have often decided that on questions of mercantile or commercial law, or usages which are not peculiar to any place, we do not feel bound to yield our own judgment, especially if it be fortified by the decision of "all other English and American courts." These securities are not peculiar to Pennsylvania, or governed by its statutes or peculiar law. Although we doubt not the facts stated as to the atrocious frauds which have been practiced in some counties, in issuing and obtaining these bonds, we cannot agree to overrule our own decisions and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad "speculators," are pleas which might have just weight in an application to restrain the issue or negotiation of these bonds, but cannot prevail to authorize their repudiation, after they have been negotiated and have come into the possession of *bona fide* holders.

§ 1412. *Sale of municipal bonds at less than par, contrary to charter, will not defeat recovery by bona fide holder.*

In the case of *Woods v. Lawrence County*, 1 Black, 386 (§§ 998-1002, *supra*), as a corollary from the principles stated, we have decided that in a suit brought on the coupons of these bonds by a *bona fide* holder, his right to recover is not affected by the fact that the railroad company sold the bonds at a discount, contrary to the provisions of their charter, which forbids the sale of them at less than their par value. As the evidence offered and overruled by the court could not have established a defense to the case made by the plaintiff below, the court did not err in refusing to receive it.

Judgment affirmed, with costs.

COMMISSIONERS OF KNOX COUNTY v. ASPINWALL.

(21 Howard, 539-546. 1853.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of Indiana. The suit was brought in the court below against the board of commissioners of Knox county to recover the amount due upon two hundred and eighty-four coupons, each for the sum of \$60, the whole amounting to the sum of \$17,040. The coupons were payable at the North River Bank, in the city of New York — one hundred and forty-two of them on the 1st of March, 1856, and the remaining number on the 1st of March, 1857. These coupons were originally attached to one hundred and forty-two bonds, issued by the defendants, for \$1,000 each, the bonds payable at the bank above mentioned, twenty-five years from date, to the Ohio & Mississippi Railroad Company, or bearer, with interest at the rate of six per cent. per annum, payable annually on the 1st of March, at the bank, upon presentation and delivery of the proper coupons hereto attached by the auditor of said county. The coupons declared upon and sought to be recovered are those which were attached to these one hundred and forty-two bonds, and represented the interest due thereon on the 1st of March, 1856 and 1857. The plaintiffs are the holders and owners of these coupons. The main ground of the defense set up and relied on to defeat the recovery is that the defendant, the board of commissioners, possessed no authority to execute, or to authorize to be executed, the bonds or coupons in question; and hence, that they are obligations not binding upon the county of Knox, which this board represents. Our chief inquiry, therefore, will be whether or not these several obligations were executed and put into circulation, as evidences of indebtedness, by competent and legal authority.

The defendant is a body corporate, under the laws of the state of Indiana, by the name of the board of commissioners of the county, and very large powers are conferred upon it in matters relating to the police and fiscal concerns of the county. The auditor of the county is to act as its clerk, and the sheriff is to attend its meetings and execute its orders. It has a common seal, and copies of its proceedings, signed and sealed by the clerk, are evidence in courts of justice. It has power to dispose of the property of the county; to adjust accounts against it; to raise revenue and examine accounts of disbursing officers; and an appeal lies from its decisions to the circuit court. 1 R. S. of Indiana, pp. 180, 187.

On the 14th February, 1848, the legislature of Indiana incorporated the

Ohio & Mississippi Railroad Company, and by the twelfth section of the charter provided as follows: "It shall be lawful for the county commissioners of any county in the state of Indiana through which said railroad passes, for and in behalf of said county, to authorize, by order on their records, so much of said stock to be taken in said railroad as they may deem proper, at any time within five years after opening the books of subscription to said stock: *Provided, however*, that it shall be, and is hereby made, the duty of said county commissioners, in any county through which said railroad may pass in the state of Indiana, to subscribe for stock for and on behalf of said county, if a majority of the qualified voters of said county, at any annual election, within five years after said books are opened, shall vote for the same." Sess. Laws 1848, p. 619.

This act was amended on the 15th January, 1849; and in the second section it was declared to be the duty of the sheriffs of the counties — and, among others, Knox county, the one in question — forthwith to give notice of an election to be held on the first Monday of March then next, to determine whether said county would subscribe for the stock of the Ohio & Mississippi Railroad Company, etc.; and if a majority of the votes shall be given in favor of the subscription, the county board of commissioners shall subscribe to said stock, etc., for the county, to an amount not less than \$100,000: *Provided*, that the county board of any of said counties may, within one week prior to said election, increase or lessen the amount to be subscribed, of which notice shall be given at the different precincts of said county on the day of the election, etc. The third section provided that the county subscription shall be payable in county bonds, bearing interest at the rate of six per cent. per annum, payable annually on the 1st day of March, redeemable at such time and place as the directors of the company may determine within thirty years from the date of the subscription. The section then provides for the levying of a tax annually upon the county by the board of commissioners, to meet the accruing interest on the bonds.

The plaintiffs gave in evidence on the trial, that at a meeting of the board of commissioners of the county of Knox, on the 26th February, 1849, it ordered, under the power given in the second section above referred to, that the county subscribe \$200,000 of the capital stock of the Ohio & Mississippi Railroad Company. And also, that at a meeting on the 25th October, 1850, after reciting that, in accordance with the wishes of the voters of the county, as expressed at the election held for that purpose in the several townships on the first Monday of March, 1849, it is ordered that the auditor, in the name and for the county of Knox, subscribe to the capital stock of the Ohio & Mississippi Railroad Company four thousand shares of \$50 each, or the sum of \$200,000; and that the auditor be authorized to vote at all elections and meetings of stockholders, or to appoint a proxy in his stead. And that, in pursuance of this direction, the auditor subscribed the four thousand shares, and received certificates in the name of the board of commissioners of the county for the same; and also executed and delivered the bonds of the county, as provided for in the third section of the act of 1849, attaching thereto coupons for the interest. The bonds and coupons in question were issued under this authority. This is the substance of the case, as presented on the record.

The ground upon which the want of authority to execute the bonds in question is placed is the alleged omission to comply with the requisition of the statute of 1849, in respect to the notices to be given of the election to be held

on the first Monday of March, at which a vote was to be taken for or against a subscription of stock to the railroad company. It is insisted that an irregularity or omission in these notices had the effect to deprive the board of this authority, or rather furnish evidence that the power had never vested in it under the act; and, further, that the plaintiffs are chargeable with a knowledge of all substantial defects or irregularities in these notices of the election, and not therefore entitled to the character of *bona fide* holders of the securities.

§ 1413. *Purchasers of municipal bonds must take notice of public statute authorizing their issue.*

The act in pursuance of which the bonds were issued is a public statute of a state, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it; and as this board was acting under delegated authority, he must show that the authority has been properly conferred. The court must therefore look into the statute for the purpose of determining this question; and upon looking into it, we see that full power is conferred upon the board to subscribe for the stock and issue the bonds, when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of the election. The case assumes that the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law.

§ 1414. *Where municipal bonds purport to be issued in accordance with a statute providing for an election, the sufficiency of the election notice is not open to question as against innocent holder.*

This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription? The court is of opinion that the question belonged to this board. The act makes it the duty of the sheriff to give the notices of the election for the day mentioned, and then declares, if a majority of the votes given shall be in favor of the subscription, the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests.

§ 1415. *Remedy where bonds are issued without requisite votes of electors.*

We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but, after the authority has been executed, the stock subscribed and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way.

§ 1416. *Fact of issuance of bonds is evidence that conditions have been fulfilled.*

Another answer to this ground of defense is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained from the fact of the subscription, by the board, to the stock of the railroad company and the issuing of the bonds. The bonds on their face import a compliance with the law under which they were issued. "This bond," we quote, "is issued in part payment of a subscription of \$200,000, by the said Knox county, to the capital stock, etc., by order of the board of commissioners," in pursuance of the third section of act, etc., passed by the general assembly of the state of Indiana, and approved 15th January, 1849.

§ 1417. *A purchaser need not look beyond the recitals in the bonds.*

The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power. This principle was recently applied in a case in the court of exchequer in England. 6 Ell. & Bl., 327, *Royal British Bank v. Turquand*. It was an action upon a bond against the defendant, as the manager of a joint stock company. The defense was a want of power under the deed of settlement or charter to give the bond. One of the clauses in the charter provided that the directors might borrow money on bonds in such sums as should from time to time by a general resolution of the company be authorized to be borrowed. The resolution passed was considered defective. Jervis, Ch. B., in delivering the judgment of the court, observed: "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." See, also, 5 Ell. & Bl., 245, S. C., and 25 Eng. L. & Eq., 114, *MacLae v. Sutherland*. The principle we think sound, and is entirely applicable to the question before us.

§ 1418. *Suit may be maintained on coupons without producing the bond.*

A question was made upon the argument, that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached. But the answer is, that these coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each instalment of interest, and at the same time to furnish complete evidence of the payment of the interest to the makers of the obligation. Some other minor points were made in the case upon the argument, which we have considered, but which it is not important should be particularly noticed. We are satisfied the judgment below is right, and should be affirmed.

MR. JUSTICE DANIEL dissented, holding (1) that the court had no jurisdiction, one of the parties being a corporation; (2) the commissioners being known to be a party, it was the duty of those who dealt with them to ascertain the extent of their powers.

TOWN OF COLOMA v. EAVES.

(2 Otto, 484-494. 1875.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—It appears by the record that the plaintiff is a *bona fide* holder and owner of the coupons upon which the suit is founded, having obtained them before they were due and for a valuable consideration paid. The bonds to which the coupons were attached were given in payment of a subscription of \$50,000 to the capital stock of the Chicago & Rock River Railroad Company, for which the town received in return certificates of five hundred shares, of \$100 each, in the stock of the company. That stock the town retains, but it resists the payment of the bonds and of the coupons attached to them, alleging that they were issued without lawful authority. Saying nothing at present of the dishonesty of such a defense while the consideration for which the bonds were given is retained, we come at once to the question whether authority was shown for the stock subscription and for the consequent issue of the bonds. At the outset it is to be observed that the question is not between the town and its own agents; it is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority.

§ 1419. *Bond act construed as to tribunal to decide whether conditions have been complied with.*

By an act of the legislature of Illinois the Chicago & Rock River Railroad Company was incorporated with power to build and operate a railroad from Rock Falls, on Rock river, to Chicago, a distance of about one hundred and thirty miles. The tenth section of the act enacted that, "to aid in the construction of said road, any incorporated city, town or township organized under the township organization laws of the state, along or near the route of said road, might subscribe to the capital stock of said company." That the town of Coloma was one of the municipal divisions empowered by this section to subscribe fully appears, and also that the railroad was built into the town before the bonds were issued. But it is upon the eleventh section of the act that the defendant relies. That section is as follows:

"No such subscription shall be made until the question has been submitted to the legal voters of said city, town or township in which the subscription is proposed to be made. And the clerk of such city, town or township is hereby required, upon presentation of a petition signed by at least ten citizens who are legal voters and tax-payers in such city, town or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township; which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township for the purpose of voting for or against such subscriptions. If it shall appear that a majority of all the legal voters of such city, town or township voting at such election have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such city, town or township, the amount so voted to be subscribed, and to receive from such company the proper certificates therefor.

He shall also execute to said company, in the name of such city, town or township, bonds bearing interest at ten per cent. per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually, and which said bonds shall be signed by such president or supervisor or other executive officer, and be attested by the clerk of the city, town or township in whose name the bonds are issued."

Section 12 provides, "It shall be the duty of the clerk of any such city, town or township in which a vote shall be given in favor of subscriptions, within ten days thereafter, to transmit to the county clerk of their counties a transcript or statement of the vote given and the amount so voted to be subscribed, and the rate of interest to be paid."

Most of these provisions are merely directory. But conceding, as we do, that the authority to make the subscription was, by the eleventh section of the act, made dependent upon the result of the submission of the question whether the town would subscribe to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the town voting at the election, a preliminary inquiry must be, how is it to be ascertained whether the directions have been followed? whether there has been any popular vote, or whether a majority of the legal voters present at the election did in fact vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made and before the bonds are issued? or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale, and it was rationally to be expected that they would be put upon distant markets. It must have been considered that the higher the price obtained for them the more advantageous would it be for the company and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was adverse to the object the legislature had in view. It could not have been overlooked that their market value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued — contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view; namely, aid in the construction of the road. Such an interpretation ought not to be given to the statute, if it can reasonably be avoided; and we think it may be avoided.

At some time or other it is to be ascertained whether the directions of the act have been followed, whether there was any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met. This

presumption is strengthened by the provisions of the twelfth section, which make it the duty of the clerk to transmit to the county clerk a transcript or statement, verified by his oath, of the vote given, with other particulars, in case a subscription has been voted. How is he to perform this duty if he is not to conduct the election and to determine what the voters have decided? If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority and in accordance with a popular vote, to inquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the inquiry must be addressed to the town clerk or executive officer of the municipality,—to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The eleventh section (quoted above) declared that if it should appear that a majority of the legal voters of the city, town or township, voting, had voted "for subscription," the executive officer and clerk should subscribe and execute bonds. "If it should appear," said the act. Appear when? Why, plainly, before the subscription was made and the bonds were executed; not afterwards. Appear to whom? In regard to this there can be no doubt. Manifestly not to a court, after the bonds have been put on the market and sold, and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. It certainly devolved upon some person or persons to decide this preliminary question; and there can be no doubt who was intended by the law to be the arbiter. In *Commissioners v. Nichols*, 14 Ohio St., 260, it was said that "a statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions, or otherwise, to complete a certain railroad, and imposing upon them the duty of delivering the bonds when such provision had been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners; and, if delivered improvidently, the bonds will not be invalidated."

In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them; and they were registered in the office of the auditor of the state, in accordance with an act, requiring that, precedent to their registration, the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they "are issued under and by virtue of the act incorporating the railroad company," approved March 24, 1869, "and

in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law."

§ 1420. *Recitals in municipal bonds are conclusive in favor of bona fide holders. (a)*

After all this, it is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others,—to those most competent to decide it,—and which the purchaser is, in general, in no condition to decide for himself.

This we understand to be the settled doctrine of this court. Indeed, some of our decisions have gone farther. In the leading case of *Com'rs of Knox Co. v. Aspinwall*, 21 How., 544 (§§ 1413-18, *supra*), the decision was rested upon two grounds. One of them was that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with; and it was said that the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to *Royal British Bank v. Turquand*, 6 Ell. & Bl., 327, a case in the exchequer chamber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in *Knox v. Aspinwall* has been more than once reaffirmed in this court. It was in *Moran v. Miami County*, 2 Black, 732 (§§ 1439-42, *infra*), in *Mercer County v. Hacket*, 1 Wall., 83 (§§ 1409-12, *supra*), in *Supervisors v. Schenck*, 5 id., 784 (§§ 1683-86, *infra*), and in *Meyer v. Muscatine*, 1 id., 384 (§§ 921-925, *supra*). It has never been overruled; and, whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox Co. v. Aspinwall*. That, we think, has been so firmly seated in reason and authority that it cannot be shaken. What it is has been well stated in sec. 419 of *Dillon on Munic. Corp.* After a review of the decisions of this court the author remarks: "If, upon a true construction of the legislative enactment conferring the authority (*viz.*, to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholder for

(a) Where a municipality has power to issue bonds, and it may be gathered from the law that certain officers are made the judges whether certain antecedent conditions have been complied with, and the bonds, when issued, recite a compliance with conditions, the recitals are conclusive in favor of a *bona fide* holder. *Marcy v. Township of Oswego*,* 2 Otto, 637. And, in such case, the question whether the taxable property was of a sufficient amount to authorize the issuing of the whole amount of bonds issued is not open in a suit on the bonds. *Ibid.*

value, bind the corporation." This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality or to its officers to subscribe for the stock of a railroad company and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal. In *Bissell v. Jeffersonville*, 24 How., 287 (§§ 1449-50, *infra*), it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three-fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in *Van Hostrup v. Madison City*, 1 Wall., 291 (§§ 1196-97, *supra*), and in *Mercer County v. Hackett*, id., 83 (§§ 1409-12, *supra*).

The same principle has recently been asserted in this court after very grave consideration, and it must be considered as settled. In *St. Joseph Township v. Rogers*, 16 Wall., 644 (§§ 1674-77, *infra*), it is stated thus: "Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner or subject to certain regulations, conditions or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations and pursuant to those conditions and qualifications, proof that any or all of these recitals were incorrect will not constitute a defense for the corporation in a suit on the bonds or coupons if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which it is alleged was not fulfilled."

There is nothing in the case of *Marsh v. Fulton Co.*, 10 Wall., 676, to which we have been referred, at all inconsistent with the rule thus asserted. In that case there were no recitals in the bonds, and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open. What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown; and, even if it had been admissible, the effort to assimilate the case to *Marsh v. Fulton Co.* would fail. There the subscription was for the stock of a different corporation from that for which the people had voted; here it was not.

Judgment affirmed.

MR. JUSTICE BRADLEY dissented from the opinion, "so far as it may be construed to reaffirm the first point asserted in the case of *Knox Co. v. Aspinwall*,

to wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance." He concurred in the opinion on the ground that "there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it was to ascertain these facts."

JUSTICES MILLER, DAVIS and FIELD dissented.

HARTER v. KERNOCHAN.

(13 Otto, 562-574. 1890.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—This suit involves the liability of the township of Harter, in the county of Clay, state of Illinois, upon certain bonds signed by its supervisor, countersigned by its clerk, and issued in its name, under date of April 1, 1870. They were each made payable in the sum of \$1,000 to the Illinois Southeastern Railway Company or bearer, thirty years after date, with interest at the rate of ten per cent. per annum; the right, however, being reserved to the township to make payment at any time after five years from date of issue. Each recites that it is one of a series "issued by said township to aid in the construction of the Illinois Southeastern Railway, in pursuance of the authority conferred by an act of the general assembly of the state of Illinois, entitled 'An act to incorporate the Illinois Southeastern Railway Company, approved February 25, 1867,' and an act amendatory thereof, approved February 24, 1869, and an election of the legal voters of the aforesaid township held on the 10th day of November, 1868, under the provisions of said act." Upon each bond also appears the certificate of the state auditor, stating that it had been registered in his office, pursuant to the provisions of the act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869.

The bill was filed in the year 1877, in the circuit court for Clay county, by the township of Harter and two of its resident tax-payers,—the latter suing in behalf of themselves and all other tax-payers of the township,—against the state treasurer and auditor, the county clerk and treasurer, the township collector, supervisor, and clerk, and two justices of the township; and also against the "unknown owners and holders" of such bonds with their coupons, who are alleged to be residents and citizens of states other than Illinois. It proceeded upon the ground that the bonds were issued without authority of law, and, consequently, were not binding upon the township. The prayer of the bill was that such a decree, with perpetual injunction, be rendered as would prevent the state, county and township officers from taking any steps towards the assessment and collection of taxes to meet the bonds or any instalment of interest thereon; that the holders and owners of the bonds and coupons, their agents and attorneys, be required to bring the same into court for cancellation; and that the state and county treasurers be ordered to pay over to the township any money in their hands which had been raised by taxation for the payment of the bonds or their coupons. The officers who were sued, although duly served with process, made no defense. The unknown holders and owners of the bonds and coupons were proceeded against by publication in the manner

authorized by the state law. A final decree was entered on the 1st day of May, 1879, giving relief to the full extent prayed for.

On the 17th day of April, 1880, Kernochan, the owner of all the bonds and coupons issued by the township,—having, it is conceded, acquired them before due, paying value therefor, and without notice of any defense except that appearing in the law and upon the face of the bonds themselves,—presented to the state court a petition stating that he had neither been summoned nor served with a copy of the bill, nor received any notice of the pendency of the suit. Upon that petition he based a motion to redocket the cause and open the decree, to the end that he might be heard touching the matters of such suit. His application was granted, and upon the same day he filed another petition, accompanied by a bond in the required form, asking the removal of the cause to the circuit court of the United States, upon the ground that the controversy was between citizens of different states, and that he was then, as well as at the commencement of the suit, a citizen of Massachusetts, while the complainants, during the same period, were citizens of Illinois. The state court approved the bond and ordered the cause to be certified to the federal court, with all the papers pertaining thereto. In the circuit court the complainants entered a motion to remand the cause to the state court, which was overruled. Kernochan answered to the merits, and to that answer a general replication was filed. Upon final hearing, the injunction granted by the state court was dissolved and the bill dismissed. The township appealed.

§ 1421. *Illinois law and practice as to process by publication and other constructive process.*

Preliminary to any consideration of the questions involving the validity of the bonds as obligations of the township, it is proper that we should notice briefly some remarks made by counsel for the appellant, in reference as well to the proceedings in the state court after the appearance of Kernochan as to the removal of the suit into the federal court. We perceive nothing irregular or erroneous in the action of the state court whereby the cause was redocketed and the decree opened. By the statutes of the state, when a final decree is entered against a defendant who has not been summoned or served with a copy of the bill, or received the notice required to be sent to him by mail, and such person, his heirs, devisees, executors, administrators or other legal representatives, as the case may require, shall, within one year after notice in writing is given him of such decree, or, in the absence of such notice, within three years after such decree, appear in open court and petition to be heard touching the matters of such decree, and shall pay such costs as the court shall deem reasonable in that behalf, "the person so petitioning may appear and answer the complainant's bill; and thereupon such proceedings shall be had as if the defendants had appeared in due season and no decree had been made. And if it shall appear upon the hearing that such decree ought not to have been made against such defendant, the same may be set aside, altered or amended, as shall appear just; otherwise the same shall be ordered to stand confirmed against said defendant." Hurd's Stat. Ill., 1880, p. 189, sec. 19.

§ 1422. *A defendant, not personally served, upon appearing within the time limited, may remove the cause to the circuit court before answering the bill in the state court.*

Kernochan appeared within one year after the decree had been passed. He was, therefore, entitled, according to any reasonable construction of the statute, to be heard touching the matters of the decree, as if no decree had been

made. When the order was made opening the decree, he acquired a position in which he could take any step that might have been taken had he appeared in due season in obedience to a summons. The court was at liberty to proceed as if no decree had been made against him. He could have demurred, pleaded or answered, or, the suit being removed into the circuit court of the United States, have filed a petition and bond as required by law in such cases. The contention of counsel for appellants is, in effect, that, until Kernochan answered the bill, the state court was without jurisdiction to proceed as if he had "appeared in due season and no decree had been made." But such a construction of the statute is too technical, and is scarcely admissible where the party appearing, and who has been proceeded against by publication only, is a citizen of another state, entitled under the constitution and laws of the United States to remove the cause from the state court. The utmost which could be claimed in such cases (and we do not say that such a claim could be sustained) is that the state court might, in its discretion, decline to open the decree or to hear the defendant, unless he presented an answer to the bill. In this case the motion of Kernochan to redocket the cause and open the decree was granted, without requiring him to file an answer disclosing his defense to the suit. We are not prepared to say that the state court erred in its ruling. We should, under the circumstances, assume that the state court correctly interpreted the local statute. If, therefore, the suit was removable, the federal court, upon its removal, and after the pleadings were made up and proofs taken upon the issues made by Kernochan, had the power to set aside, alter or amend the decree as might be just, or adjudge that it stand confirmed as entered in the state court. Upon his appearance in the state court the suit became, as to him, for all practical purposes, a new suit, to be conducted, however, subject to the authority of the court to confirm the former, instead of entering a new decree.

§ 1423. *The United States circuit court has jurisdiction where the only defendant having a real interest adverse to that of the complainants is a citizen of a different state.*

We do not doubt that the suit was one which the defendant was entitled, under the act of March 3, 1875, c. 137, to remove from the state court. Disregarding, as we may do, the particular position, whether as complainants or defendants, assigned to the parties by the draughtsman of the bill, it is apparent that the sole matter in dispute is the liability of the township upon the bonds; that upon one side of that dispute are all of the state, county and township officers and tax-payers, who are made parties, while upon the other is Kernochan, the owner of the bonds whose validity is questioned by this suit. He alone of all the parties is, in a legal sense, interested in the enforcement of liability upon the township. It is, therefore, a suit in which there is a single controversy embracing the whole suit between citizens of different states, one side of which is represented alone by Kernochan, a citizen of Massachusetts, and the other by citizens of Illinois. Removal Cases, 100 U. S., 457.

§ 1424. *A petition for removal of a cause is filed in due season if within the first term after the reopening of the decree.*

But it is contended that the petition of Kernochan for the removal of the suit was not filed within the time prescribed by the act, that is, at the term at which the cause could be first tried. The argument is that Kernochan, although not advised, in any legal mode, of the pendency of the suit, was at liberty to appear therein before the decree was entered, and, consequently,

that he did not seek its removal at or before the term at which the cause could have been first tried; that his appearance and filing his petition praying to be heard touching the matters of the decree have relation to the time when he *should* have appeared in court *had* he been duly summoned. The bare statement of this proposition suggests its refutation. When the defendant would have been summoned had he been within the local jurisdiction of the state court we are not informed; and, consequently, it is difficult to ascertain, upon the theory of appellant's counsel, when he should have appeared in court. It is sufficient to say that the defendant, within the period fixed by the statute, appeared and secured the opening of the decree. The first term thereafter at which the cause could properly have been tried upon the merits, as to him, was the term at which, within the meaning of the act, he should have filed his petition for removal. And it was so filed.

§ 1425. *Illinois statutes authorizing the issue of county and township bonds.*

We now come to the consideration of questions involving the merits of the cause. We have seen that the bonds recite that they were issued in pursuance as well of the authority conferred by the act of February 25, 1867, incorporating the Illinois Southeastern Railway Company, and the act of February 24, 1869, amendatory thereof, as of an election of the legal voters of the township, held on the 10th day of November, 1868. The first of those acts conferred authority upon townships to donate to the railway company any amount not exceeding \$30,000. That authority was not, however, to be exercised until after a proposition by the railroad company to the township, nor unless the donation was sanctioned by a majority of legal votes, cast at an election duly called and held to consider the question of donation, upon the terms proposed. It appears, from the record, that the company made to the township a proposition which contemplated a donation of \$20,000, payable in three instalments, to be raised by a special tax to be assessed and collected in 1869, 1870 and 1871; and which also bound the company to accept township bonds in lieu of the special tax, in the event legislation could be obtained giving authority to issue them. An election was held on the day stated in the bonds, and the donation, upon the terms set forth in the company's proposition, was approved by a vote of three hundred, out of a total vote of three hundred and forty-two.

The fifth section of the amendatory act of February 24, 1869, is in these words:

“And whereas, certain townships in Wayne and Clay counties have voted donations to said railway company, said townships are hereby authorized and empowered to issue township bonds for the amount so donated, without submitting the proposition again to be voted upon,—said bonds to be issued in sums not less than one hundred, nor more than one thousand, dollars each, with interest coupons attached, drawing interest at the rate of ten per cent. per annum, payable semi-annually at the county treasurer's office, in each county where such townships are located,—said bonds to be payable in five years or any time thereafter, not exceeding twenty years, at the option of the townships; and said bonds to be signed by the supervisors thereof, or by the supervisor or supervisors of the district wherein such township is located, and to be countersigned by the township clerk of the respective townships; and said bonds to be delivered, properly executed, to the president of said railway company, when the conditions are complied with as contained in election notices and propositions submitted to and voted upon by the people of said townships; and said townships shall each, by its proper corporate authorities,

provide, in due time, by a levy and a collection each year of a sufficient tax on its assessed property to pay the interest on its bonds, as it accrues half-yearly, as aforesaid, and ultimately to provide for the principal of said bonds at maturity: *Provided*, that said bonds shall be placed in the hands of a trustee, on the demand of said railway company as hereinafter provided: *And also provided*, that such townships may determine, by a vote of their electors, at any regular or special town meeting or election, whether they will issue bonds or not in payment of the donations heretofore voted to said company." Private Laws Ill., vol. iii, p. 310.

In conformity with the provisions of that act, a special town meeting of the township was duly called and held on the 20th day of May, 1870, at which the electors present voted unanimously in favor of an issue of bonds, in payment of the donation previously voted, rather than proceed with the levy and collection of a special tax, as contemplated by the original proposition of the company. A few days thereafter, to wit, May 27, 1870, as appears from the records of the township, the bonds, amounting to \$20,000, were delivered by the township officers to the Springfield & Illinois Southeastern Railway Company, a corporation which had been formed on the 3d of December, 1869, in accordance with the laws of Illinois, by the consolidation of the Illinois Southeastern Railway Company with the Pana, Springfield & Northwestern Railway Company. The bonds were transmitted by the township supervisor to the state auditor for registration, under the provisions of the funding act in force April 16, 1869. He certified, under oath, that they had been issued under the said acts of February 25, 1867, and February 24, 1869, and that all the preliminary conditions required, in the act of April 16, 1869, to be performed before such registration, and to entitle them to the benefits of that act, had been, to the best of his knowledge and belief, fully complied with. It may also be stated that taxes were annually levied, collected and applied, by the township, in payments of interest on the bonds up to the commencement of this suit in 1877.

§ 1426. *Where the recitals of bonds import a compliance with all the requirements of the statutes authorizing their issuance, they are conclusively presumed to be valid.*

In view of these facts it is difficult to perceive upon what just ground the township can escape liability. In the first place, the bonds were issued in pursuance of a popular vote in favor of a donation to be met by a special tax, and also of a vote, at a subsequent special election, in favor of an issue of bonds in payment of that donation. In the next place, and as conclusive against the township, the recitals in the bonds import a compliance with all of the provisions of the acts of assembly under which they were issued. It is true that the bonds do not, in express words, refer to the special election of May 20, 1870; but since the amendatory act authorized the township, upon a vote, at a regular or special town meeting or election, to issue bonds in payment of the donation previously voted, the recital in them fairly imports that such an election was, in fact, held before they were issued.

§ 1427. *Neither the act of 1867 nor that of 1869, authorizing the issuance of township bonds, is in conflict with the constitution of Illinois.*

If those acts are not repugnant to the constitution of the state, it results that, according to repeated adjudications of this court, the township is estopped, by the recitals in the bonds, to assert that their provisions were not complied with. The constitution of Illinois, in force when these acts were passed, declared that the corporate authorities of counties, townships, school districts, cities, towns

and villages may be vested with power to assess and collect taxes for corporate purposes. It is the settled law of the state, as heretofore recognized by this court, that this constitutional provision was intended to define the class of persons to whom the right of taxation might be granted, and the purposes for which it might be exercised; and that the legislature could not constitutionally confer that power upon any other than corporate authorities of counties, townships, school districts, cities, towns and villages, or for any other than corporate purposes. *County of Livingston v. Darlington*, 101 U. S., 411. Our attention is called to several cases in the supreme court of the state, in which it has been held that the legislature could not constitutionally require a municipal corporation, without its consent, to issue bonds or incur a debt for a merely corporate purpose. Some of those cases turn upon the inquiry as to who are, in the sense of the constitution, corporate authorities of counties, cities, towns, etc., and what are corporate purposes. A leading case is *Williams v. Town of Roberts*, 88 Ill., 11, where the court, speaking by Chief Justice Scholfield, said that under the system of township organization existing in Illinois, the electors alone represented the corporate authority of the town, and without their consent, expressed at town meetings or town elections, no debt for a merely local corporate purpose could be imposed upon the township.

§ 1428. — *railroad aid by townships; corporate purpose.*

But neither that nor any other decision by the state court cited by counsel distinctly meets the precise point now before us, or would justify us in holding (as we ought not to do except in a clear case) that the general assembly of the state had transcended its constitutional powers. The act of February 27, 1867, did not assume to impose a debt upon the township without the consent of the electors. It expressly required an election to be held, at which the legal voters could determine the question of donation for themselves. The election was held, and a donation voted to aid in the construction of a railroad. That, it must be conceded, was a corporate purpose, within the meaning of the constitution as interpreted by the state court. But it is contended that the amendatory act authorized the township officers, without the assent of the voters, to impose a burden or create a debt wholly different from that to which the voters, at the election on the 10th of November, 1868, gave their assent. Counsel overlook or fail to give proper force to the proviso in that act authorizing the electors at a regular or special town meeting to determine whether they would issue bonds in payment of the donation previously voted to the company. And there was, as we have seen, a special town meeting, duly called for the specific purpose of determining that question, and the decision was unanimous in favor of issuing bonds to pay off the donation.

§ 1429. — *case cited and distinguished.*

It is urged, in this connection, that the supreme court of the state, in the recent case of *Schaeffer v. Bonham*, '95 id., 378, decided in 1880, has ruled that the fifth section of the amendatory act of February 24, 1869, was in violation of the constitution of the state, and that it was the duty of this court to accept that decision as conclusive. That case in many respects resembles this one, but, upon the particular point arising here, it is materially different. It was submitted upon an agreed statement of facts, from which it appears that a certain township had, in 1868, voted a donation to the Illinois Southeastern Railway Company, to be raised by special tax, under the authority conferred in the act of February 25, 1867. But it did not appear, from the evidence in that case, that an election had been held, as authorized by the fifth section of the

act of February 24, 1869, to determine whether the donation should be paid by township bonds rather than by a special tax for a limited period. We infer from the agreed statement of facts in that case, as well as from the remarks of the court, that no opportunity was, in fact, given to the voters to determine the question of issuing bonds. The court said that the charter authorizing townships to vote donations did not contemplate, and, consequently, did not provide, for issuing bonds; that it only intended a donation to be paid by the levy of a tax, and the payment of the money, when thus collected, to the railroad company; that the legislature could not confer upon the township officers, without a vote of the people, authority to make such a radical change in the proposition upon which the people voted, as would occur, if, instead of a special tax, during a limited period, to meet the donation, township interest-bearing bonds should be issued, running from five to twenty years.

The state court, in referring to the fifth section of the act of February 24, 1869, states that it "authorizes and empowers townships in Wayne and Clay counties, that had voted donations to the road, *without submitting the question to a vote*, to issue bonds," etc. We are unable to concur in that construction of the act, since that section, after authorizing townships in Wayne and Clay counties, which had voted donations to the railway company, "to issue township bonds for the amount so donated, *without submitting the proposition* [for a donation] *again* to be voted upon," expressly declares that "such townships may determine by a vote of their electors, at any regular or special town meeting or election, whether they will issue bonds or not in payment of the donations heretofore voted to said company." The purpose of the fifth section was to dispense, as to certain townships, with a second vote upon the general question of donation, and to confer authority to issue township bonds in payment of such donation, when, and only when, the electors so voted at a regular or special town meeting or election. In *Schaeffer v. Bonham* it did not appear that the voters were consulted as to whether bonds should be substituted in lieu of the special tax previously voted. The parties there sought the opinion of the court upon an agreed statement of facts, which, in effect, conceded that no such election was held. Here it is shown that the bonds in suit were issued in pursuance of the vote of the electors at a special town meeting called to determine the question whether the donation previously voted should be paid in that mode. It is clear that *Schaeffer v. Bonham* proceeds upon the ground, in part, that the bonds there in suit were issued in payment of the donation, without any submission of the question to the voters. In another portion of its opinion, after stating that the assessment of taxes to pay off the donation was the imposition of a debt upon the township, the state court said: "Had the township voted to incur a debt, and the bonds had been issued by a person named by the general assembly, different from the corporate authorities, then payment of interest and acquiescence for such a length of time might have operated as an estoppel. In such a case, the vote to create the debt, if authorized by law and had in pursuance of law, would have been the essential act to create the debt, and the mere signing and delivering the evidence of the debt would have been valid if done by a person specified by the general assembly, whether named before or after the vote was had. But such is not the case here. No debt was voted, and the legislature was powerless to authorize any but the corporate authorities to create a debt" (p. 381). If, as held by the state court, the issuing of bonds, in payment of the donation previously voted, was incurring a debt, and if such a debt could not be incurred without a direct vote of the

electors, it is sufficient to say that such a vote was had in reference to the bonds here in suit.

For the reasons stated we are of opinion that the acts of February 25, 1867, and February 24, 1869, are not in violation of the constitution of the state; and in so holding we do not, we think, come in conflict with any decision of the state court in which the precise question here presented has been passed upon.

§ 1430. *That a subscription is made to one railroad and the bonds issued to another with which the first has been consolidated does not impair their validity.*

It remains for us to consider whether the township can avoid liability upon the bonds by reason of the fact that they were delivered to the Springfield & Illinois Southern Railroad Company, the donation having been originally voted to the Illinois Southeastern Railway Company. We are of opinion that there is nothing of substance in this objection. The act incorporating the Illinois Southeastern Railway Company, the act amendatory thereof, and the act in relation to the Pana, Springfield & Northwestern Railway Company (even if the general statutes of the state were not sufficient for the purpose), fully authorized the consolidation between those two companies, and upon such consolidation the new company succeeded to all the rights, franchises and powers of the constituent companies. The power in the township to make a donation to aid in the construction of the Illinois Southeastern Railway was also a privilege of the latter corporation, and that privilege, upon the consolidation, passed to the new company. The donation was voted before the consolidation took effect; and since the consolidated or new company did not propose to apply such donation to purposes materially different from those for which the people voted it in 1868, its right to receive the donation, at least when the township assented, cannot be doubted. The records of the township show that the bonds were directed to be issued and delivered to the new company, and it will not, under the circumstances, be allowed to say, as against a *bona fide* purchaser for value, that the bonds are invalid. There is, consequently, no pretext for saying that a burden was imposed upon the people to which they had never given their consent in the mode prescribed by law. Other questions are discussed, but we do not deem it necessary to refer to them.

Decree affirmed.

SCHOOL DISTRICT v. STONE.

(16 Otto, 183-187. 1882.)

ERROR to U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—On the 1st day of July, 1870, the Board of School Directors of Independent School District of Steamboat Rock, Hardin county, Iowa, issued, in its name, thirty bonds, each for \$500, and bearing interest at the rate of ten per cent. per annum. Each bond recites that it “is issued by the board of school directors by authority of an election of the voters of said school district held on the 31st day of July, 1869, in conformity with the provisions of chapter 98 of acts twelfth general assembly of the state of Iowa.” The statute referred to authorizes independent school districts to borrow money, within a prescribed limit as to amount, for the purpose of erecting and completing school-houses, by issuing negotiable bonds,—provided the loan was previously sanctioned by a majority of all the votes cast at an annual or a special meeting of the electors, of which meeting the same notice should be given as

required by law in case of the election of officers of such districts, and which notice should state the amount proposed to be raised by a sale of bonds. When the bonds were issued the assessed value of the property of the district, as shown by the last assessment immediately preceding the issue of the bonds, was \$47,986. The indebtedness of the district was \$425, and there was no money in its treasury. Upon a portion of the bonds Stone, at their maturity, brought suit in the court below against the district, and judgment was rendered in his favor. The district thereupon brought this writ of error.

The constitution of Iowa declares that "no county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness." The largest indebtedness, therefore, which the district, consistently with the fundamental law of the state, could have contracted, when these bonds were issued, was five per cent. on \$47,986. Consequently, those here in suit, constituting one issue, and aggregating \$15,000, must be held to have been made without authority of law, and, upon well-established principles, are not enforceable obligations against the district, unless it is estopped by their recitals from showing, against a *bona fide* purchaser, the value of its taxable property as disclosed by the last state and county tax lists previous to the creation of the debt. The argument on behalf of defendants in error, briefly stated, is this: That the law invested the school board with authority to execute bonds for the purposes for which those in suit were issued, within the limit, as to amount, prescribed by the constitution and the statute passed in conformity therewith; that that board, when issuing the bonds, were under a duty to determine, and necessarily did determine, whether the aggregate indebtedness of the district, thus increased, was in excess of five per cent. upon the value of the taxable property of the district, as shown by the last state and county tax lists; consequently, it is contended, their recitals should be regarded as a declaration by the board, upon which *bona fide* purchasers could rely, of its determination that the taxable property of the district, as thus ascertained, was of value sufficient to justify the proposed indebtedness of \$15,000.

§ 1431. *Recitals in bonds that do not include averments of full authority for their issuance do not authorize purchasers to conclude that all legal requirements have been complied with.*

Waiving any discussion of the question whether the constitutional requirement that the amount of the taxable property should be "ascertained by the last state and county tax lists," did not compel every purchaser, at his peril, to obtain from that source the necessary information, and did not preclude him from relying upon the representations of district officers as to what those lists disclosed, we are of opinion that the recitals in the bonds do not, necessarily nor distinctly, import any determination of that question by the district officers invested with authority, under certain circumstances, to issue them. Had the bonds recited that they were issued by authority of the election of July 31, 1869, and in conformity with the provisions of the statute referred to, there would, in view of the decisions of this court, be more force in the argument in behalf of the defendant in error. *Town of Coloma v. Eaves*, 92 U. S., 484 (§§ 1419-20, *supra*); *Town of Venice v. Murdock*, id., 494 (§§ 1447-48, *infra*); *Converse v. City of Fort Scott*, id., 503 (§§ 1039-40, *supra*); *Marcy v. Town-*

ship of Oswego, id., 637; Commissioners of Douglas County v. Bolles, 94 id., 104 (§§ 1435-38, *infra*); Commissioners of Johnson County v. January, id., 202 (§§ 1361-62, *supra*); Buchanan v. Litchfield, 102 id., 278 (§§ 1232-36, *supra*).

§ 1432. *A corporation is not estopped by imperfect recital in its bonds from showing that the essential conditions of their issuance had not been complied with.*

And we should, then, be obliged to decide whether, in view of the constitutional provision, a false recital by the school board as to the value of the taxable property would conclude the district as between it and a *bona fide* purchaser for value; for, in such case, since the statute itself contains, substantially, the same limitation upon indebtedness by independent school districts as is prescribed by the state constitution for county or other political or municipal corporations, a distinct recital that the bonds were issued in conformity with the statute would fairly import a compliance with the constitution. But the recitals do not, as we have said, necessarily import a compliance with the statute or the fundamental law of the state upon that subject. They necessarily imply nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity with the statute. The statute may have been pursued as to the notice required to be given of the time and place of the election, and as to the manner in which the will of the voters was to be ascertained, and yet it may have been disregarded in respect of the limit it imposed upon district indebtedness. The declaration, therefore, that the election was held in conformity with the statute does not, with sufficient distinctness, imply that the indebtedness voted was less than five per cent. on the value of the taxable property of the district, as shown by the state and county tax lists.

This construction of the words employed in the bonds is characterized by counsel for the defendant in error as too narrow and technical. It may be a strict construction, and such, it seems to the court, ought to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds, issued in its name, were made in violation of the constitution and of the statute, of the provisions of which all must take notice. Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers — invested with authority to determine whether such conditions have been performed — the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued “in pursuance of,” or “in conformity with,” or “by virtue of,” or “by authority of,” the statute, have been held in favor of *bona fide* purchasers for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the recitals fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound public policy forbids it. Where the holder relies for protection upon mere recitals, they should at least be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation or without authority of law.

For the reasons given, we are of opinion that, in the present action on the

bonds, judgment should have been entered upon the special verdict for the district. To what extent, if any, the district may be held responsible, in some other form of proceeding, is a question not now before us, and as to which we express no opinion. Judgment reversed, with directions to render judgment upon the special verdict for the defendant below.

INSURANCE COMPANY v. BRUCE.

(15 Otto, 828-833. 1881.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—This action involves the liability of the town of Bruce, in the state of Illinois, upon sundry interest coupons, attached to bonds, in the ordinary form of negotiable municipal bonds. On the 1st day of December, 1870, they were delivered by the constituted authorities of the town to the Plymouth, Kankakee & Pacific Railroad Company in payment of a subscription to the capital stock of the Kankakee & Illinois River Railroad Company. The latter company, after organization, became consolidated with the former, and hence the delivery to the consolidated company. The bonds upon their face recite that they are “issued by virtue of the law of the state of Illinois, entitled ‘An act to incorporate the Kankakee & Illinois River Railroad Company,’ approved April 15, 1869, and ‘An act to fund and provide for paying railroad debts of counties, townships, cities, and towns, in force April 16, 1869;’ and we, the supervisor and town clerk of the township of Bruce, do hereby certify that a special election was held in said township on the 7th day of September, 1869, at which special election a majority of the legal voters, participating at the same, voted ‘for subscription’ to the capital stock of the Kankakee & Illinois River Railroad Company, in the sum of \$25,000, and to issue bonds of said township therefor; and said special election was by the proper authorities then and there duly declared carried ‘for subscription,’ and that all the other requirements of the law in relation to said special election were duly complied with.”

The act of April 15, 1869, is the charter of the railroad company. By the sixteenth section thereof it is made the duty of the supervisor or clerk of any town or township, declaring by a majority of its voters in favor of subscription to the capital stock of the railroad company, to make the subscription, receive the proper certificates and execute bonds therefor, which shall be delivered to the president or secretary of said railroad company for the use of said company, and shall be a pledge upon the revenue of said territories respectively. Sess. Laws Ill., 1869, vol. iii, p. 1.

The coupons in suit, before their maturity, to wit, on the 19th June, 1871, together with the bonds to which they are severally attached, were purchased by the American Life Insurance Company, the plaintiff in error, from one Alexander Whillden, the lawful and *bona fide* holder thereof, for the sum of \$9,500 cash in hand paid. Neither Whillden nor the insurance company had any notice, at the time, of any irregularity, invalidity or informality in the making, issuing or delivery of the bonds.

§ 1433. *A municipal body having issued bonds, which by their recitals in effect declared that the statutory requirements had been complied with, is estopped from showing that it had imposed certain conditions on its liability.*

It is not seriously disputed, either in the pleadings or in argument, that the acts of assembly referred to in the bonds gave ample authority for sub-

scription by the town to the capital stock of the Kankakee & Illinois River Railroad Company, to be paid for in bonds of the town, provided a majority of legal voters, at an election previously called and held for that purpose, expressed their approval of such subscription and its payment in that mode. But the contention of the town is: 1st. That by the seventh section of the act of April 16, 1869, it is provided that "any county, township, city or town shall have the *right*, when making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds and subscriptions or donations shall be made, and such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with." 2d. That, in pursuance of the authority thus given, the town voted to make a subscription of \$25,000, to be paid for in bonds, subject to the following conditions, distinctly set forth in the notice under which the election was held, and assented to by the railroad company, viz.: that the road be so constructed as to pass through the town, making Streator a point in a northwesterly direction towards Bureau Junction; that a depot be located and maintained in the town of Bruce; that the bonds be delivered in sums of \$1,000 for every mile of road graded, as the work progresses, and \$1,000 for every mile of ties laid, and the balance when the road-bed is ready for the iron; and that no further calls or assessments shall be made upon the town or upon subscription to stock over the amount aforesaid; provided, nevertheless, that the subscription be void and of no effect unless an agreement by the railroad company for said iron and rolling stock with responsible parties shall be made on or before one year from the day of the election, and the railroad company shall have formed satisfactory arrangements to connect said railroad with some eastern terminus. 3d. That the conditions thus prescribed have never been complied with in these respects; more than one year elapsed after the election, and yet no agreement had been made on or before September 7, 1870, by the original or consolidated company, with any party for the iron or the rolling stock of the railroad; the road was never so constructed as to pass through the town of Bruce; it was not so constructed when the bonds were issued, and has never been constructed at any time since; no depot has ever been located or maintained in the town; the ties were never laid for any one mile of the railroad within the town; and no part of the railroad for the line of railroad of the Kankakee & Illinois River Railroad Company, or of the original line of the original Plymouth, Kankakee & Pacific Railroad, has ever been constructed.

These facts are set out in detail in the special plea of the town. Do they constitute a defense against a *bona fide* holder, for value, of the bonds and their coupons? Or to state the question more distinctly, can the town, after the bonds have been signed, sealed and delivered by its constituted authorities to the railroad company, and have passed into the hands of *bona fide* holders for value, escape liability by showing that the conditions or some of them, imposed by popular vote, have not been complied with upon the part of the railroad company?

The statute did not make it obligatory on the town to impose conditions upon the performance of which its liability should depend. It conferred simply the right to do so, leaving the town at liberty to prescribe conditions or to make an unconditional subscription. Consistently with the statute the town could issue and deliver bonds for the subscription in advance of the construction of any part of the road. But when conditions were prescribed, good faith, and the obligations which everywhere arise out of negotiable securities,

required — if the town intended to rely upon them — that the public, who were expected to buy the bonds or to advance money upon them, should be informed by their recitals that the town had exercised its statutory right to impose conditions upon its liability. The officers both of the town and the railroad company knew, however, that bonds could not have been negotiated in the market had their recitals disclosed the fact that payment depended upon conditions thereafter to be fulfilled by the railroad corporation. To the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the constituted authorities of the town, and the officers or agents of the company, co-operated in putting out bonds negotiable in form and with recitals that gave no intimation even that the subscription was conditional. The fact that conditions had been prescribed was omitted in recitals, full of everything necessary to induce the public to buy the bonds. The statement, on the face of the bonds, that they were issued by virtue of the statutes of April 15, 1869, and April 16, 1869,—the first of which contains *an absolute requirement that the bonds be issued and delivered upon the subscription being voted*, while the second gives the *right*, but does not make it imperative, to impose conditions,—and the further statement that the people had voted for subscription *and to issue township bonds therefor*, fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town in the hands of *bona fide* purchasers. Under these circumstances, the town, by every principle of justice, is estopped, as against a *bona fide* holder, to plead conditions, the existence of which was withheld from the public, either to facilitate the negotiation of the bonds in the markets of the country, or because it had full confidence that the railroad company would meet the prescribed conditions. It should not now be heard to make a defense inconsistent with the representations contained in the recitals upon its bonds, or upon the ground that the conditions imposed, of which purchasers had no notice, have not been performed.

§ 1434. *A town is concluded, in a suit by a bona fide holder upon its bonds, by the recitals they contain.*

But this conclusion, it is contended, is in the face of the express declaration in the act of April 16, 1869, that subscriptions or donations made and bonds issued, upon conditions, “shall not be valid and binding until such conditions precedent shall have been complied with.” And in support of that contention counsel cite *Town of Eagle v. Kohn*, 84 Ill., 292, in which case one of the justices dissented and another did not sit. That case involved the liability of the town of Eagle upon certain coupons of bonds issued to the same railroad company. The defense was there, as here, non-compliance with certain conditions which had been attached by popular vote to the subscription. The court, construing that act, held that there was *no want of power* to make the subscription and issue bonds; that, if the town so willed, *the subscription could be made and bonds issued in advance of the compliance with any condition imposed by the popular vote*; that aside from the statute, innocent purchasers for value would enjoy the protection accorded to *bona fide* holders of negotiable paper, and would not be affected by non-compliance with such conditions; that such holders could not be required to take notice of the conditions or of any resolution relating to them upon the records of the railroad company; but that, in view of the express provision of the statute that the bonds should not be “valid and binding until such conditions precedent shall have been complied

with," non-compliance therewith is a good defense, even against purchasers in good faith for value. The decision in that case was made several years after the bonds had been put on the market, but being a construction of a local statute, it is insisted that the federal court is bound to accept it as controlling in the present case. We waive discussion as to the soundness of the conclusion reached by the state court, or any extended examination of the authorities bearing upon the general question whether the federal court is concluded by the construction given by the state court to a local statute, under which rights have accrued to citizens of other states before that construction was given. We do this because the present case is distinguishable from *Town of Eagle v. Kohn* in this, that it does not appear, from the report of the latter case, that the town had, by the recitals in its bonds, estopped itself from asserting, as against a *bona fide* holder, the non-performance of conditions imposed by popular vote. Had the town of Eagle represented, in express words, upon the face of the bonds, that no conditions whatever were prescribed by the people, or that the subscription was unconditional, the state court would not, we suppose, adjudge that the town, as against a *bona fide* holder, could take shelter behind the statutory provision in question. In the present case the town of Bruce did not make, in express terms, a representation of that character. But, in effect, by the recitals in its bonds, it did represent to the public that the bonds were issued in all respects in conformity to law, and that nothing remained to be done which was essential to its liability thereon. The town having power, under the statute, to make an unconditional subscription, and to issue and deliver its bonds in advance of the construction of the road, what was said in *Brooklyn v. Insurance Co.*, 99 U. S., 362 (§§ 1402-4, *supra*), may be repeated here: "It is now too late for the town to claim exemption, as against *bona fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice, either from the statute or otherwise." Judgment reversed, with directions for further proceedings in conformity with this opinion.

COMMISSIONERS OF DOUGLAS COUNTY v. BOLLES.

(4 Otto, 104-110. 1876.)

ERROR to U. S. Circuit Court, District of Kansas.

§ 1435. *The capacity of a de facto corporation to contract cannot be questioned in a suit upon an obligation given to it.*

Opinion by MR. JUSTICE STRONG.

Whether the St. Louis, Lawrence & Denver Railroad Company was lawfully a corporation, capable of contracting with the defendants below, is a question that cannot be raised in this case. The findings of the circuit court establish that a majority of the persons named as corporators in the certificate filed in the office of the secretary of state on the 11th day of May, 1868, published a notice that books would be opened on a designated day for subscriptions to the stock of the company. The books were accordingly opened, subscriptions to the capital stock were made, a meeting of the stockholders ensued, and directors were chosen, together with a president, vice-president, secretary, treasurer and an executive committee. This was on the 28th of July, 1868; and from that time corporate meetings have been regularly held, and the company has

built and operated a railroad from Lawrence to the Missouri state line, and has exercised the usual functions of a railroad corporation. It has been a corporation *de facto*, at least, if not *de jure*, from the date of its organization. Its corporate existence, therefore, and its ability to contract cannot be called in question in a suit brought upon evidences of debt given to it.

It was after the organization of the company that the defendants subscribed, on behalf of Douglas county, for \$125,000 of its capital stock, stipulating that the subscription should be paid with the county bonds, payable to bearer in thirty years, and that the stock and bonds should be issued and delivered when the railroad should be completed and in full operation from Lawrence to the eastern boundary of Douglas county. The road was thus completed and put in operation; the county received the \$125,000 of stock; and the bonds were sold by the railroad company to the contractor for building the road, and, after its completion, delivered to him by direction of the defendants. The bonds were executed by the board of county commissioners of the county of Douglas, who by law are constituted the financial agents of the county. They were made payable to bearer, and each contains the following recital: "This bond is executed and issued by virtue of, and in accordance with, the act of the legislature of the state of Kansas, entitled 'An act to authorize counties and cities to issue bonds to railroad companies,' approved April 10, 1865, and the other laws of said state, and in pursuance of, and in accordance with, the vote of a majority of the qualified electors of said county of Douglas, at a special election, regularly called and held on September 12, 1865."

§ 1436. *Under the Kansas acts of April 10, 1865, and February 25, 1868, authorizing counties to issue bonds, the board of county commissioners were the tribunal to determine whether conditions precedent had been complied with.*

This recital, it will be perceived, asserts legislative authority for the issue of the bonds, found in the statute of April 10, 1865, and other laws of the state. Referring to the act of 1865, it is there enacted that the "board of county commissioners of any county to, into, through, from or near which, whether in this or any other state, any railroad is or may be located, may subscribe to the capital stock of any such railroad corporation, in the name and for the benefit of the county, not exceeding in amount the sum of \$300,000 in any one corporation, and may issue the bonds of said county in such amounts as they may deem best, in payment for said stocks, provided that said bonds shall be issued only in payment of assessments made upon all the stocks of such railroad company, which bonds shall bear interest at a rate not exceeding seven per cent. per annum, and shall be payable within thirty years. But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county at some general election or at some special election to be called by the board of county commissioners, . . . and, in submitting such question, said board of commissioners shall direct in what manner the ballot shall be cast. If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners of the county shall issue the same." Stats. of Kansas, 1865, p. 41. This statute plainly gives to the board plenary authority to subscribe for stock of a railroad corporation, and to issue county bonds in payment of the subscription, though whether such authority in any case may be exercised or not is made to depend upon the collateral question whether the result of a popular election has indicated an approval of the proposed issue. And the board of commissioners is the tribunal contemplated by the laws to determine whether the contingency of fact has occurred,—a

determination necessary to be made preparatory to their issuing the county bonds.

The act of 1865 was followed by the act of February 25, 1868, which was in force when the stock subscription above mentioned was made, and when the bonds of Douglas county were executed and delivered. This later act was even more liberal in its grants of authority than the former was. It referred to elections held before its passage, and to irregular elections, which might not have been in compliance with the statutes. It enacted, in substance, that whenever there had been an election called by the board, at which a majority of the persons voting had voted in favor of subscribing stock and issuing bonds to any railroad company or companies, the board might subscribe and pay the subscription, by issuing to each company the bonds of the county, whether such orders and elections, or either of them, had been in compliance with the statutes in such cases made and provided, or not, or whether the proposition submitted at the election was for the subscription for stock and issuance of bonds to one or more railroad companies. The purpose of this act was evidently to cure irregularities and invalidities of prior elections, and to enlarge the powers of county boards. Still, under this act, as under the former, the board was to judge whether the precedent condition had been complied with in substance. Gen. Stats. of Kansas, 892.

§ 1437. *The recitals in municipal bonds are conclusive in favor of bona fide holders.*

Such, then, having been the authority of the board of commissioners of Douglas county when the bonds now under consideration were issued, what must be the effect of the recitals they contain? The question has been frequently before us for decision, and it is no longer open for debate. In the late case of *Town of Coloma v. Eaves*, 92 U. S., 484 (§§ 1419-20, *supra*), we considered it fully, and reviewed many of our former judgments. We there held that when, by legislative enactment, authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the enactment that the officers of the municipality were invested with power to decide whether that condition had been complied with, their recital that it had been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal. The recitals we have now before us are that the bonds were executed and issued not only in virtue of, but in accordance with, the acts of the legislature, and in pursuance of and in accordance with the vote of a majority of the qualified electors of the county. They are untrue, if the board had not followed the directions of the law, and if there had not been a popular vote at an election, approving the issue of those bonds. The truth or falsehood of the assertion cannot be inquired after here; for, as we have said, the recitals are practically an annunciation of the judgment of the board, that all the steps required by the law had been taken. Behind such a recital, as we have seen, a *bona fide* holder for value paid is bound to look for nothing except legislative authority given for the issue of municipal bonds to railroad companies. He is not required to examine whether the conditions upon which such authority may be exercised have been fulfilled. He may rely upon the decision made by the tribunal selected by the legislature.

§ 1438. *Every person succeeding a bona fide holder for value, in the ownership of negotiable bonds, may stand upon his rights.*

Do, then, the plaintiffs below stand in the position of *bona fide* holders for value paid, and without notice of any defect or irregularity in the proceedings anterior to the issue of the bonds? In view of the findings of the circuit court, very plainly they do. They are the holders of the coupons in suit, taken from those bonds, some of which they purchased without notice of any defense. The residue of those held by them are owned by other persons, who deposited them with the plaintiffs, for collection, taking a receipt. There is no evidence when or for what consideration those other persons purchased, and no evidence of actual notice to them or to the plaintiffs of any of the facts anterior to the issue of the bonds. The findings of the court exhibit no fraud in the inception of the contracts, nor anything that casts upon the holders of the bonds or coupons the burden of showing that they are *bona fide* holders for value. The legal presumption, therefore, is that they are. But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly, the railroad company paid for the bonds and coupons by giving an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fault in the issue. And still more: the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights. It is, therefore, manifest that the plaintiffs have the rights of *bona fide* purchasers, even if the burden of showing it be regarded as resting on them. What we have said is sufficient to show that the coupons of the first class of bonds, viz., those dated July 1, 1869, are valid evidences of debt as between the plaintiffs and the defendants, and that the former are entitled to a judgment for the amount of them.

It is unnecessary to remark at length upon the second class of bonds and coupons, those dated July 1, 1872. The considerations we have suggested respecting the first apply in full force to the second, and the defendants have no defense to a suit for their recovery brought by the plaintiffs. The first and fourth questions certified from the circuit court are, therefore, answered in the affirmative, and the remaining questions in the negative. This leads to an affirmance of the judgment. Happily, such a result is in accordance with the plainest justice. The case is not one in which the municipality has incurred a debt, without securing the object sought by it. Popular votes approved the issue of the bonds to further the construction of the railroad, which has been completed, and which the county now enjoys. The bonds have not been misappropriated or squandered. They have been applied to the purpose for which they were made. By direction of the county, they were paid to the contractor who built the road, after his contract was completed, and, as intended, they have gone into the hands of remote purchasers. In addition to this, the county received in exchange for them an equal amount of stock of the railroad com-

pany. So far as appears, it holds that stock still. It has acted as the owner, by assenting to a consolidation of the company with another. Common honesty demands that a debt thus incurred should be paid. *Judgment affirmed.*

MORAN v. COMMISSIONERS OF MIAMI COUNTY.

(2 Black, 722-732. 1862.)

ERROR to U. S. Circuit Court, District of Indiana.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This cause has been fully argued. It is an action to recover the interest in arrears on coupons annexed to bonds which were issued by Miami county, payable to the Peru & Indianapolis Railroad Company or bearer, and which is declared in the bonds to be given for a loan of money. We are relieved from the task of considering several of the arguments of counsel and the pleadings on the record, believing as we do that the defendants are estopped from denying the declarations as to the purpose and cause for which the bonds were issued, and that the coupon holders had a right to infer from the face of the bonds that they had been regularly issued by the county of Miami. It is not a new case to this court, either in its facts or the principle involved. The object of this court has been, in cases of a like kind, and it is still its purpose, to give to the contracts of counties for the purchase of railroad stocks, and for borrowing money to aid in the construction of railroads and other internal improvements, a strict interpretation of the legislative acts empowering them to do one or the other; but, at the same time, to give protection to the *bona fide* holders of such contracts as have been put on sale in the money market, by corporations or by counties acting corporately, against their efforts to be relieved from the responsibilities of official acts, in putting such papers into circulation for capitalists to invest money in them, on assurances that the principal and interest would be paid accordingly.

§ 1439. *Powers do not pass to corporations by legislative grant, unless expressed in unambiguous terms.*

We repeat now, as appropriate to the subject matter of the case in hand, as it was in the case in which this court said it, that corporations are as strongly bound as individuals are to a careful adherence to truth in their dealings with mankind, and that they cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced. *Zabriskie v. Cleveland, etc., R. Co.*, 23 How., 400. In our construction of the act of Pennsylvania to incorporate the Northwestern Railroad Company, the court said that neither privileges, powers nor authorities can pass, unless they are given in unambiguous words, and that an act giving special privileges must be construed strictly. That, in case a sentence is capable of having two meanings, a construction must be given favorable to the public. However, that, in applying those principles of construction, it must be done with reference to the subject matter contemplated by the legislature as a whole, so as not to allow its manifest purpose and design to be defeated by denying the use of means by which the main object could only be accomplished.

§ 1440. *Where municipal bonds purport to be issued in compliance with law, a purchaser is not bound to look beyond the bonds.*

In our leading case upon the subject, that of *The Commissioners of Knox County v. Aspinwall*, 21 How., 539 (§§ 1413-1418, *supra*), the suit having

been brought for the interest due upon coupons annexed to one hundred and forty-two bonds, in which the main ground of defense was that a board of commissioners had not power to execute them, and that, on such account, they were not binding upon the county of Knox, our answer and judgment was that the bonds, on their face, import a compliance with the law under which they were issued; and that the purchasers of them were not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them. In confirmation of such conclusion we then cited the case of *The Royal British Bank v. Turquand*, 6 Ell. & Bl., 327, decided in 1856 in the exchequer chambers, in error from the court of queen's bench, the decision of which we will now give in full, on account of the principle and its peculiar application to the pleadings in the case before us. Jervis, C. J.: "I am of the opinion that the judgment of the court of queen's bench ought to be affirmed. I am inclined to think the question which has been principally argued, both here and in that court, does not necessarily arise, and need not be determined. My impression is, though I will not state it as a fixed opinion, that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sums of money as shall, from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed, and the replication shows a resolution passed at a general meeting authorizing the directors to borrow on bond such sums for such periods and rates of interest as they might deem expedient, in accordance with the deed of settlement and the act of parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me to be enough. If that be so, the other question does not arise. But whether it be so or not, we need not decide, for it seems to us that the plea, whether we consider it a confession and avoidance or a special *non est factum*, does not raise any objection to the advance as against the company. We may here take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done."

At an ensuing term of this court we had under consideration the case of *Bissell v. City of Jeffersonville* (24 How., 287; §§ 1449, 1450, *infra*) and it was fully discussed in connection with the English and our own case of *Aspinwall*, etc. We said there: "When the contract has been ratified and affirmed, and the bond issued and delivered to the railroad company in exchange for stock, it was then too late to call in question the fact determined by the common council,—and, *a fortiori*, it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are holders for value. Certified copies of the proceedings were exhibited to the plaintiffs at the time they received the bonds, etc., and whether we look to the bonds or recorded proceedings there is nothing to indicate any irregularity, or to raise a suspicion that the bonds had not been issued pursuant to lawful authority. We hold that the company and its assigns, under the circumstances of the case, had a right to assume that they imported verity." It would be difficult to find cases more controlling of

that before us than those which have just been cited. The same ruling was made by the court in the case of *The Commissioners of the County of Knox v. Wallace*, 21 How., 546. It was substantially repeated in *Aspinwall et al. v. The Commissioners of the County of Davis*. This was brought to this court from the circuit court of Indiana upon a certificate of a division of opinion between the judges. The points were, whether, by the act of incorporation of the Ohio & Mississippi Railroad, and the amendments to it of January, 1849, any right to county subscriptions had been vested in the company, to exclude the operation of the constitution of Indiana, which took effect on the 1st of November, 1851, and whether the railroad company had acquired any right to subscription of the defendant as was protected by the constitution of the state. Both questions were answered negatively. But we said it was done reluctantly, for the subscriptions to the stock by the board of commissioners were made in good faith to the railroad company, and also sold by it, and purchased by the plaintiff in confidence of their validity.

STATEMENT OF FACTS.— With these cases on our minds, we will now proceed to give the facts and circumstances of the present case, that it may be seen whether there is anything in them to take it out of our decisions. The abstracts of it by both counsel are so similar that either may be used without giving to the other any advantage. It is an action of *assumpsit*, brought by the plaintiff in error, on interest warrants or coupons, annexed to fifteen bonds of the county of Miami for \$1,000 each, bearing date the 21st of August, 1851, redeemable in ten years from the 1st of September following. The bonds were payable to the Peru & Indianapolis Railroad Company, or bearer, at the office of the treasurer of Miami county, in Peru, bearing an interest of ten per cent. per annum, payable semi-annually at the same place. The suit is for a failure to pay coupons for the years 1857 and 1858, amounting to \$3,000, the interest accrued before having been paid by the railroad company. It is averred in the declaration that the bonds had been issued by Miami county, in pursuance of powers conferred on its board of commissioners by the laws of Indiana, and particularly by an act approved January 6, 1849, entitled an act to authorize the commissioners of Hamilton, Miami and Tipton counties to borrow money. Howard county was afterwards permitted to borrow money. The language of the act authorizes the loaning of money to the board to any amount not exceeding \$50,000, from time to time, at any rate of interest, not more than ten per cent. per annum. The second section is, that all persons loaning money to the counties, or either of them, are authorized to receive any rate of interest upon such loans as may be agreed upon, not exceeding ten per centum.

The Peru & Indianapolis Railroad Company was incorporated in January, 1846. The twenty-eighth section of the charter authorizes the county commissioners of each county through which the road shall pass to take, by an order for either county, as much stock in it as they may think proper. After the act permitting the counties to borrow money had been passed, the railroad company, urged by the condition of its finances, appointed a committee to apply to the auditors of the counties of Hamilton, Miami and Howard, to call special sessions of the boards of the commissioners of their respective counties to consider proposals which they wished to make. In a meeting afterwards held, the committee stated that they were required to ask from the counties additional subscriptions to the stock of the railroad company. From the counties of Hamilton and Miami respectively, \$20,000, and from Howard county \$10,000. The committee then said that their subscriptions would be received

if the respective counties would issue bonds bearing ten per cent. interest per annum, redeemable in ten years, with coupons annexed to them, which the railroad would receive if the bonds were made payable to the company, or bearer, for the purpose of borrowing money upon them, to be applied to the payment of the stock which either of the counties should subscribe for. As a further inducement to the counties to do so, the committee stated that upon the subscription being made, and the bonds being issued, that the railroad would issue stock to the county for its subscription, credited in full to the amount of its bonds; and for the issue of the bonds, that the president of the railroad would execute an obligation binding the company to pay the interest annually upon the bonds as it became due, until the principal became payable, and then the principal also; but that when both principal and interest had been paid by the railroad company, that the counties would return to it the stock certificate which they had received when the bonds were issued, if it did not wish to retain it. And it was further agreed between the parties, if the counties, or either of them, should at any time before the redemption of the county bonds by the railroad company elect to surrender to it its obligation, and assume the payment of the interest that shall accrue afterwards, and the principal also when it became due, that the stock issued to the counties should become absolute in their favor, entitling them to all future dividends on the stock. But that until such assumption had been undertaken and performed, the stock was merely to be held as a security by the counties for the performance of the stipulation of the railroad company, but not entitling them to dividends, though it would give them the right to vote the stock in elections for directors. These propositions were considered by the auditor and board of commissioners of Miami county. It resulted in an issue by them of twenty bonds, \$1,000 each, in which it is declared in the bonds "that there is due to the president and directors of the Peru & Indianapolis Railroad Company, or bearer, \$1,000 from the county of Miami, payable in ten years from the 1st of September, 1851," this bond being issued for a loan of the amount to the county, as authorized by an act of the state of Indiana, permitting the commissioners of Hamilton, Miami and Tipton counties to borrow money. The coupons or interest warrants annexed to the bonds are in these words:

AUDITOR'S OFFICE, MIAMI COUNTY, PERU, INDIANA.

The treasurer of said county will pay the legal holder hereof \$100 on the 1st day of September, 1857, on presentation thereof, being for interest due on the obligation of said county, No. 16, given to the Peru & Indianapolis Railroad Company. By order of the commissioners.

IRA MENDENHALL, County Auditor.

The interest warrants, payable on the 1st September, 1858, are like the preceding; and others of the same kind are annexed to the other fifteen bonds legally held by the plaintiff in error. The bonds were delivered to the railroad company, were received by it in payment of the certificate of stock, and the county of Miami was credited with \$20,000 upon the certificate. The railroad company then offered them for sale, transferred them to purchasers as commercial securities by indorsement, and the plaintiff in error bought them in the full confidence that the consideration for which they had been issued was truly expressed on the face of the bonds. The county retained the stock certificate and voted it on the election for directors as its own. Thus matters stood between the railroad company and the county of Miami, both being satisfied with what

had been done, and that they had acted conformably to their respective powers, until the railroad ceased to pay to the holders the interest warrants.

Upon the trial of the case, the defendants filed a plea of *non-assumpsit*, and the plaintiff joined issue by a similiter. At the same time the defendants put in several pleas, affirming that several irregularities had been committed by the board of commissioners of Miami county and the railroad company, in their negotiation and proceedings, for the issue of the bonds and interest warrants, by the force of which it is declared that the bonds were void at law, and that they were purchased by the plaintiff with notice of these irregularities. We have examined these pleas critically, and find the facts stated in each to be imputations, only calculated to raise supposed equities between Miami county and the railroad company, in which the plaintiffs in error, as the legal holders of the bonds and coupons, can in no event have any concern, even if it be admitted that they had notice of such irregularities when they bought, as all of them relate to circumstances contradictory to the declarations upon the face of the bonds.

Though the proposals, or contract as it is termed in the record, for additional subscriptions of stock are confusedly expressed, there can be no doubt that it was its intention to solicit subscriptions, and that it was so understood by the board of commissioners of Miami county when it issued the bonds; and that in furtherance of such purpose, the parties proceeded to devise the means to pay for the subscription by borrowing money. In doing that there was nothing irregular in the transaction. Both parties seem to us to have acted within their respective powers; the railroad within its charter to allow the counties to subscribe for stock in it, and the county of Miami to do so, and according to the power given to it to borrow money. When the railroad undertook to pay the interest upon the treasury bonds and the principal also when that became due, it was substantially a loan to the county from the time of the execution of the bonds until their maturity, though it was provided that the county might then, upon the cancellation of these bonds, decline to return the certificate of stock which had been issued to it.

The narrative of the negotiation which led to the issue of the bonds and interest warrants brings the case, by the declaration in the bond as to the object and purpose for which they were issued, so entirely within what we have shown to be the law in such cases as to the inference which may be made from the face of the bond, of its having been regularly executed by the party having authority to do it, that we are relieved from the task of considering much of the argument made to us by counsel; and from examining the special pleas which were put in by defendant, or the reasoning of the court upon the third and fourth pleas, upon which it rested its judgment for the dismissal of the plaintiff's case. If the contract and bonds are considered in connection with the authority of the board of commissioners of Miami county to issue them, it must be obvious that several of the points presented to us by the counsel of the defendant do not arise in the case. For instance, whether the board of commissioners of Miami county had power to issue them at the time and for the purpose for which it was done, or that the bonds and interest warrants, by having been indorsed to the plaintiff by the railroad company, were subjected to the Revised Statutes of Indiana, making certain promissory notes, etc., negotiable by indorsement thereon so as to vest the interest in the contract to the assignee, and permitting the obligor to set up any defense to the obligation against the assignee that he could have done against the original obligee, or

that it was necessary to them that the bonds were issued by virtue of a special statute, and if that did not exist, that the bonds may be held to be void.

§ 1441. *Bonds payable to bearer are commercial securities, and the equities between the maker and the payee cannot be set up against innocent holders for value.*

It is true that all of these points were as well argued by the counsel of the defendant as the circumstances of the case permitted, but in every instance, either of argument or of pleading, the point of estoppel, as made by the plaintiff's counsel in the court below, and renewed here by him with vigor by the citation of many cases, was not directly met by the counsel of the defendant. The first point of the plaintiff's counsel was, that even if the bonds had been issued irregularly, and not in strict conformity with the power of the county to borrow money, the defendant is nevertheless estopped by the bonds themselves, which on their face express that they were issued for a loan of the amount to the county, as authorized by the act of the general assembly to borrow money, and that such bonds being habitually received and passed as commercial securities, and being *bona fide* in the hands of the plaintiff, they were entitled to recover the amount of interest sued for, notwithstanding there might be equities between the original parties to the transaction. It is not necessary for us to follow out the plaintiff's argument in this particular, thinking it, as we do, conclusive. We think that the bonds in this case, with interest warrants annexed, are commercial securities, though they are not in the accustomed forms of promissory notes or bills of exchange; that the parties intended them to be passed from hand to hand to raise money upon them, so that a full title was intended to be conferred on any person who became the legal holder of them, and that the original maker, under such circumstances, has no equity to prevent the recovery of the interest.

§ 1442. *The recitals in the bonds estop the maker from denying the facts so recited and are conclusive.*

But the real point in this case, as made by the counsel of the plaintiff in error and sustained in argument by numerous adjudicated cases, was, that as it is declared in the bonds that they were issued by the board of commissioners of Miami county by order or resolution, pursuant to the statute authorizing the county to borrow money, passed at a regular meeting of the board, to be used by the Peru & Indianapolis Railroad, payable to the company or bearer, for a loan to the county, that the *bona fide* holders of the bonds, whether so by indorsement or delivery, had a right to infer that the bonds had been lawfully issued, by which the county of Miami is estopped, in a suit for the recovery of the interest, from denying by pleas that its bonds had been issued to the Peru & Indianapolis Railroad for a loan of money to the county of Miami. We think and adjudge that the recitals in the bonds are conclusive, constituting an estoppel *in pais* upon the defendants in this suit. In support of this conclusion we cite the following cases: *Girard v. Bradley*, 7 Ind., 600; *Reeves v. Andrews*, 7 Ind., 207; *Frances v. Porter*, 7 Ind., 213; *May v. Johnson*, 3 Ind., 448; *Trimble v. State*, 4 Blackf., 435; 8 Blackf., 258; *Ryan v. Vanlandingham*, 7 Ind., 416; 24 How., 375 (§§ 1237-39, *supra*); 23 How., 381; *Society of Saving v. City of New London*, 29 Conn., 174; 1 Ves. Sr., 123; 8 Blackf., 47. It is the opinion of this court that the defendant is estopped from setting up the defenses taken as set forth in the transcript of the record of this case, and that the judgment of the court below sustaining the demurrer should be and is hereby reversed and annulled, and that the case should be remanded to that court with directions to award a *venire facias de novo*.

OTTAWA v. NATIONAL BANK.

(15 Otto, 342-346. 1881.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—The bonds in suit constitute a portion of the issue of \$60,000 referred to in *Hackett v. Ottawa*, 99 U. S., 86 (§§ 1160-61, *supra*). Like those held by *Hackett*, they were purchased before maturity, and without notice of any circumstances or facts impeaching their validity.

§ 1443. *Case cited and followed.*

As in that case, so here, the bonds recite that they are issued in virtue of the power conferred by the charter of the city upon its council,—the majority of voters, attending at an election for that purpose, assenting,—to borrow money on its credit and to issue bonds, pledging its revenue for the payment thereof; and also in pursuance of two ordinances of the city council, one, passed June 15, 1869, entitled “An ordinance to provide for a loan for municipal purposes,” duly ratified by popular vote, and the other, entitled “An ordinance to carry into effect the ordinance of June 15, 1869, entitled ‘An ordinance to provide for a loan for municipal purposes.’” The defense in the *Hackett* case was that the bonds were not issued to effect a loan for municipal purposes, but were issued and delivered as a donation to one Cushman or to the Ottawa Manufacturing Company, a private corporation, to be used in aid of a merely private enterprise, and not for legitimate municipal purposes. Upon that ground, it was contended that they were void for the want of authority to issue them. Waiving any direct decision of the question, much elaborated by counsel, as to what, under the constitution of the state, as interpreted by the supreme court of Illinois in numerous cases, is to be regarded as a municipal or corporate purpose, for which the city can lawfully exercise the power of borrowing money and issuing bonds, we there adjudged the defense to be insufficient for these reasons: The city council had power, the voters consenting, to issue negotiable securities for certain municipal purposes; if the purchaser, under some circumstances, would have been bound to take notice of the provisions of the ordinances whose titles were recited in the bonds, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances provided for a loan for municipal purposes; such a representation, by the constituted authorities of the city, would naturally avert suspicion of bad faith upon their part and induce purchasers to omit an examination of the ordinances themselves; and, consequently, the city was estopped, as against a *bona fide* holder for value, to say that the bonds were not issued for legitimate or proper municipal or corporate purposes. Upon these grounds, the main defense in this suit must, also, be adjudged insufficient.

§ 1444. *Municipal bonds in Illinois, payable to a named person or bearer, are transferable by delivery without indorsement, and the holder can sue in his own name.*

There is, however, one question raised in this case which was not made or determined in *Hackett v. Ottawa*. The bonds in suit are made payable at the St. Nicholas National Bank in the city of New York to W. H. W. Cushman or bearer, and, without his written assignment or indorsement, were taken by the First National Bank of Portsmouth, New Hampshire, the defendant in error. The city paid the interest maturing on the 2d days of August, 1870

and 1871. The contention of counsel is that an assignment or indorsement of the bonds by the payee named therein, although they are also made payable to bearer, is, by the laws of Illinois, where the original contract was made, a prerequisite to pass the legal title, and to authorize a suit by the holder in his own name. This precise question arose in *Roberts v. Bolles*, 101 U. S., 119 (§§ 1006-1009, *supra*), involving the validity of certain municipal bonds, payable to a railroad company or bearer, and on which there appeared no assignment or indorsement by the company. Upon examination of the decisions of the supreme court of Illinois, we there reached the conclusion that, by the repeated adjudications of that learned tribunal, municipal bonds, payable to bearer, or to some named person or bearer, were excepted from the rule announced in *Hilborn v. Artus*, 4 Ill., 344, and *Roosa v. Crist*, 17 id., 450, in which it was, in effect, held that notes payable to a person or bearer could not be transferred or assigned by delivery only, so as to authorize the holder to sue in his own name.

Counsel in the present case insist that our ruling in *Roberts v. Bolles* resulted from a misapprehension of the settled course of decisions in the state court; and we are asked to reconsider the question in connection with some cases in that court to which our attention was not then called. Those specially relied on to establish the error of our conclusion in that case are *Garvin v. Wiswell*, 83 Ill., 215, and *Turner v. Peoria & Springfield R. Co.*, 95 id., 134.

The first of those cases related to a county order executed by a board of supervisors, directing the treasurer of the county, on a day named, to "pay to John Murphy or bearer" a certain sum "out of the funds appropriated for bounties to volunteers, with interest at the rate of eight per cent. per annum from this date, upon the presentation of the annexed coupons"—an instrument of writing not negotiable, in the sense of the law merchant, so as to exclude defenses or evidence of invalidity, even when held by a *bona fide* purchaser. *Wall v. County of Monroe*, 103 U. S., 74. The case in 95 Ill. relates to a certificate of indebtedness issued by a receiver appointed in a suit against a railroad company, and which certificate, the state court expressly held, did not possess the qualities of negotiable or commercial paper. It also appears, in that case, that the certificate was made payable to a named person "or bearer," when the order of court, printed thereon, directed it to be made payable to such person "or order." The language of those two cases must be construed in connection with the particular kind of instrument to which the court referred. While in each may be found general statements which seem to justify the position of counsel, we do not understand those cases to determine anything necessarily inconsistent with the conclusion reached in *Roberts v. Bolles*, viz., that by the law of Illinois municipal bonds, whether payable to bearer, or to some person or bearer, are negotiable by delivery, so that the holder, even in the courts of Illinois, can sue thereon in his own name, although they have not been previously assigned or indorsed by the named payee. Notwithstanding the criticism by counsel of the opinion in *Johnson v. County of Stark*, 24 Ill., 75, we are not satisfied that the supreme court of Illinois has intended, in any subsequent case, to qualify what was there said by Walker, J., in reference to municipal bonds and coupons issued to railroad companies: "It seems to be the well settled doctrine that state, county, city and other bonds and public securities of this character are negotiable by delivery only, without indorsement, in the same manner as bank bills, especially when they are payable to bearer." In that case the coupon was not payable either to order or to bearer,

but the promise was to pay the amount named "on this coupon." The court ruled that the holder of the coupon could sue and recover in his own name.

§ 1445. *By what law the rights of a holder, without indorsement, of bonds payable outside the state where issued are governed.*

The bonds in suit, it will be observed, are payable at a bank in New York. According to the general rules of commercial law, as recognized in that state, the holder of negotiable securities, payable to a named person or bearer, whether they are indorsed or not by such payee, acquires, by delivery merely, the legal title and the consequent right to sue thereon in his own name. 3 Kent Com., 78; *Brush v. Reeves*, 3 Johns. (N. Y.), 439; *Dean v. Hall*, 17 Wend. (N. Y.), 214. Whether the nature and extent of the rights acquired by the bank are determinable by the law of New York, the place of performance, or whether the general rule that a contract is to be expounded by the law of the place where it is to be executed (6 Pet., 200; 13 id., 77; 1 How., 169), can be applied to an Illinois municipal corporation whose bonds, without express legislative authority, have been made payable elsewhere than at its own treasury (19 Ill., 406; 22 id., 151; 24 id., 91; 31 id., 531; 68 id., 535), are questions which need not be now determined. It is sufficient in this case to say that the ground first alluded to, upon which the plaintiff denies the right of the bank, the holder for value of its bonds, to sue in its own name, cannot be maintained.

Judgment affirmed.

COUNTY OF CASS v. SHORES.

(5 Otto, 375-380. 1877.)

ERROR to U. S. Circuit Court, Western District of Missouri.

STATEMENT OF FACTS.—Shores sued Cass county on bonds and coupons issued to fund certain unpaid bonds and coupons issued as trustee for townships under the Township Aid Act. They were on their face county bonds and coupons, without any reference to townships. They were issued by virtue of an order of the county court, which recited that certain bonds and coupons for townships had matured and were unpaid, that the credit of the county had suffered, etc., and these bonds were issued to be sold, the proceeds to be applied to the payment of overdue township bonds. The county pleaded that the debt was a township debt which the county officials had not the power to assume for the county. Plaintiff replied that they were sold to him by the agent of the county, and without notice to him of any fact that could impair their validity. There was judgment for the plaintiff.

§ 1446. *When a county issues bonds to preserve the county credit, it cannot, against an innocent holder for value, plead that the bonds were township debts and that the county is not responsible.*

Opinion by WAITE, C. J.

It was conceded upon the argument that, under the decisions of this court, the county was estopped from denying its liability upon the bonds in question, being, as they are, in the hands of an innocent holder, if the presiding justice of the county court and the clerk were, by the terms of the order of October 20, 1871, authorized to execute bonds which would bind the county for their payment. The question of the power of the county court under the law to bind the county for the payment of a debt of a township, or to issue bonds on behalf of a township to fund township debts, is not involved. The only inquiry is as to the authority conferred upon the presiding justice and the

clerk by the terms of the order. On the one hand, it is contended that they were only empowered to issue the bonds of the county in behalf of the township, and thus bind the township alone for payment under the Township Aid Act; and, on the other, that they were authorized to charge the county with the indebtedness to be incurred.

The latter, we think, is the true construction of the order. It recited that coupons for interest upon the bonds of the county issued for the benefit of the township had matured and remained unpaid; that the court had been prevented from making provision therefor until after the last annual levy of taxes; that the credit of the county had suffered, and was likely to suffer, on account thereof; and that honor required counties as well as individuals to meet their obligations in good faith. It then directed that, for the benefit of the township, county funding-bonds be issued "for the purpose of paying said coupons, keeping the faith of the county, protecting and preserving her credit, and also that the next levy of taxes upon said township may not prove burdensome." For the purposes of construction, language is to be given, if possible, its ordinary and natural meaning. Applying this elementary rule in the present case, there seems hardly room for doubt as to what was intended. "County funding-bonds" were to be issued to protect the faith and preserve the credit of the county. The law under which the action was taken was one authorizing counties "to fund any and all debts they may owe." The county court may have been mistaken in supposing that the interest in arrears was a county debt; but, however that may be, they clearly assumed that it was, and acted accordingly.

Judgment affirmed.

TOWN OF VENICE v. MURDOCK.

(2 Otto, 494-502. 1875.)

ERROR to U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—It would be worse than useless for us to discuss separately each of the twenty-two assignments of error filed in this case; for the questions involved that are of any importance are very few in number. The leading one is, whether sufficient authority was shown at the trial for the issue of the town bonds. The act of the legislature empowered the supervisor and the railroad commissioners of the town to borrow money, and to execute bonds therefor to an amount not exceeding \$25,000. It directed that all moneys borrowed under its authority should be paid over to the president and directors of such railroad company (then organized, or that might thereafter be organized, under the provisions of the general railroad law), as might be expressed by the written assent of two-thirds of the resident tax-payers of the town, to be expended by said president and directors in grading, constructing and maintaining a railroad or railroads passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna & Cayuga Railroad, or the New York & Erie Railroad. The act provided, however, that said supervisor and commissioners should have no power to do any of the acts authorized by the statute until a railroad company had been duly organized according to the requirements of the general railroad law, for the purpose of constructing a railroad between the termini above mentioned and through the town, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll of such town made next previous to the time

such money might be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga county, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town on its assessment roll next previous thereto.

This act was passed on the 16th day of April, 1852; and, on the 23d of August next following, a railroad company was organized to construct a railroad through the town between the termini mentioned in the act. On the 3d of November, 1852, there was filed in the office of the county clerk of Cayuga county a written assent that the supervisor and assessors of the town (the assessors being railroad commissioners) might borrow such sum of money as they might deem necessary, not exceeding \$25,000, giving town bonds therefor, and that the money might be paid to the railroad company organized to construct the railroad. Two hundred and fifty-nine names were signed to the assent, the persons signing representing themselves to be resident tax-payers of the town of Venice. Upon this instrument was indorsed the affidavit of the supervisor and one of the commissioners that the persons whose names were subscribed to the assent comprised two-thirds of all the resident tax-payers of the said town of Venice on its assessment roll next previous to the date of the affidavits, namely, next previous to October 30, 1852; and, on the 2d of March next following, the supervisor and the commissioners executed the bonds now in suit. Evidence of these facts was given at the trial, but the defendant objected to the admission in evidence of this assent and of the bonds on the ground that the plaintiff must first prove that the signatures to the assents were the genuine signatures of those persons whose names purported to be signed. The circuit court overruled this objection, and whether rightfully or not is the primary and almost the only material question in the case.

§ 1447. *Where a tribunal is created to determine whether the requisite assent of tax-payers has been given to authorize the issue of bonds, the judgment of that tribunal is conclusive. (a)*

It is very obvious that if the act of the legislature which authorized an issue of bonds in aid of the construction of the railroad on the written assent of two-thirds of the resident tax-payers of the town intended that the holder of the bonds should be under obligation to prove by parol evidence that each of the two hundred and fifty-nine names signed to the written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest. If such was the duty of the holder it was always his duty. It could not be performed once for all. The bonds retained in the hands of the company would have been no help in the construction of the road. It was only because they could be sold that they were valuable. Only thus could they be applied to the construction. Yet it is not to be doubted that the legislature had in view, and intended to give, substantial aid to the railroad company if a sufficient number of the tax-payers assented. They must have contemplated that the bonds would be offered for sale, and it is not to be believed that they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to inquire

of each one whose name appeared to the assent whether he had in fact signed it.

The act of the legislature manifests a contrary intent. It created a tribunal to determine whether two-thirds of the resident tax-payers had assented. That tribunal was the supervisor and the commissioners, empowered also to execute the bonds in case such an assent were given. They were the appointed agents to obtain the assent, and, when acquired, they, or any two of them, were to make an affidavit that the persons whose written assents were attached to the statement comprised two-thirds of the resident tax-payers. That statement, with the affidavits, was required to be filed in the county clerk's office. All this indicates unmistakably that it was their appointed province to decide whether the condition precedent to the exercise of their authority to issue the bonds had been complied with. *Commissioners v. Nichols*, 14 Ohio (N. S.), 260. They did decide the question before they issued the bonds. Their statement verified by their affidavit, filed in the county clerk's office, was a decision, and the recital in the bonds was a declaration of the decision. That such a decision concludes the town against denying that the condition precedent had been performed, that it relieves the holder of the bonds from the obligation to look beyond it, is too firmly settled in this court to admit of question. In *Dillon on Municipal Corporations*, sec. 418, the author, after reviewing the decisions, states this conclusion: "If, upon a true construction of a legislative enactment conferring the authority, the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their recital of their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation." Here there was more than a recital. There was, in addition, proof of an actual decision, verified by oath. Without citing the numerous decisions which sustain this statement of the law, we refer only to *St. Joseph Township v. Rogers*, 16 Wall., 644 (§§ 1674-77, *infra*), and *Town of Coloma v. Eaves*, 2 Otto, 484 (§§ 1419-20, *supra*), decided at this term, which unequivocally assert it. And the rule has additional reason in its favor, where, as in the present case, the authority of the municipal officers to bind the municipality is made dependent upon a precedent condition of fact; and the fact is not of a nature to be ascertained by purchasers in the market, to whom it was contemplated the bonds might be sold. *Dillon*, in sec. 419, states this as another exception to the rule that an unauthorized representation by a municipal officer that he has power is not binding on the corporation. His language is, "The only exception to this rule (the rule above stated),—to wit, where it is the sole province of the officers who issued the bonds to decide whether conditions precedent have been complied with,—is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission and authority is, from its nature and circumstances, peculiarly known to the officer or agent; in which case the principal will, or may be, bound by the false representations of the agent respecting its authority and its extent and scope." The present is exactly such a case. The town officers had means of knowledge which the purchaser had not. They procured the signatures to the assent, and they knew whether or not they were genuine. They had knowledge which, from the nature of the case, the purchaser could not have.

§ 1448. *The decisions of the state courts on the question of liability of municipalities, etc., upon negotiable bonds are not binding on the United States supreme court.*

We are aware that in the state of New York it has been held adversely to the opinions we have expressed. It was so held in *Starin v. Town of Genoa*, and in *Gould v. Town of Sterling*, 23 N. Y., 439, 456. In the former case the court ruled that, under the act of April 16, 1852 (the same act which conferred powers conditionally upon the supervisors and commissioners of the town of Venice), the *onus* was on the bondholder to show, in a suit against the town, that two-thirds of the resident taxables had given their written assent to the creation of the bonds. In the latter case a similar decision was given when bonds had been issued under another act, much like the act of 1852, though differing in some material particulars. These decisions are in conflict with the rulings of this court in *Bissell v. Jeffersonville*, 24 How., 287 (§§ 1449-50, *infra*); *Knox County v. Aspinwall*, 21 id., 539 (§§ 1413-18, *supra*); *Mercer County v. Hackett*, 1 Wall., 83 (§§ 1409-12, *supra*), and other cases which we have cited. They are in conflict also with decisions in other state courts. *Society for Savings v. New London*, 29 Conn., 174; *Railroad Co. v. Evansville*, 15 Ind., 395; *Comm'rs v. Nichols*, 14 Ohio (N. S.), 260. We have carefully considered the reasons given for the judgments in the New York cases, without being convinced by them. They ignore the paramount purpose for which the bonds were authorized by the legislature, and they treat the written assent of the taxables as the authority to the township officers, when, in fact, the power was given by the legislature, and it was only left to the town to determine by the action of two-thirds of the resident taxables whether the supervisors and commissioners might act under the power. In *Gould v. Sterling* the legislative act required no affidavit to be filed with a statement of the assenting tax-payers; and in *Starin v. Genoa* the affidavit filed was regarded as merely verifying that the persons whose names appeared on the assents comprised two-thirds of all the resident tax-payers. But it is obvious that, if no more than this was meant by the required affidavit, it was wholly useless, for the assessment rolls of the township would have shown as much.

The authority of *Starin v. Genoa* has not been increased by the subsequent action of the New York courts. In *The People v. Mead*, 24 N. Y., 114, the ruling was followed; but Judge Denio, who only gave an opinion, claimed that the decision in *Starin v. Genoa* had been made on the ground that the bonds were not issued upon a loan, and that the plaintiff was not a *bona fide* holder. *The People v. Mead* came again before the court of appeals in 36 N. Y., 224, when Davis, J., said, "We do not think it seemly to review and reverse the former judgment of this court in this action upon the same facts;" and Grover, J., said, "But for the previous adjudication of this court, I should have held that the affidavit filed with the clerk of Cayuga county, pursuant to the second section of chapter 375 of the laws of 1852, was conclusive evidence of the assents of the tax-payers of the town, required by the act in favor of a *bona fide* holder of the bonds issued under its provisions." But assuming that what was ruled in *Gould v. Sterling*, and in *Starin v. Genoa*, is still the doctrine of the New York courts, we find ourselves unable to yield to it our assent. It is against the whole current of our decisions, as well as against the decisions made in other states; and we think it is not supported by the soundest reasons.

It is argued, however, that the New York decisions are judicial constructions

of a statute of that state; and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction; but they do not. They are not attempts at interpretation. They would apply as well to the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute of April 16, 1852. They assert general principles,—to wit, that persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company; a doctrine denied in this court, in the supreme court of Pennsylvania, and even in the court of appeals of New York. *People v. Mead*, 24 N. Y., 124; *Town of Venice v. Woodruff*, 62 id., 462. They assert, also, that, where an authority is given to an officer to execute and issue bonds (on the assent of two-thirds of the voters of a town, the assent to be obtained by the officer and filed in a public office, with an affidavit verifying the assent), the verification amounts to nothing, subserves no purpose, and that a *bona fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a general proposition. They do not assert that the statute so declares, or that such is even its implied requisition. There is, therefore, before us, no such case of the construction of a state statute by state courts as requires us to yield our own convictions of the right, and blindly follow the lead of others, eminent as we freely concede they are.

We have treated the case thus far on the assumption that the plaintiff below was a *bona fide* holder of the bonds which he put in suit. That he was such abundantly appears, and nothing that was offered at the trial tended in the slightest degree to show the contrary. Even the railroad company itself, when it took some of the bonds and gave its stock therefor, could have had no reason to suppose that every condition precedent to their issue had not been performed; and a subsequent purchaser, at any time prior to the time fixed for their final payment, must be regarded as a *bona fide* purchaser. We have thus considered all the assignments of error that deserve particular notice, and all that were much pressed at the argument. The others are without the least merit. In our opinion, the law and the plainest dictates of justice demand an affirmance of this judgment.

Judgment affirmed.

JUSTICES MILLER, DAVIS and FIELD dissented.

BISSELL v. CITY OF JEFFERSONVILLE.

(24 Howard, 287-300. 1860.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This case comes before the court upon a writ of error to the circuit court of the United States for the district of Indiana. It was an action of *assumpsit*, and was instituted by the present plaintiffs against the corporation defendants, to recover two instalments of interest which had accrued upon certain bonds, purporting to have been duly issued in the name of the defendants, for stock subscribed in their behalf by the common council of the city to the Fort Wayne & Southern Railroad Company. Assuming to act in behalf of the city, the common council subscribed \$200,000 to the stock of the railroad company, and on the 24th day of April, 1855, issued two hundred bonds, of \$1,000 each, in the name of the city, and subsequently delivered the same to the railroad company, in payment for the stock previously subscribed.

Interest on the whole amount of the loan was to be paid semi-annually in the city of New York, at the rate of six per cent., and coupons or warrants for the same, payable to bearer, were annexed to each separate bond. Plaintiffs became the holders, for value, and in the usual course of their business, of thirty-seven of these bonds; and the suit in this case was founded on thirty-seven of the coupons for the first instalment of interest, and thirty-six coupons for the second instalment. As amended, the declaration contained a count for money had and received, and a special count upon each of the seventy-three coupons. Defendants pleaded the general issue, and also filed a special plea, in bar of the cause of action set forth in the several special counts. More particular reference to the special plea is unnecessary, as it was subsequently held bad on general demurrer, and at the same time the parties went to trial on the general issue.

To maintain the issue on their part, the plaintiffs, in the first place, introduced one of the original bonds, which is set forth at large in the record. Among other things, it recites, in effect, that it was issued by authority of the common council of the city, and that three-fourths of the legal voters thereof "petitioned for the same, as required by the charter." They also gave in evidence, without objection, the several coupons described in the declaration. All of the coupons, as well as the bonds given in evidence, were signed by the mayor of the city, and were countersigned by the city clerk, and the defendants admitted their execution. Presentment and protest of the coupons for non-payment were also duly proved by the plaintiffs; and to show that the bonds were duly and legally issued, they introduced the records of the common council of the city, and the minutes of their proceedings upon that subject. From that record it appeared that on the 23d day of August, 1853, a petition of certain legal voters of the city was presented to the common council, representing that the construction of the before-mentioned railroad would be of great benefit to the public generally, and especially to the commercial interests of the city, and praying that the board to which it was addressed would subscribe stock in the railroad to the amount of \$200,000, and contract a loan for an equal amount, through the issue of city bonds, for the payment of the subscription. That petition purports on its face to have been signed by four hundred and sixty-seven persons, and it recites that they constituted at that time three-fourths of the legal voters of the city. On the day of its presentation it was referred by vote of the common council to three members of the board, who reported in effect that they found upon examination of the petition, and of the poll-book of the last charter election, that the names of more than three-fourths of the legal voters of the city were appended to the petition, and they also reported a preamble and resolution to carry into effect the prayer of the petitioners. Evidently the report of the committee was entirely satisfactory, as the record shows that the resolution was immediately adopted, without alteration or amendment, by the unanimous vote of the board.

Without reproducing the document it will be sufficient to say that the common council thereby resolved, in case the road came into the city, to subscribe \$200,000 to the stock of the railroad company, and the preamble, which was adopted as a part of the resolution, expressly affirmed the fact reported by the committee, that more than three-fourths of the legal voters of the city had petitioned for that object. Pursuant to that determination, the parties having met, and arranged the terms and conditions of the proposed agreement, a contract was made with the railroad company, that the common council should

make the subscription thus authorized, and execute and deliver the bonds of the city to the company for an equal amount in payment for the stock. Throughout the period when these proceedings took place, the parties to them, it seems, had acted upon the supposition that the fifty-sixth section of the general law of the state for the incorporation of the cities fully authorized the defendants, through their common council, to make the subscription and issue the bonds. Before the bonds were issued, however, the supreme court of the state decided, in an analogous case, that no such authority was conferred upon cities by that section. 1 R. S., 215; *City of Lafayette v. Cox*, 5 Ind., 38. Some delay ensued in issuing the bonds, apparently in consequence of that decision; but on the 21st day of February, 1855, the legislature of the state passed an additional act to enable cities which had subscribed for stock in companies incorporated to construct works of public utility to ratify such subscriptions. By the first section of that act, the common council of any city which had contracted such obligations or liabilities upon the supposition that they were authorized so to do under the provisions of the former act might, "at any time after the passage of this act, ratify and affirm such subscription;" and upon such ratification it was expressly enacted that "such subscription, and the obligation and liabilities, and the corporate bonds or obligations issued or to be issued therefor by such city, shall be valid." Sess. Acts 1855, p. 132. To prove such ratification, the plaintiffs introduced the record of the subsequent proceedings of the common council of the city, showing that at their meeting held on the 6th day of April, 1855, it was resolved by the board, then in session, that the former contract between the city and the before-mentioned railroad company, "for \$200,000, be and the same is hereby confirmed and ratified."

In this connection, the plaintiffs also proved, by the same record, that the common council, on the 13th day of April of the same year, authorized and directed the mayor of the city and the city clerk to procure and sign two hundred bonds, of \$1,000 each, in the name of the city, and deliver the same to the railroad company, reciting in the resolution upon the subject that the proceeding was in accordance with the statute of the state, and the contract and arrangement previously made with the railroad company. Prior to the trial, the court, by the consent of parties, appointed a commissioner to take such evidence as either party might direct to have taken, and to report both the evidence and his finding of the facts proved by it, subject to all exception as to the competency of the testimony, and the correctness of his finding. He reported that three-fourths of the legal voters of the city had not signed the petition to the common council, which constituted the foundation of their action in making the subscription to the stock and issuing the bonds. This report was accompanied by the several depositions on which it was founded, and the transcript shows that certain portions of the testimony of the deponents tended to prove the fact reported by the commissioner. Defendants offered the report, with the several depositions, in evidence, to prove, among other things, that the petition in question was not signed by three-fourths of the legal voters of the city. They also offered oral evidence to prove the same fact. To all such testimony the plaintiffs objected, and also moved the court to suppress all such portions of the depositions taken by the commissioner as tended to prove that a less number than three-fourths of the legal voters had petitioned for the subscription to the stock and for the issuing of the bonds. But all of these objections of the plaintiffs were overruled by the court, and the report of the

commissioner, with the depositions as taken by him, and the parol testimony, were admitted to the jury, and the plaintiffs excepted to the several rulings in that behalf. Further testimony was then given by the plaintiffs, showing that the bonds in question were negotiated to them for value by the agent of the railroad company; and that the agent, at the time they were received, exhibited to them the certificate of the city clerk, under the seal of the city, giving a condensed statement of the proceedings of the common council from the presentation of the petition to the delivery of the bonds, and affirming, in effect, that all those proceedings appeared of record in the office of the city clerk; and they further proved, that he also exhibited to them at the same time another certificate, signed by the mayor of the city and city clerk, showing that the bonds had been exchanged with the railroad company for an equal amount of their capital stock, and affirming that the exchange was authorized by the contract between the parties and the resolutions of the common council of the city. After the testimony was closed, the court instructed the jury to the effect that, if they found from the evidence that three-fourths of the legal voters of the city had petitioned for the subscription to the stock, and for the issuing of the bonds, their verdict should be for the plaintiffs; but if they found that three-fourths of the legal voters had not so petitioned, then their verdict should be for the defendants. Under the rulings and instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted to the instructions.

1. On that state of the case the main question presented for decision is, whether it was competent for the defendants to introduce parol testimony to prove that three-fourths of the legal voters of the city did not petition for the subscription to the stock and the issuing of the bonds. That question is raised as well by the exceptions to the rulings of the court in admitting such testimony as by those taken to the instructions given to the jury. Some further reference, however, to the law under which the common council acted, in making the subscription and in issuing the bonds, becomes necessary before we proceed to the examination of that question. It is conceded on both sides that the defendants had adopted the general law of the state, entitled an act for the incorporation of cities, before any of these proceedings were commenced. Prior to the adoption of that law by the corporation, the charter of the city authorized the common council to subscribe, in the name of the city, for any amount of stock in railroad or turnpike companies formed, or to be formed, for the purpose of constructing any railroad or turnpike from the city to any other point, provided the stock so held by the city did not, at any time, exceed \$100,000; and with that view they were authorized to borrow money or issue bonds to pay for such stock. But it is admitted by the plaintiffs that the corporation, at the date of the proceedings in question, was duly organized under the subsequent general law for the incorporation of cities, which provides, in effect, that the acceptance of that act by any incorporated city shall be deemed a surrender by such city of its prior charter. By the fifty-sixth section of the last named act it is also provided that no incorporated city, under this act, shall have power to borrow money, or incur any debt or liability, unless three-fourths of the legal voters shall petition the common council to contract such debt or loan. All of the proceedings in question which led to the contract for the subscription to the stock took place under that provision of the charter; and we have already adverted to the fact that the supreme court of the state decided, before the bonds were issued, that, by its true construction, it did not

authorize a subscription to the stock of a railroad company. At the argument, the construction adopted by the state court was controverted by the counsel of the plaintiffs. But suppose it to be correct; still the limitation or restriction was one created by the legislature which granted the charter, and certainly it was competent for the same authority to repeal it altogether, or to substitute some other in its place.

§ 1449. *A corporation issuing bonds, which recite that three-fourths of the legal voters of the city had petitioned for their issuance, cannot controvert that recital by parol evidence.*

Municipal corporations are created by the authority of the legislature, and Chancellor Kent says they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the state. 2 Kent's Com., p. 275. Whatever may be the true construction of that section of the charter, it is nevertheless certain that it was under that provision that the petition for the subscription was presented to the common council, and it is equally certain that it was under the same provision that they heard and determined the question whether the petition actually contained the signatures of three-fourths of the legal voters of the city. Bad faith is not imputed to the board, nor is it denied that they acted "upon the supposition" that they were authorized by that provision, on "the written petition of three-fourths of the legal voters of the city," to subscribe for the stock and contract to issue the bonds. Having ascertained and determined that three-fourths of the legal voters had petitioned, they adopted the resolution reported by the committee, and entered into the contract with the railroad company. Clearly, therefore, the common council had contracted the obligation to take the stock; and in case of refusal, would have been liable in damages for a breach of the contract. Other cities in the state had contracted like obligations under similar circumstances; and to remedy the anticipated difficulty, and to remove the doubt first suggested by the decision of the supreme court of the state, the legislature passed the explanatory act of the 21st of February, 1855, to which reference has been made. Sufficient has already been remarked to show that the circumstances of the case exhibited in the record bring it within the very terms of the act; and if so, then the common council might lawfully ratify and affirm the subscription; and upon such ratification it is expressly declared that the bonds issued or to be issued shall be valid.

Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority. Unlike what is sometimes exhibited in laws of this description, the legislature did not attempt to ratify the subscription, but left the matter entirely optional with the common council, as the representatives of the city, to accept or reject the proffered remedy. They elected to ratify and affirm the subscription; and by so doing gave the same effect to the contract to subscribe for the stock, and to all the proceedings that led to it, as if the authority to make it had been coeval with the presentation of the petition on which those proceedings were founded. No injustice will result from this conclusion, as it is obvious that the contract had been made in good faith, under the full belief that they were duly authorized to subscribe for the stock, and issue the bonds

in the name of the city, so that the only operation of the confirmatory resolution was to give the very effect to the proceedings which they had intended, but which, from the defect in their authority, had not been accomplished. *Watson v. Mercer*, 8 Pet., 111; *Wilkinson v. Leland*, 2 Pet., 661. Authority on the part of the common council to subscribe for the stock, and to issue the bonds on the petition of three-fourths of the legal voters of the city, is therefore shown to have existed, and must be assumed in the further consideration of the case. With this explanation as to the authority of the common council, we will proceed to the examination of the main question discussed at the bar.

2. It is insisted by the plaintiffs that the defendants had no right to disprove the verity of their own records, certificates and representations, concerning the facts necessary to give validity to the bonds. On the other hand, the defendants controvert that proposition, and insist that it was competent for them, under the circumstances, to prove, by parol testimony, that the records given in evidence did not speak the truth, and that, in point of fact, three-fourths of the legal voters had not petitioned, as required by the charter. Unless three-fourths of the legal voters had petitioned, it is clear that the bonds were issued without authority, as by the terms of the explanatory act it could only apply to a case where the common council of a city had contracted the obligation or liabilities therein specified upon the petition of three-fourths of the legal voters of such city; and if no such petition had been presented, or if it was not signed by the requisite number of the legal voters, the law did not authorize the common council to ratify and affirm the subscription. That fact, however, had been previously ascertained and determined by the board to which the petition was originally addressed. After the explanatory act was passed, the common council were fully authorized to revise the finding of the former board; and if it did not appear, upon inquiry and proper investigation, that it was correct, it was their duty, as the representatives of the city, to have refused to ratify and affirm the contract for the subscription. Such an inquiry might have been made through the medium of a committee, as it had been when the petition was presented, or in any other mode, satisfactory to the board, which would enable them to ascertain the true state of the case. By the terms of the explanatory act they were authorized to ratify and affirm the subscription, if the obligation or liability incurred had been contracted on the petition of three-fourths of the legal voters of the city; and, of course, the necessary implication is that they must be satisfied that the requisite number had petitioned. In making that investigation, however, it was not required that there should be a new petition, and the law is entirely silent as to the manner in which it was to be conducted. If the common council was composed of the same persons who had already passed upon the question, further investigation was unnecessary, provided they were satisfied with their former determination. Such of the members as knew the record of the fact to be correct might safely act upon their own personal knowledge, without further inquiry; and if there were any who had not been members of the board when the prior determination was made, they might ascertain the fact in any mode which was satisfactory to themselves and their associates. Nothing appears in the record to show whether further information upon the subject was necessary or desirable, or, if so, what means were adopted to obtain it; but it does appear that the board unanimously resolved to ratify and confirm the contract with the railroad company, and subsequently issued the bonds, reciting in each that it was issued by authority of the common council of the city, "three-fourths of the legal voters

of the city having petitioned for the same as required by the charter." Taken together, we think the record of the resolution ratifying and confirming the contract, and the recital in the bonds, furnish conclusive evidence in this case that the common council did readjudicate the question whether the requisite number of the legal voters of the city had signed the petition. Fraud is not imputed in this case, and it does not appear that it was even suggested at the trial in the court below that the board neglected that duty at the time the contract was confirmed; but the defense was that the finding was erroneous, because the petition, as matter of fact, did not contain three-fourths of the legal voters of the city.

§ 1450. *Whether three-fourths of the legal voters had petitioned for the issuance of bonds is a question for the corporation; its decision is binding upon it in any question with an innocent holder for value.*

3. It only remains to consider the effect of that determination as between the defendants and the holders for value of the bonds, without notice of the supposed defect in the proceedings under which they were issued, and put into the market. Two hundred bonds, with twelve hundred interest warrants or coupons, were issued in the name of the city, and the coupons, as well as the bonds, were payable to bearer. Interest was payable semi-annually, but the redemption of the principal was postponed for a period exceeding twenty-five years. Capitalists could not be expected to accept such paper, and advance money for it, unless the authority to issue it was put beyond dispute. They certainly would not pay value for such securities, with knowledge that the question under consideration would be open to litigation whenever payment, either of principal or interest, was demanded. Purchasers of such paper look at the form of the paper, the law which authorized it to be issued, and the recorded proceedings on which it is based. When the law was passed authorizing the common council to ratify and affirm the contract with the railroad company, it must have been understood by the legislature that the bonds were to be received by the company in payment for the stock, and used as a means for borrowing money for the construction of the road, and it could hardly have been expected that the object could be accomplished, if, by the true construction of the act, it contemplated that the bonds should be issued before it was conclusively determined that the requisite number of the legal voters of the city had petitioned the common council. But a much stronger reason why that construction cannot be adopted is that it would involve an absurdity, as it would render the law altogether inoperative, or else it would admit that the bonds might be issued without authority. Whether three-fourths of the legal voters had petitioned, or not, was a question of fact; and if not ascertained and conclusively settled before the bonds were issued, it would remain open to future inquiry, and might be determined in the negative; and clearly the common council could not lawfully ratify and affirm the subscription, unless that proportion of the legal voters had petitioned; and without such ratification the bonds would be invalid. Beyond question, therefore, the construction must be rejected.

Jurisdiction of the subject matter on the part of the common council was made to depend upon the petition, as described in the explanatory act, and of necessity there must be some tribunal to determine whether the petitioners, whose names were appended, constituted three-fourths of the legal voters of the city, else the board could not act at all. None other than the common council, to whom the petition was required to be addressed, is suggested either

in the charter or the explanatory act, and it would be difficult to point out any other sustaining a similar relation to the city so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Adopting the language of this court in the case of *The Commissioners of Knox County v. Aspinwall*, 21 How., 544 (§§ 1413-18, *supra*), we are of the opinion that "this board was one, from its organization and general duties, fit and competent to be the depository of the trust confided to it." Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings, but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, without interference or complaint. When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and *a fortiori* it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value.

Duly certified copies of the record of the proceedings were exhibited to the plaintiffs at the time they received the bonds, showing to a demonstration that further examination upon the subject would have been useless; for, whether we look to the bonds or the recorded proceedings, there is nothing to indicate any irregularity, or even to create a suspicion that the bonds had not been issued pursuant to a lawful authority; and we hold that the company and their assigns, under the circumstances of this case, had a right to assume that they imported verity. Citation of authorities to this point is unnecessary, as the whole subject has recently been examined by this court, and the rule clearly laid down that a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with other parties, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced. *Zabriskie v. Cleveland, etc., R. Co.*, 23 How., 400. For these reasons we are of the opinion that the parol testimony was improperly admitted, and that the instructions given to the jury were erroneous. The judgment of the circuit court is, therefore, reversed, with costs, and the cause remanded, with directions to issue a new venire.

HUMBOLDT TOWNSHIP v. LONG.

(2 Otto, 642-651. 1875.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The first question certified from the court below is whether the bonds to which the coupons in suit were attached are negotiable bonds, such as to entitle the plaintiff to the rights of a *bona fide* holder of negotiable paper taken in the ordinary course of business before maturity.

§ 1451. *Municipal bonds construed; contingency held not to destroy negotiability.*

They are certificates of indebtedness to the railroad company, or bearer, each for \$1,000, lawful money of the United States, payable on a day certain, with interest at the rate of seven per cent., payable annually on the first days of January in each year, at a specified banking house, on the presentation and surrender of the respective interest coupons thereto annexed. If this were all.

there could be no doubt of their complete negotiability. But, it is said, the subsequent language of the certificates controls the absolute promise, and shows that payment was to be made only on a contingency. This is argued from the recital contained in the instrument, and from what follows it. We quote: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott & Allen County Railroad, and for the construction of the same through the said township, in pursuance of and in accordance with an act of the legislature of the state of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870;' and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt township, as also its property, revenue and resources, is pledged." Relying upon this clause of the certificate, the township contends that the construction of the railroad through the township was a condition upon which the payment was agreed to be made. We think, however, this is not the true construction of the contract. The construction of the road, as well as the subscription for stock, were mentioned in the recital as the reasons why the township entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road, that the bond was given. The words, "upon the performance of the said condition," cannot then refer to anything mentioned in the recital, for there is no condition there. A much more reasonable construction is that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's, "on the presentation and surrender of the respective interest coupons." Such presentation and surrender is the only condition mentioned in the instrument. But that stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange,—that it is to be presented and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency and, therefore, non-negotiable, as to affirm that one payable on its presentation and surrender is, for that reason, destitute of negotiability.

§ 1452. *Conclusiveness of recitals in bonds in a suit by a bona fide holder.*

The next question certified is whether the bonds are invalid because of the fact that the election was held within less than thirty days after the day of the order calling for it. The act of the legislature under which the bonds purport to have been issued (passed in 1870) is the act under which the bonds considered in the case of *Marcy v. Township of Oswego*, 2 Otto, 637, were issued. We held in that case that, by its provisions, the board of county commissioners who caused the bonds to be issued were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to execute and issue the bonds, had been performed, and that their recital in the bonds issued by them was conclusive in a suit against the township brought by a *bona fide* holder. In so ruling, we but decided what had often before been decided, and what ought to be regarded as a fixed rule. Applying it to the solution of the question now before us, it is plain that the bonds are not invalid, because all the notice of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself

confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county commissioners, and which it was necessary for them to answer before they could act. In the present case, the board passed upon them and issued the bonds, asserting by the recitals that they were issued "in pursuance of and in accordance with the act of the legislature." Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board, that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments.

§ 1453. *Issued in excess of statutory limit.*

The third question certified is answered by what was decided in the case of *Marcy v. Township of Oswego*, 2 Otto, 637, to which we have already referred. There is no essential difference between this case and that. The assessment rolls of the township may have been proper evidence for the consideration of the board of county commissioners, when they were inquiring what the value of the taxable property of the township was; but the bonds are not invalid in the hands of a *bona fide* holder by reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township as against those who issued the bonds, it cannot set up against a *bona fide* holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act of 1870.

Judgment affirmed.

MR. JUSTICE MILLER dissented (DAVIS and FIELD, JJ., concurring), holding that the defense that the bonds are in excess of the statutory limitation as to amount may be set up against a *bona fide* holder. *Floyd Acceptances*, 7 Wall, 666; *Knox Co. v. Aspinwall*, 21 How., 539; *Town of Coloma v. Eaves*, 2 Otto, 484; *Royal British Bank v. Turquand*, 5 Ad. & Ell., 259, cited and reviewed.

COUNTY OF WARREN v. MARCY.

(7 Otto, 96-110. 1877.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—It is insisted by the plaintiff in error that the bonds and coupons were void, for want of authority in the board of supervisors to issue them, in consequence of insufficient notice of the election. It must be conceded, however, that if the case is to be governed by the act of March 23, 1869, there was no defect in the proceedings. But it is insisted that the act of March 4, 1869, which prescribed a notice of thirty days, by publication in a newspaper, was still binding, and was not abrogated by the act of March 25th, the tenth section of which provided that the question should be submitted in such manner as the county authorities might determine. This was the very question raised before the state court in *Harding v. Rockford, R. I. & St. L. R. Co.*, 65 Ill., 90; and the supreme court of Illinois decided that the provisions of the act of March 4th were binding, and that the election was void for want of such published notice of thirty days. The court considered that the object of

the act of March 25th was to remove the limitation as to the amount of the subscription, and to change the time for the maturity of the bonds, as imposed by the act of March 4th, but not to change the time or manner of giving notice of the election; and they conclude their opinion in the following words: "We are of opinion that the proviso to section six (6) of the act of 4th of March is not abrogated by section ten (10) of the subsequent act. Their reconciliation, in the manner we have attempted, will best subserve the public good; and the validity of both, thus reconciled, will make the legislation more in accordance with reason, shield the legislature from an absurdity and prevent serious consequences. As the election was invalid for want of sufficient notice, there was no power to make the subscription, and none was conferred by the vote to issue the bonds."

If we accept this as the true construction of these statutes, the question then arises, whether, the bonds having been issued and acquired under the circumstances shown by the special findings of the circuit court, the defendant in error is entitled to recover. Is the county bound to pay the coupons in question to one who purchased them for value before maturity, and without any actual knowledge of the facts relied on to invalidate them, or of the pendency of the suit brought to have the proceedings declared void? This involves two questions: 1. Are the bonds so absolutely void, as against the county, as to be invalid under all circumstances, even in the hands of a *bona fide* holder for value? 2. If not, was the commencement and pendency of the suit for having the proceedings of the supervisors declared void, and preventing the issue of the bonds, such notice to all persons of their invalidity, as to defeat the title of a purchaser for value before maturity, having no actual notice of the suit, or of the objection to the bonds?

§ 1454. *The holder of municipal bonds has a right to presume from the recitals on the face of the bonds that the preliminary proceedings have been regular.*

The first question is to be viewed in the light of the former decisions of this court. We have substantially held, that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it. *Commissioners of Johnson County v. January*, 94 U. S., 202 (§§ 1361-62, *supra*); *Commissioners of Douglas County v. Bolles*, id., 104, 108 (§§ 1435-38, *supra*); *Town of Coloma v. Eaves*, 92 id., 484, 488 (§§ 1419-20, *supra*); *Lynde v. The County*, 16 Wall., 6 (§§ 1051-55, *supra*). Now, that is the case here. The bonds are executed by the board of supervisors, or which is the same thing, by their clerk, under their order and direction. They certify on their face that they are issued in conformity with the vote of the electors of said county, cast at an election held on the 23d day of September, 1869. This, according to the cases, is a sufficient authentication of the fact that an election was duly held to protect a *bona fide* holder for value. A similar defense, that the bonds were absolutely void for want of authority (and so declared by the state tribunals), in consequence of irregularity in the preliminary proceedings, was set up in the case of *Lee County v. Rogers*, 7 Wall., 181. That case arose in Iowa. A county election had been held to determine on the subscription of stock to a railroad, and the issue of bonds in payment thereof. A bill in equity was

filed to prevent such subscription and issue and was successful. The legislature then passed a healing act, and the bonds were issued. A year after this another bill was filed to have both the act and the bonds declared void, but was dismissed. Two years after this dismissal, a bill of review was filed to reverse the last decree, and it was reversed, and the bonds and the healing act itself were declared void. This court held that, notwithstanding all this, the *bona fide* holder of the bonds was entitled to recover upon them. It being contended that he was bound to take notice of the *lis pendens* for avoiding the bonds, the court held otherwise, on the ground that there was no continuous litigation. The first suit was determined before the issue of the bonds, and the second was not commenced until after they had been issued. No suit was pending when they were issued.

§ 1455. *Bonds may be valid in the hands of a bona fide holder although the preliminary proceedings were defective.*

This case is an authority for the position that bonds of this sort may be valid in the hands of a *bona fide* holder, notwithstanding the fact that the preliminary proceedings requisite to their issue may have been so defective as to sustain a direct proceeding against the county officers to annul them or prevent their issue.

§ 1456. *The rule that all persons are bound to take notice of pending suit does not apply to the purchaser of negotiable securities before maturity.*

This brings us to the second question, namely, whether the pendency of the chancery suit for vacating the proceedings of the supervisors and preventing the issue of the bonds, in this case, was in itself constructive notice to all persons of their invalidity, or of the objections raised against them. (a) This question has an important bearing upon the case; for, whilst the bonds may be valid in the hands of a *bona fide* purchaser before maturity, and without notice of any defect or vice in their origin, this cannot be said in reference to one who has such notice, or who is chargeable therewith. It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent, in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions. The learned chancellor gave the history and grounds of the general doctrine of *lis pendens*, in 1815, in the case of *Murray v. Ballou*, 1 Johns. Ch., 566, which is the leading American case on the subject, and deserves the careful study of every student of law. The fundamental proposition was stated in these words: "The established rule is, that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpoena after the bill is filed." P. 576. That case related to land, with regard to which the doctrine is uniformly applied.

In the subsequent case of *Murray v. Lylburn*, 2 id., 441, decided in 1817, the same doctrine was held to apply to choses in action (in that case a bond and mortgage) assigned by one of the parties *pendente lite*. But the chancellor,

(a) The bonds were issued after the dissolution of the temporary injunction and the dismissal of the bill, and before the reversal of the decree in the state supreme court. The defendant in error received the bonds without notice of the suit.

with wise prevision, indicated the qualification to which the rule should be subject in such cases. Speaking of the trustee, whose acts were in question, he said: "If Winter had held a number of mortgages, and other securities, in trust, when the suit was commenced, it cannot be pretended that he might safely defeat the object of the suit, and elude the justice of the court, by selling these securities. If he possessed cash, as the proceeds of the trust estate, or negotiable paper not due, or perhaps movable personal property, such as horses, cattle, grain, etc., I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealing would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce; and they formed one of the specific subjects of the suit against Winter, and the injunction prohibited the sale and assignment of them, as well as of the lands held in trust." Here we have the whole law on the subject. Subsequent cases have only carried it out and applied it. We shall cite only a few of the most important.

In *Kieffer v. Ehler*, 18 Penn. St., 388, decided in 1852, it was held that, although a promissory note not due is liable to attachment under the Pennsylvania statute of 1836, relative to executions, yet such attachment is unavailable against a *bona fide* holder for value of a negotiable note, where it was obtained after the attachment was served on the maker of the note as garnishee, and after its return, but before the maturity of the note, and without actual notice of the attachment. Mr. Justice Lowrie, in that case, speaking of such instruments, says: "They have a legal quality that renders the hold of an attachment upon them very uncertain. Unlike all other property, they carry their whole evidence of title on their face; and the law assures the right of him who obtains them for valuable consideration, by regular indorsement, and without actual notice of any adverse claim, or of such suspicious circumstances as should lead to inquiry. To hold that an attachment prevents a subsequent *bona fide* indorser for value from acquiring a good title, would be almost a destruction of one of the essential characteristics of negotiable paper." He admits that the negotiation of such paper by a defendant after he had notice of the attachment would be a fraud upon the law; but he suggests the remedy, namely, that the court should exert its power to prevent it, by requiring the instrument to be placed in such custody as to prevent it from being misapplied,—a remedy analogous to that of injunction and sequestration by a court of chancery. In a subsequent case in Pennsylvania, that of *Diamond v. Lawrence County*, 37 id., 353, it is true, the same court held the purchaser of county bonds *pendente lite* to be affected with constructive notice; but placed its decision specially on the ground that, in Pennsylvania, such bonds are not deemed negotiable securities. The case of *Winston v. Westfeldt*, which came before the supreme court of Alabama in 1853 (22 Ala., 760), is directly in point, and was decided upon great consideration and after exhaustive arguments by counsel. The note sued on, at the time of its purchase by the plaintiff, was the subject of controversy in the chancery court; and the question was, whether the proceedings operated as notice to him, "or, in other words," says the court, "does the doctrine of *lis pendens* apply to negotiable paper?" And the decision was, that it does not. The arguments of the counsel, as well as the judgment of the court, in this case, are very instructive; but we forbear to accumulate further quotations.

Suffice it to say, that the same doctrine is held and adjudged in *Stone v. Elliott*, 11 Ohio St., 252; *Mims v. West*, 38 Ga., 18; *Durant v. Iowa County*, 1

Woolw., 69; and *Leitch v. Wells*, 48 N. Y., 585, overruling same case in 48 Barb., 637. The case of *Durant v. Iowa County* was decided by Mr. Justice Miller, and related to coupons attached to county bonds, being parallel to the case now under consideration, except that the coupons had been issued before the *lis pendens* was instituted. Justice Miller, in this case, meets the objection that the rule may operate to defeat the action of the court by withdrawing from its jurisdiction the subject matter of the controversy. He says: "It is insisted that, in this view, proceedings to enjoin the transfer of such securities are futile. Not so. An injunction will prevent the transfer of the securities during the pendency of the suit, and a decree that they be delivered up to be canceled, if enforced at once, will protect the parties. A neglect to take out the injunction, or to enforce the decree, is the fault of the plaintiff, not of the law." In the present case an injunction was issued, and, so long as it was in force, was obeyed by the board of supervisors. The circuit court saw cause to dissolve the injunction, it is true, and eventually dismissed the bill; and it was not till two years afterward that the supreme court reversed this decree. Whether the circuit court did right in dissolving the injunction without dismissing the bill (which was emphatically an injunction bill), or whether the complainant ought not, at once, to have submitted to a dismissal, taken an appeal, and adopted the necessary proceedings for a continuance of the injunction,—it is unnecessary now to inquire. It cannot be said that the court was destitute of power to maintain its own jurisdiction and protect its suitors. If it did not choose to exert this power, and any failure of justice ensued, it is to be attributed to that inherent imperfection to which the administration of all human laws is liable. At all events, the evil is no greater than that which would befall the innocent purchasers of the bonds, if the loss should be made to fall upon them. From this dilemma there is no escape, unless we abrogate the privileges of commercial paper, and make it the duty of those who take it to inquire into all its previous history and the circumstances of its origin. This would be to revolutionize the principles on which the business of the commercial world is transacted, and would require a new departure in the modes and usages of trade.

§ 1457. *Although a suit be pending at the time of the issuance of bonds, to prevent that issuance, the subsequent purchaser in open market is not affected by notice arising from lis pendens.*

The only thing calculated to raise any doubt, in the present case, is the fact that the bonds in question were not in existence when the suit to prevent their issue was brought. But we see no good reason for limiting the exception to paper or securities previously in existence. The court, as we have seen, has ample power, by injunction, to prevent their execution; and the reason of the exception is as applicable to the one class as to the other. Its object is to protect the commercial community by removing all obstacles to the free circulation of negotiable paper. If, when regular on its face, it is to be subject to the possibility of a suit being pending between the original parties, its negotiability would be seriously affected, and a check would be put to innumerable commercial transactions. These considerations apply equally to securities created during, as to those created before the commencement of, the suit; and as well to controversies respecting their origin, as those respecting their transfer. Both are within the same mischief, and the same reason. This very question was involved in *City of Lexington v. Butler*, 14 Wall., 283 (§§ 1377–81, *supra*). In that case, irregularities had occurred in the preliminary proceedings, and the city authorities refused to issue the bonds. A *mandamus* was applied for by

the railroad company, for whose use the bonds were intended; and a judgment of *mandamus* was rendered, to compel the city to issue them, and it issued them accordingly. Subsequently, this judgment was reversed by the court of appeals of Kentucky, and an injunction was obtained to prevent the railroad company from parting with the bonds. The injunction was not obeyed; the bonds were negotiated whilst proceedings were still pending, and were purchased by the plaintiff for value before maturity, without any knowledge of these circumstances. This court held that the bonds were valid in his hands. The point in question received no discussion in the opinion of the court, it is true; but it appeared on the pleadings, was made in the argument, and must have been passed upon in arriving at the judgment. Whilst the doctrine of constructive notice arising from *lis pendens*, though often severe in its application, is, on the whole, a wholesome and necessary one, and founded on principles affecting the authoritative administration of justice, the exception to its application is demanded by other considerations equally important, as affecting the free operations of commerce, and that confidence in the instruments by which it is carried on, which is so necessary in a business community. The considerations that give rise to the exception apply with full force to the present case. We think that the result reached by the circuit court was correct.

Judgment affirmed.

JUSTICES MILLER, FIELD and HARLAN dissented.

KENICOTT v. THE SUPERVISORS.

(16 Wallace, 452-471. 1872.)

APPEAL from U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE HUNT.

The following propositions may be considered as settled in this court:

§ 1458. *Recitals in municipal bonds are conclusive in favor of bona fide holders.*

1. If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer, or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, or that the fact exists, or has taken place, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds.

§ 1459. *Informalities in the issue of such bonds are not available against bona fide holders.*

2. If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, cannot be urged against a *bona fide* holder seeking to enforce them. *Grand Chute v. Winegar*, 15 Wall., 355; *Commissioners of Knox Co. v. Aspinwall*, 21 How., 539 (§§ 1413-18, *supra*); *Gelpcke v. Dubuque*, 1 Wall., 203 (§§ 1367-70, *supra*); *Moran v. Miami County*, 2 Black, 722 (§§ 1439-42, *supra*).

§ 1460. *Municipalities must be specially authorized to issue bonds or to sell or mortgage lands held by them.*

3. There must, however, be an original authority, by statute, to the municipality to issue the bonds. Municipal corporations have not the power, except through the special authority of the legislature, to issue corporate bonds which

will bind their towns; neither have they the power to sell or mortgage the lands belonging to such towns without special authority. *Marsh v. Fulton County*, 10 Wall., 676 (§§ 1186–89, *supra*).

§ 1461. *Legislation held to authorize a county to mortgage its swamp lands to secure its bonds issued to a railroad company.*

The alleged absence of such authority is the basis of the defense to the mortgage sought to be foreclosed in the present action. Four several and distinct grounds on which such power is based are urged by the plaintiffs. But one of these will be examined. The court is satisfied with the authority to be found in the tenth section of the act to incorporate the Mount Vernon Railroad Company. An examination of the others is not necessary.

STATEMENT OF FACTS.—The town of Mount Vernon is situated in Jefferson county, and some eighteen miles easterly of the Illinois Central Railroad. This road passes within a short distance of the westerly line of said county, and nearly parallel with it. Wayne county is still east of Jefferson county, the whole of the latter county lying between Wayne and the Illinois Central road. In the month of February, 1853, the legislature of Illinois passed an act to incorporate the Mount Vernon Railroad Company, for the purpose of building a railroad from Mount Vernon to the Illinois Central Railroad, or to its Chicago branch. The seventh section of the act provided that the company might borrow money and secure the same by bond or mortgage. By the eighth section it was enacted that the county of Jefferson might issue its bonds and provide for the payment thereof by the sale or mortgage of its swamp or overflowed lands, or that they might make such other disposition of the lands in aid of the construction and maintenance of the railroad as they deemed best for the public interests of the county. The ninth section provided that the question of aiding the railroad, and of the mode in which such aid should be given, should be submitted to the decision of the voters of the county.

The tenth section was in the following words: “Any county through which said road *may* run, and every county through which *any other railroad may* run, with which this road *may be joined, connected or intersected, may*, and are hereby *authorized and empowered to aid in the construction of the same or of such other road with which it may so connect; and for this purpose the provisions of the seventh, eighth and ninth sections of this act shall extend, include and be applicable to every such county and every such railroad.*”

The provisions of the seventh, eighth and ninth sections of the charter of the Mount Vernon Railroad Company were thus made applicable to any other county than that of Jefferson, through which that road should run, or through which any other railroad should run, which might join, intersect or connect with the Mount Vernon road. Such other county was expressly authorized to aid in the construction of the Mount Vernon road, or of such other road with which it might so connect. No reasonable construction of this act will require that the road to be aided should be actually built before the county was authorized to give it aid. That theory would no doubt add greatly to the security of the county, and would relieve it from many of the perplexing questions which so commonly arise. If, however, the road were actually built, no aid would be needed in its construction. The aid might, in that event, be useful to its stockholders, or might relieve it from embarrassments, but a road which is built can neither need nor receive aid in its construction. That is a fact accomplished. The language of this act expressly authorizes the swamp or overflowed lands to be used by the counties in aid of the construction of the

road, and it seems to be quite plain that the aid was intended to be given before the road was built, and that the counties were expected to take the ordinary risk of the success of the undertaking in which they embarked their property.

The county of Wayne held an election in November, 1858, and voted that these lands should be applied in aid of any company that would build a railroad through the county. Soon after this time Van Duser & Smith entered into a contract with Wayne county for building that part of the road of the Belleville & Fairfield Company lying between the east line of Wayne county and Mount Vernon, thus running across the entire width of Wayne county. This contract was assigned to the Mount Vernon Railroad Company, who undertook the construction of this portion of the road. The county of Jefferson entered into a like contract for the construction of the Mount Vernon road, from Mount Vernon to the Illinois Central.

It was for the purpose of aiding in the construction of the road thus undertaken to be built by the Mount Vernon Railroad Company from the east line of Wayne county to Mount Vernon, the charter of that company also requiring its road to be built from Mount Vernon to the Illinois Central, that the bonds in question were issued. They were sold under the authority of the county of Wayne, by its agents, and the proceeds were applied as was intended by the county. The Belleville & Fairfield Railroad Company, afterwards changed to the St. Louis & Louisville Railroad Company, was chartered for the construction of a railroad from St. Louis, on the Mississippi, to Mount Carmel, on the Wabash river. Its proposed line crossed the Illinois Central, and was located directly through five different counties, among which was the county of Wayne. It was that portion of the line of this road through the county of Wayne that was located and surveyed by the Mount Vernon Railroad Company and of which the construction was undertaken by that company, as the assignee of Van Duser & Smith. Some portion of the work had then been done. This brought the county of Wayne within the terms of the tenth section already quoted, and authorized its action in the issue of bonds to aid in its construction. These were existing contracts, under which the contracting parties were taking efficient measures for the construction of the road. Those contracting parties could make no objection to the power of the counties so to contract. The contracts were valid and obligatory against them, and would be effectual, if carried out, to make the railroad connections needed by the county.

The authority to construct the connecting road, and the entering into a contract for its construction, formed a connection within the meaning of the tenth section. Such was also the opinion and the assertion of the county of Wayne, when, in November, 1856, it conveyed these lands to Charles Wood, in trust for certain railroads that should build a road through that county. The deed to Wood recites that a connection had been made between the Mount Vernon road and the others mentioned, that a vote had been taken in the county of Wayne authorizing that deed, and that it was made in pursuance thereof. This deed was recognized and confirmed by the legislature, and expressly declared to be valid in the passage of the act of February 14, 1857, to amend the charter of the Belleville & Fairfield Railroad Company. The lands were afterwards reconveyed to the county by Mr. Wood.

§ 1462. *A mortgage securing negotiable bonds stands in the hands of a bona fide holder the same, as to defenses which can be made, as the bonds.*

Holding that there was valid power for the giving of the mortgage in question by the county of Wayne under the tenth section of the Mount Vernon

charter, and that there was in fact and in law a sufficient connection with other roads, we do not deem it necessary either to examine the other alleged sources of authority for the execution of the mortgage, or the alleged acts of the county in confirmation of it. Under the circumstances stated, we are also of the opinion that there was a sufficient submission of the question to the voters of the county, and that as against *bona fide* holders for value the question is not an open one. It has been decided at the present term of this court, that where a note secured by a mortgage is transferred to a *bona fide* holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defenses are allowed as against the mortgage than would be allowed were the action brought in a court of law upon the note. *Carpenter v. Longan*, 16 Wall., 271.

§ 1463. *The execution of a deed and mortgage by the judges of a county court is a sufficient execution by the county.*

In this action to foreclose the mortgage, the case stands in this respect as it would stand had the present suit been brought directly upon the bonds, and without reference to the mortgage. The execution of the deed and mortgage by Wilson and Scott, the judges of the county court of Wayne county, and on behalf of the county, was a sufficient execution by the county. In the mortgage and trust deed all the proceedings to authorize a conveyance by the county are recited — the title of the swamp lands in the county through an act of congress; the authority of the state to dispose of the same by the courts or county judges; the passage of the act incorporating the Mount Vernon Railroad Company,—and that the parties of the first part were duly authorized on behalf of the county to make disposition of the land in aid of the construction of the railroad; that the question had been referred to and passed upon by the voters of the county; that, by virtue of all the proceedings recited, the said judges, parties of the first part, had become endowed with power to dispose of the lands; therefore they conveyed, as set forth. This conveyance was, on the 20th of April, 1859, by an order that day entered in its minutes, recognized and confirmed as the act of the county of Wayne by its authorized agents, and by which the lands were mortgaged and conveyed. The seventh section of the Mount Vernon Railroad Act, above referred to, vests the power to dispose of these lands in the county court. This body must act by agents, and none can be more suitable and appropriate than the judges of the court. By the second section of the act to dispose of swamp and overflowed lands, passed January 22, 1852, it is provided that in the cases in the first section mentioned, the deed of conveyance shall be made by the judges of the county court as such, and countersigned by the clerk with his official seal. In reference to sales at auction, it is provided by the eleventh section that a conveyance shall be executed by “the court, signed in their official capacity,” and countersigned by the clerk. The signature of the clerk is nowhere declared to be an absolute prerequisite. In effect this was a conveyance on behalf of the county, by their agents for that purpose duly appointed. By the seventh section of the Mount Vernon charter the county court was authorized to sell or mortgage the lands, or to make such other disposition of them “as they may deem best for the public interest.” No mode was pointed out in which a conveyance should be made. No particular signature was made a condition to the validity of the conveyance. There is no ground for the objection to the form here adopted, viz.: by a deed of trust and mortgage, signed by the judges of the county court. In form and in substance the deed was well executed, and valid as the deed of the county.

§ 1464. *The word "bonus" does not necessarily imply a gratuity.*

The objection to the word "bonus" in the proposition submitted to the voters of Wayne county is not valid. This submission, in connection with the general subject of a failure to comply with the requisites prescribed by the statute, has been already discussed. Upon its individual merits we are also of the opinion that the objection is not valid. It is a verbal criticism merely — an objection to the words and not to the substance of the submission. A proposition was submitted to the voters, of which the affirmative was in these words: "For appropriating the swamp lands of Wayne as a bonus to any company for building a railroad through said county." It is said that the word "bonus" condemns the submission; that this word means a gratuity, a voluntary donation, a gift, and that a town or county cannot, although it have the direct authority of the legislature, give away its property. When this question is properly before us it will be disposed of. It does not, however, arise in this case. In the first place, if it be assumed that the word is correctly defined as a gift, or gratuity, that meaning is controlled and limited by the connection in which it is here used, to wit: that in consideration of it the company receiving the lands will undertake to build a railroad through the county. It is not simply a *bonus*, but a bonus to any company who shall undertake the great task of building a railroad through the county, a task which, it is loudly complained, has not yet been performed by any one. But, secondly, the meaning of the word bonus is not that given to it by the objection. It is thus defined by Webster: "A premium given for a loan or a charter or other privilege granted to a company; as, the bank paid a *bonus* for its charter; a sum paid in addition to a stated compensation." It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given.

Upon the principles announced in the opening of this opinion, the plaintiffs are entitled to a judgment for the amount of the bonds held by them. If we are right in the positions taken, there was, indeed, no real defense to the bonds. We think there was error in the decision of the case; that the judgment must be reversed, and a new trial had.

JUSTICES MILLER and FIELD dissented. JUSTICE DAVIS did not sit.

SMITH v. SAC COUNTY.

(11 Wallace, 139-164. 1870.)

ERROR to U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The plaintiff sets out in his petition all the proceedings, by vote of the county, which he deems necessary to authorize the issue of the bonds, with a copy of one of the bonds and coupons, and after describing, by number and otherwise, twenty-five of the coupons, avers that he is the owner and holder of them; that he received them in good faith before maturity and paid value therefor, and that the same are valid and legal claims against the county. The defendant answers, denying each and every allegation of the petition, and then sets up that the bonds were issued without authority of law, failure of consideration, and other defenses. The denials of the first part of the answer, though not strictly in the form required by the rule, put in issue every material fact alleged in the petition. It therefore made an issue on the

plaintiff's allegation that he became the holder of said coupons before maturity, and that he paid value therefor, so far as that might become material to be shown on the trial. The parties having by stipulation submitted the case to the court without a jury, and the court made a special finding of facts, on which it held the law to be for defendant, and rendered a judgment accordingly, the question before us is, whether the judgment is justified by the facts found?

§ 1465. *If there be fraud in the inception of negotiable paper, or in the circumstances under which it was taken by the person who transferred it to plaintiff, the latter must prove consideration.*

Treating the bonds and coupons sued on in this case, which are payable to bearer, as negotiable paper, and conceding to its fullest extent the protection which commercial usage throws around such paper in the hands of a *bona fide* purchaser for value before maturity, it is nevertheless undoubtedly true that circumstances may be shown in connection with the origin of such paper which will devolve upon the holder the burden of showing that he *did* give value for it before maturity. This principle is asserted in the text books of Chitty (Chitty on Bills, 260, 648), Story (Story on Prom. Notes, § 196), Parsons (2 Pars., Notes and Bills, 438), and others, and is so laid down and sustained by numerous citations of authorities by the learned American annotator of Smith's Leading Cases, p. 752. In one of the latest of the English cases, *Hall v. Featherstone*, 3 Hurlst. & N., 284, Pollock, C. B., says: "If there are any circumstances in the nature of fraud or illegality which can be left to the jury, proof of these circumstances will cast on the plaintiff the *onus* of showing that he gave value for the bill." To which Martin, Baron, added: "I think there was, at the close of the defendant's case, evidence for the jury in support of the plea. The authorities have established a principle which is contrary to the general rule, by which a defendant is bound to prove all the facts necessary to constitute a defense." And Bramwell said: "The cases have established that if there be fraud or illegality in the inception of a bill or in the circumstances under which it was taken by the person who indorsed it to plaintiff, he must prove consideration. That is established beyond controversy."

§ 1466. *Where a county judge executed and delivered court-house bonds outside his county, and at the same time the contractor gave him one of the bonds as a gratuity, and no court-house was built, held, a holder must show that he gave value for the bonds.*

With this statement of the law on that subject, we approach the examination of the facts found by the court. The fifth finding is "that the county judge in fact signed, sealed and delivered said bonds and coupons at Fort Dodge, in the county of Webster, and state of Iowa, and not within the county of Sac; and that the contractor, Meservy, gave one of said bonds as a gratuity to the county judge as soon as the same were delivered by said county judge to said Meservy, and no court-house was ever built by said contractor, or any other person in pursuance of said contract." Now, the coupons sued on, being part of the transaction here referred to, was there not enough in what the court finds to devolve upon the plaintiff the necessity of showing that he purchased for value? In the language of Chief Baron Pollock, "were there not circumstances in the nature of fraud, proof of which cast on the plaintiff the *onus* of showing that he gave value for the bonds?" They are circumstances from which no court or jury could fail to find fraud in the inception of the bonds on which he sued. Besides, he had, perhaps unnecessarily, but expressly,

averred that he had paid value, and this had been denied by defendant, so that the issue was fairly raised by the pleadings. He not only failed to prove that he gave value, but it does not appear that he offered any evidence to that effect. The bill of exceptions, which recites much that was offered and submitted in evidence, is silent on this point.

The sixth finding of the court is that the plaintiff was, at the time of commencing this action, and still is, the holder and owner of the twenty-five coupons declared on in the petition, that he became such holder by *transfer* thereof to him before maturity, and after the entry of the proceedings on the minute-book, etc. It must be taken, then, that plaintiff did not show that he was a holder for value. There is neither finding nor evidence that he gave value, and the statement that he became the holder by *transfer* before maturity does not imply that he was a purchaser in any sense or received them on any consideration whatever. Under these circumstances the plaintiff can occupy no better position than Meservy, to whom the bonds were originally delivered by the county judge. If Meservy had been plaintiff, ought the judgment to have been other than what it is on the record presented to us? He contracted to build the court-house, and never built it or attempted to do so. He received under this contract \$10,000 of what purported to be the bonds of the county. These bonds were signed, and the county seal, which was necessary to their validity, affixed by a person assuming to act as county judge in another county, at the place where Meservy resided, and as soon as the transaction was completed one of the bonds was given by Meservy as a gratuity to the person who had thus played the part of county judge. That the county judge should have left his own county and his official place of business, should have put the seal of the county in his pocket, and gone to meet Meservy in a place without the limits of his jurisdiction, should there have concocted these bonds, and, on delivering ten of them to Meservy, have received back one of them without any consideration but Meservy's satisfaction at the completion of the transaction, and that this should create in Meservy's favor a right of action against the county, is more than we can affirm. That the court-house was not built is only the natural result of such a proceeding. That the bonds should turn up in the possession of some one else was to be expected. But to hold that, after all this was shown in defense, such holder should have a judgment on those bonds, without any proof that he purchased them for value or that he gave any consideration for them at all, is in our judgment pushing the doctrine which gives sanctity to negotiable paper beyond any just principle or any decided case. We think the judgment of the circuit court was right, and it is accordingly affirmed.

MR. JUSTICE CLIFFORD dissented, holding that coupons, when indorsed in blank or made payable to bearer, are negotiable by delivery, and, so far as the rights of a holder are concerned, are subject to the rules applicable to promissory notes and bills of exchange (*White v. Railroad Co.*, 21 How., 575; *Murray v. Lardner*, 2 Wall., 110; *Moran v. Miami Co.*, 2 Black, 722; *Mercer Co. v. Hackett*, 1 Wall., 83; *Gelpcke v. Dubuque*, 1 id., 176; *Meyer v. Muscatine*, 1 id., 385; *Chester v. Dorr*, 41 N. Y., 282; *Turnbull v. Bowyer*, 40 id., 460; *Thomson v. Lee County*, 3 Wall., 327; *Park Bank v. Watson*, 42 N. Y., 492; *Goodman v. Simonds*, 20 How., 364; *Goodman v. Harvey*, 4 Ad. & Ell., 870; *Noxon v. De Wolf*, 10 Gray, 346); that the party in possession of negotiable paper is presumed to be a holder for value (*Wheeler v. Guild*, 20 Pick., 551;

Collins v. Martin, 1 Bos. & Pull., 648; Miller v. Race, 1 Burr., 452; Peacock v. Rhodes, 2 Doug., 633; Grant v. Vaughan, 3 Burr., 1516; Lawson v. Weston, 4 Esp., 56; Story on Bills, 4th edit., § 416; Byles on Bills, 10th ed., 119; Mills v. Barber, 1 Mees. & W., 425; Sisternans v. Field, 9 Gray, 336; Story on Bills, § 415; Uther v. Rich, 10 Ad. & Ell., 784; Bailey v. Bidwell, 13 Mees. & W., 73; Raphael v. Bank of England, 33 Eng. L. & Eq., 276; Stephens v. Foster, 6 Carr. & P., 289; Arbouin v. Anderson, 1 Ad. & Ell. (N. S.), 498; Wyman v. Fisk, 3 Gray, 238; Bailey v. Bidwell, 13 Mees. & W., 76; Smith v. Braine, 16 Ad. & Ell. (N. S.), 244; that where a municipal corporation has power to issue negotiable bonds, such bonds are no more liable to be impeached for any infirmity in the hands of a *bona fide* holder than any other commercial paper (Hull v. Marshall Co., 12 Ia., 142; Rogers v. Burlington, 3 Wall., 666; Seybert v. Pittsburg, 1 id., 272; Supervisors v. Schenck, 5 id., 784; Gelpcke v. Dubuque, 1 id., 203; Savings Co. v. New London, 29 Conn., 174; Tash v. Adams, 10 Cush., 252; State v. Delafield, 8 Paige, 533; S. C., 2 Hill, 177); that an executory contract is a good consideration for a negotiable instrument. Davis v. McCready, 17 N. Y., 232.

CROMWELL v. COUNTY OF SAC.

(6 Otto, 51-63. 1877.)

ERROR to U. S. Circuit Court, District of Iowa.

STATEMENT OF FACTS.—On the first trial of this case the county set up as an estoppel a judgment rendered in a suit by one Smith on earlier coupons on the same bonds (Smith v. Sac County, §§ 1465-66, *supra*), and offered to show that Cromwell was the real owner of the coupons in that suit, and that the suit was prosecuted for his benefit. The plaintiff offered to prove that he was a holder for value of the present coupons, but the evidence was excluded, and the ruling was reversed in the supreme court. (Cromwell v. Sac County, 4 Otto, 351.) This proof was made on the second trial in respect to the bonds payable in 1870 and 1871. It appears that the bonds payable in 1868 and 1869 were purchased by the plaintiff from one Clark, in 1873, and were taken for a precedent debt. Clark had purchased the bonds in 1863, by paying a debt for which they were pledged, and at the time of the purchase there were unpaid coupons attached. (See Smith v. Sac County, §§ 1465-66, *supra*.)

Opinion by MR. JUSTICE FIELD.

It appears that on the second trial of this case the plaintiff proved that he had received two of the bonds in suit — those payable in 1870 and 1871 — with coupons attached, before their maturity, and given value for them, without notice of any defense to them on the part of the county. Under our ruling, when the case was first here, there can be no doubt of his right to recover upon them. The only questions for our determination as respects them relate to the interest which they shall draw after maturity, and the interest which the judgment shall bear. These questions we shall hereafter consider.

§ 1467. *Non-payment of an interest coupon at maturity does not render the bond and immature coupons dishonored paper.*

As to the other two bonds in suit — those payable in 1868 and 1869 — and coupons annexed, it appears that when Clark purchased them on the 20th of May, 1863, there were attached to each the coupon due on the first of that month and all subsequent unmatured coupons. His vendor stated to him that the coupons previously matured had been paid, and that those due on

the first of the month would be paid in a few days. He had no notice at the time of any defense to the bonds, except such as may be imputed to him from the fact that one of the coupons attached to each of the bonds was then past due and unpaid. And the principal question for our determination is, whether, this fact existing, the plaintiff had, as to these bonds, the right of a holder for value before dishonor, without notice of any defenses by the county; or, as stated by counsel, whether this fact rendered the bonds themselves, and all subsequently maturing coupons, dishonored paper, and subjected them, in the hands of Clark and the plaintiff succeeding to his rights, to all defenses good against the original holder. The judges of the circuit court were divided in opinion upon this question; and, as in such cases the opinion of the presiding judge prevails, the decision of the court was against the plaintiff, and he was held to have taken the bonds and subsequent coupons as dishonored paper, subject to all the infirmities which could be urged against them in the hands of the original holder. In this decision we think the court erred. The special verdict does not show that the coupons overdue had been presented to the Metropolitan Bank for payment, and their payment refused. Assuming that such was the fact, the case is not changed. The non-payment of an instalment of interest when due could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities. The non-payment of the instalment of interest represented by the coupons due at the commencement of the month in which the purchase was made by Clark was a slight circumstance, and, taken in connection with the fact that previous coupons had been paid, was entirely insufficient to excite suspicion even of any illegality or irregularity in the issue of the bonds.

§ 1468. *Municipal bonds are negotiable paper, and a purchaser for value before maturity takes them freed from any infirmity in their origin.*

Obligations of municipalities in the form of those in suit here are placed, by numerous decisions of this court, on the footing of negotiable paper. They are transferable by delivery, and, when issued by competent authority, pass into the hands of a *bona fide* purchaser for value before maturity, freed from any infirmity in their origin. Whatever fraud the officers authorized to issue them may have committed in disposing of them, or however entire may have been the failure of the consideration promised by parties receiving them, these circumstances will not affect the title of subsequent *bona fide* purchasers for value before maturity or the liability of the municipalities. As with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part. Such is the decision of this court, and substantially its language, in the case of *Murray v. Lardner*, reported in the 2d of Wallace (110; §§ 1340-42, *supra*), where the leading authorities on the subject are considered.

The interest stipulated was a mere incident of the debt. The holder of the bond had his option to insist upon its payment when due, or to allow it to run until the maturity of the bond; that is, until the principal was payable. Many causes may have existed for a failure to meet the interest as it matured, entirely independent of the question of the validity of the bonds in their inception. The payment of previous instalments of interest would seem to suggest that

only causes of a temporary nature had prevented their continued payment. If no instalment had been paid, and several were past due, there might have been greater reason for hesitation on the part of the purchaser to take the paper, and suspicions might have been excited that something was wrong in issuing it. All that we now decide is, that the simple fact that an instalment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as a *bona fide* purchaser. *National Bank of North America v. Kirby*, 108 Mass., 497. To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every instalment of interest on them as it matured; and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons dishonored paper, subject to all defenses good against the original holders, would greatly impair the currency and credit of such securities and correspondingly diminish their value. We are of opinion, therefore, that Clark took the two bonds in suit and the subsequently maturing coupons as a *bona fide* purchaser, and as such was entitled to recover upon them, whatever may have been their original infirmity. The plaintiff Cromwell succeeded, by his purchase from Clark, to all Clark's rights, and can enforce them to the same extent. Nor does it matter whether, in the previous action against the county by Smith, who represented him, he was informed of the invalidity of the bonds as against the county, and knew, when he purchased, the circumstances attending their issue, or whether he was made acquainted with them in any other way. The rule has been too long settled to be questioned now, that, whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with a like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition. This doctrine, as well as the one which protects the purchaser without notice, says Story, "is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy." Story, *Prom. Notes*, sec. 191. The only exceptions to this doctrine are those where the paper is absolutely void, as when issued by parties having no authority to contract, or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction.

§ 1469. *A purchaser of negotiable securities from a bona fide holder for value before maturity takes them freed from all infirmities in their origin, though he may not have paid full value.*

The plaintiff, therefore, holds the bonds and the subsequent coupons as his vendor held them,—freed from all infirmities attending their original issue. Nor is he limited in his recovery upon them or upon the other two bonds, as contended by counsel for the county, to the amount he paid his vendor. Clark had given full value for those he purchased, and could have recovered their amount from the county, and his right passed to his vendee. But, independently of the fact of such full payment, we are of opinion that a purchaser of a

negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law, but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities and those of private corporations are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the markets were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes only a loan upon such paper or takes it as collateral security for a precedent debt may be limited in his recovery to the amount advanced or secured. *Stoddard v. Kimball*, 6 Cush. (Mass.), 469; *Allaire v. Hartshorne*, 1 Zab., 665; *Williams v. Smith*, 2 Hill (N. Y.), 301; *Chicopee Bank v. Chapin*, 8 Met. (Mass.), 40; *Lay v. Wissman*, 36 Ia., 305.

§ 1470. *The law of interest on bonds and coupons after maturity and after judgment.*

The only questions remaining which we deem of sufficient importance to require consideration relate to the interest which the bonds and coupons in suit shall draw after their maturity and the interest which the judgment shall bear. The statute of Iowa on this subject provides that the rate of interest shall be six per cent. a year on money due by express contract unless a different rate be stipulated, and on judgments and decrees for the payment of money in such cases, but that parties may agree in writing for any rate of interest not exceeding ten per cent. a year, and that any judgment or decree thereon shall draw the rate of interest expressed in the contract. The bonds, by their terms, as already stated, bear interest at the rate of ten per cent. until maturity. The plaintiff claims that they should draw the same rate of interest after maturity, and that, under the statute of Iowa, the judgment should also bear ten per cent. interest. The court below allowed only seven per cent. on the bonds after maturity, that being the rate in New York, where the bonds are payable, and only six per cent. on the judgment. In this ruling, we think the court erred. By the settled law of Iowa, as established by repeated decisions of her highest court, contracts drawing a specified rate of interest before maturity draw the same rate of interest afterwards. *Hand v. Armstrong*, 18 Ia., 324; *Lucas v. Pickel*, 20 id., 490. A like decision has been made in several of the states upon similar statutes. *Brannon v. Hursell*, 112 Mass., 63; *Marietta Iron Works v. Lottimer*, 25 Ohio St., 621; *Monett v. Sturges*, id., 384; *Kilgore v. Powers*, 5 Blackf. (Ind.), 22; *Phinney v. Baldwin*, 16 Ill., 108; *Etnyre v. McDaniel*, 28 id., 201; *Spencer v. Maxfield*, 16 Wis., 178, 541; *Pruyn v. City of Milwaukee*, 18 id., 567; *Kohler v. Smith*, 2 Cal., 597; *McLane v. Abrams*, 2 Nev., 199; *Hopkins v. Crittenden*, 10 Tex., 189. There are, however, conflicting decisions; but the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment. *Pearce v. Hennessey*, 10 R. I., 223; *Lash v. Lambert*, 15 Minn., 416;

Searle v. Adams, 3 Kan., 515; Kitchen v. Branch Bank at Mobile, 14 Ala., 233. The statutory rate of six per cent. in Iowa only applies in the absence of a different stipulated rate. As the judgment in case of a stipulated interest in the contract must bear the same rate, it could not have been intended that a different rate should be allowed between the maturity of the contract and the entry of the judgment.

The case of Brewster v. Wakefield, 22 How., 118, is cited against this view. That case came from a territorial court, and arose under a statute which allowed parties to agree upon any rate of interest, however exorbitant, and only prescribed seven per cent. in the absence of such agreement. This court, bound by no adjudication of the territorial court, and looking with disfavor upon the devouring character of the interest stipulated in that case, gave a strict construction to the contract of the parties. "The law of Minnesota" (then a territory), said the court, "has fixed seven per cent. per annum as a reasonable and fair compensation for the use of money; and when a party desires to extort, from the necessities of a borrower, more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written in plain and unambiguous terms; for with such a claim he must stand on his bond." The statute of Iowa only allows the parties by their agreement to stipulate for interest up to ten per cent. a year,—a rate which has not been deemed extravagant or unreasonable in any of the states lying west of the Mississippi. Be that as it may, the question is one of local law under a statute of a state, and the construction given by its tribunals should conclude us.

§ 1471. *The rate of interest where the contract is made in one state and payable in another.*

The position of counsel, that because the rate of interest in New York, where the bonds were payable, is only seven per cent., the bonds can only draw that rate after maturity, is not tenable. When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern. Miller v. Tiffany, 1 Wall., 298; Depeau v. Humphreys, 8 Mart. (La.), 1; Chapman v. Robertson, 6 Paige (N. Y.), 627, 634; Peck v. Mayo, 14 Vt., 33; Butters v. Olds, 11 Ia., 1. The bonds were made with reference to the law of Iowa as to interest, and not to that of New York, where interest above seven per cent. is deemed usurious and avoids the whole contract. The obligor is a municipal corporation of Iowa, the bonds were deliverable in that state, and proceedings to enforce their payment could only be had in courts sitting there. With reference to interest on the coupons after their maturity, that can be allowed only at the rate of six per cent. under the law of Iowa. See, as to coupons drawing interest, Aurora City v. West, 7 Wall., 82.

It follows, from the views expressed, that the plaintiff was entitled to judgment for the amount of the four bonds and the coupons in suit, with interest on the bonds after maturity until judgment at the rate of ten per cent. a year, and with interest on the coupons after their maturity until judgment at the rate of six per cent. a year; and that the judgment should draw interest at the rate of ten per cent. a year upon the amount found due on the bonds, and at the rate of six per cent. a year upon the amount found due on the coupons, including the costs of the action. The judgment of the circuit court must, therefore, be reversed, and the cause remanded with directions to enter a judgment for the plaintiff in conformity with this opinion; and it is so ordered.

§ 1472. In general.— The possession of a negotiable bond is strong *prima facie* evidence of just title, and, in ordinary cases, throws upon the party questioning it the burden of showing that it is not *bona fide*; that the holder had notice of some vice or defect which vitiates the title. *North Carolina R. Co. v. Drew*, 8 Woods, 891.

§ 1473. There being satisfactory evidence, in an action on bonds, that the holder is a *bona fide* holder, and no evidence to the contrary, the court may refuse to let the question go to the jury. *Phelps v. Lewiston*,* 15 Blatch., 131.

§ 1474. Where a master has authority to determine who are the *bona fide* holders of bonds of a county, parties presenting themselves with the bonds of the county, and stating that they are holders in good faith, are entitled to the presumption of *bona fides* in their favor, and will be held to be holders in good faith in the absence of proof to the contrary. *Kennicott v. The Supervisors*,* 6 Biss., 138. (Reversed. See §§ 1458-64.)

§ 1475. Holder for value.— A railroad company delivered bonds issued by it to a contractor for the construction of its road, in payment of work done and to be done by him, and to enable him to complete his contract. The bonds, by the assent of the contractor and the railroad company, were transferred to a rolling mill as a pledge to secure payment for iron furnished for the railroad by the rolling mill, for which it held the contractor's notes. *Held*, the rolling mill was a holder for value. *Allen v. Dallas, etc., R. Co.*, 8 Woods, 316.

§ 1476. A. was a creditor of a railroad company in a certain amount, for which he held its obligation, secured by a mortgage on its road and property. To procure the release of this mortgage the company pledged him a number of its bonds as collateral security for the payment of his claim. The bonds were subsequently sold in conformity with the contract of pledge, and A. bought them in. *Held*, that he was a holder for value. *Ibid*.

§ 1477. The purchaser from a *bona fide* holder of municipal bonds succeeds to all the rights of his assignor independent of his own good faith. One who receives bonds in payment of an antecedent debt is a purchaser for value. *Foot v. Hancock*,* 15 Blatch., 843.

§ 1478. Negotiability.— An instrument, to be negotiable, need not, in terms, be made payable to bearer or order; other equivalent expressions will be sufficient. Thus municipal bonds, payable to a railroad company or to the holder, "if the bond is transferred by the signature of the president of the company," are, in effect, payable to the company or order, and are negotiable. *County of Wilson v. National Bank*, 13 Otto, 770 (§§ 1044-1048).

§ 1479. Bonds which recite on their face that they are convertible into bonds thereafter to be issued contingently are not negotiable; and where they purport to be issued on condition that the road be built to a certain point, if the road is not built the consideration fails, and the bonds and coupons constitute no legal obligation to pay. *Merriwether v. Saline County*,* 5 Dill., 265.

§ 1480. A holder of commercial paper is presumed to have taken it before maturity for a valuable consideration, and without notice of any objection to which it was liable. *San Antonio v. Mehaffy*,* 6 Otto, 312.

§ 1481. The common law rule that the purchaser of a chattel acquires no better title than his vendor possessed has no application to negotiable paper. Nothing but bad faith can invalidate the title of the purchaser of such paper; and this rule applies to negotiable municipal bonds. *Johnson v. Lewis*,* 2 McC., 479.

§ 1482. In Illinois, bonds payable to a person named or bearer pass by delivery. And it is held that, where a statute is passed after bonds are made, making such bonds negotiable by delivery, such statute will apply to actions commenced after it took effect. *Roberts v. Bolles*, 11 Otto, 119 (§§ 1006-1009).

§ 1483. The bonds of an individual, issued under his seal, made payable to a certain person named or bearer, are negotiable paper, and not specialties, so as to make them subject to equities in the hands of an assignee. *In re Leland*, 6 Ben., 175.

§ 1484. In Virginia the assignee of a chose in action, bringing suit in his own name, by express statute sues subject to all equities which the defendant had against the assignor before notice of the assignment. A county of that state issued its bonds in payment of a subscription to the stock of a railroad, payable to the company "or its assignees." *Held*, that the bonds were not negotiable. *Cronin v. Patrick Co.*,* 4 Hughes, 524.

§ 1485. The indorsement by a railroad company of a negotiable municipal bond renders the company liable as indorser, although the bond has twenty years to run. *Bonner v. City of New Orleans*,* 2 Woods, 135.

§ 1486. It is sufficient to charge the indorser on such bond that notice was served at the principal office of the indorser during the day following the day of demand. It need not be served during business hours. *Ibid*.

§ 1487. The bond of a railroad company, made payable in blank, no payee being inserted, when delivered to a holder, is held to be intended by the company as a negotiable security payable to the holder as bearer; and therefore the holder may negotiate it by inserting the

name of another in the blank, and the latter may maintain his action against the company. *White v. Vermont & Mass. Railroad Co.*, * 21 How., 575.

§ 1488. The seven-thirty notes of the United States, payable to the order of —, were, without the blanks being filled up, payable to bearer, and the writing of anything on the back of the notes, with the blanks not filled, did not amount to an indorsement in the sense of the law merchant, so as to restrict their negotiability by delivery. *United States v. Vermilye*, * 10 Blatch., 287.

§ 1489. And the doctrine that the purchaser of an overdue note takes it subject to defenses, and acquires only the title of his vendor, applied to such securities. *Ibid.*

§ 1490. And where such notes were stolen, and negotiated after maturity, the purchaser acquired no title; and the fact that notes of the description continued to be bought and sold was not material. *Ibid.*

§ 1491. Proof of bad faith.—Transcripts from the records of a county court, purporting to contain evidence of irregularity in the issue of county bonds, when offered in evidence without connection with any other evidence, for the purpose of establishing *mala fides* or notice of defects on the part of the plaintiff in an action on the bonds, are rightly excluded. *Chambers County v. Clews*, 21 Wall., 317.

§ 1492. Private correspondence between third parties cannot affect the *bona fides* of holders of bonds who had no connection with such correspondence. *Kennicott v. The Supervisors*, * 6 Biss., 138. Reversed in 16 Wall., 452 (§§ 1458-64).

§ 1493. Where the only evidence on the subject was the deposition of the holder of railroad bonds, that he took them on a settlement with his bankers, in absolute payment of money due him, at seventy-five cents on the dollar, and had no notice of any defect in the title of his vendor, held, that this established that he was a *bona fide* holder. *Howell v. Western R. Co.*, 4 Otto, 463.

§ 1494. Stolen bonds.—The bonds of a railroad company, payable to bearer, with interest coupons attached, were stolen from the state of Virginia, which held them in exchange for bonds of the state delivered to the railroad company. They were sold for value to certain bankers, who had no knowledge of the theft, nor was there any circumstance attending their purchase tending to put the bankers on inquiry, except that they purchased of a stranger, and eight coupons were overdue. The bankers were held entitled to recover against the company, except as to the overdue coupons. *Gilbough v. Norfolk & Petersburg R'y Co.*, 1 Hughes, 410.

§ 1495. Recitals.—Where bonds purport on their face to have been issued in pursuance of law, the holder is not required to inquire as to the regularity of their issue. *Davis v. Kendallville*, * 5 Biss., 280; *Marcy v. Township of Oswego*, * 2 Otto, 637; *Lynde v. The County*, 16 Wall., 6 (§§ 1051-55); *Miller v. Town of Berlin*, * 13 Blatch., 245; *Milner v. City of Pensacola*, * 2 Woods, 632; *Walnut v. Wade*, * 13 Otto, 683; *Marshal v. Elgin*, * 3 McC., 35.

§ 1496. A city is estopped by the recital on the face of a bond to deny its verity. A *bona fide* purchaser has a right to regard the recital as true, and is not bound to look further. *San Antonio v. Mehaffy*, * 6 Otto, 312.

§ 1497. An innocent holder is not required to look beyond the authority and recital in the bond to see whether formalities of any kind, embracing the question as to the subscription, have been complied with. *Pollard v. Pleasant Hill*, * 3 Dill., 195.

§ 1498. Thus, where the law authorized the issue of bonds to a road to aid in building a branch of that road, bonds issued to the branch by name were held valid in the hands of an innocent holder. *Ibid.*; *County of Cass v. Jordan*, * 5 Otto, 373; *Jordan v. Cass Co.*, 3 Dill., 245.

§ 1499. Where bonds purport to have been issued for the purpose authorized by law, it cannot be shown, as against a *bona fide* holder, that they were issued for another and illegal purpose. *Pollard v. Pleasant Hill*, * 3 Dill., 195.

§ 1500. Purchasers of municipal bonds are charged with knowledge of the facts recited therein. *Jarrolt v. Moberly*, * 5 Dill., 253.

§ 1501. Where bonds do not contain recitals as to the authority under which they were issued, the burden is on the holder to show that they were issued pursuant to law. *Hopper v. Town of Covington*, * 8 Fed. R., 777.

§ 1502. In the absence of recitals it seems there is no presumption in favor of a *bona fide* holder that the bonds were issued in compliance with a constitutional provision limiting the indebtedness of the municipality. *Buchanan v. Litchfield*, 12 Otto, 278 (§§ 1232-36).

§ 1503. Negotiable municipal bonds payable out of the state or to bearer, if their issue is authorized by law, are unimpeachable in the hands of *bona fide* holders for value. If the act authorizing such issue imposes conditions which the bonds recite upon their face to have been fulfilled, the county is estopped to deny the performance of the conditions. *Woodward v. Board of Supervisors of Calhoun Co.*, * 2 Cent. L. J., 398.

§ 1504. Where the ordinance under which city bonds were issued recites that the needed election was duly had, etc., in a suit on the bonds the city is estopped to deny that the voters were duly sworn. A recital in the ordinance is held to have the same effect as a recital on the face of the bond. *Gause v. City of Clarksville*, 1 McC., 78 (§§ 1284-88).

§ 1505. Where the recitals on the face of a bond show that its issue was unauthorized, it is void even in the hands of a *bona fide* holder for value. *Harshman v. Bates County*, 2 Otto, 569 (§§ 899, 900).

§ 1506. Where the mayor and recorder of a city issue its negotiable bonds, reciting a compliance with the law, it is too late to maintain in defense that the mayor and recorder acted without authority, when the city is sued on the bonds by a *bona fide* holder. *Larned v. Burlington*,* 4 Wall., 275.

§ 1507. Where a county has authority to issue bonds of a certain description, and bonds are issued reciting on their face that they are issued pursuant to such authority, a *bona fide* holder is not obliged to inquire whether the county has issued more bonds than it was authorized to do. *County of Moultrie v. Fairfield*, 15 Otto, 370 (§§ 898-896).

§ 1508. Where bonds issued by a county recite upon their face that they were issued on a subscription made at a certain time under authority which existed at that time for the making of such subscription, the county is estopped, as against an innocent purchaser, to set up that the subscription was not made till a later date, when authority to make it had expired. *County of Moultrie v. Rockingham Ten-Cent Savings Bank*, 2 Otto, 681 (§§ 872-875).

§ 1509. The recital in county bonds, that the subscription on which they were issued was made pursuant to the orders of a board which had authority to make the subscription and issue the bonds, is conclusive against the county, that the prescribed preliminaries to the subscription have been observed in an action by a *bona fide* holder. *County of Clay v. Society for Savings*, 14 Otto, 579 (§§ 1019-28).

§ 1510. Where a county court has power to subscribe to stock in a railroad and issue bonds of the county therefor, and the bonds issued under such authority recite a valid subscription, a *bona fide* holder for value can recover thereon notwithstanding irregularities in the issue, of which he has no actual notice. *Nicolay v. St. Clair County*,* 8 Dill., 163.

§ 1511. A *bona fide* holder of county bonds, which by their recitals import a compliance with law, is not chargeable with notice of the contents of record of the county court which issued the bonds. Thus, where the bonds recite a subscription to the stock of the A. company, he is not chargeable with constructive notice that the subscription was in fact made to the stock of the B. company, as is disclosed by the record. *Ibid*.

§ 1512. Where bonds of a county, issued under authority of law, contain recitals that their issue was duly authorized by a vote of the people of the county, and that the result of such election was entered upon the commissioners' records as required by law, and the bonds have been used in building bridges in the county—the purpose for which they were issued,—a purchaser in good faith may recover thereon, notwithstanding the recitals were false, where he took them without knowledge of the infirmity. *Lewis v. Board of Commissioners*,* 2 McC., 464.

§ 1513. *Bona fide* holders of municipal bonds, which recite that they were issued pursuant to law, may recover thereon, notwithstanding the act which allowed the commissioners to borrow only such a sum as a majority of the tax-payers, representing a majority of the taxable property, should fix in writing, and which prohibited the exercise of such a power unless such consent should be acknowledged and recorded, together with a copy of the assessment roll of the town, in the clerk's office, was almost totally disregarded by the commissioners. It is no objection that the commissioners were not made the judges of the sufficiency of the tax-payers' assent, and that they were special agents of the town, and did not have general powers to represent the city in its affairs. *Miller v. Town of Berlin*,* 18 Blatch., 245.

§ 1514. Irregularities.—Questions of form merely, or irregularity, or fraud, or misconduct on the part of the agents of the town, cannot be considered in an action by a *bona fide* holder of municipal bonds. *East Lincoln v. Davenport*, 4 Otto, 801 (§§ 1208-9).

§ 1515. The fact that the judges of election were appointed by the county court instead of by the board of registration is an irregularity that cannot be urged against the bonds in the hands of an innocent holder. *Huidekoper v. Buchanan County*,* 8 Dill., 175.

§ 1516. A *bona fide* holder of bonds is not required to inquire into the regularity of the election—whether the registration laws were properly observed. *Judson v. City of Plattsburg*,* 8 Dill., 181.

§ 1517. A party taking municipal bonds in good faith has a right to presume that if the public agents issuing them had legal authority to act, they had fully complied with the requirements of that authority; and in an action thereon the municipality cannot be heard to object to the regularity of its own proceedings. *Meyer v. City of Muscatine*, 1 Wall., 384 (§§ 921-925).

§ 1518. Where bonds are issued by the agents of a county, negotiable in form, such agents being legislatively authorized, and the bonds on their face do not show non-compliance with conditions precedent, and no steps have been taken by the county authorities to prevent the irregular issue of its bonds, the county is estopped from objecting to the irregularity of the issue as against holders in good faith. *Cronin v. Patrick Co.*,* 4 Hughes, 524.

§ 1519. Bonds were issued by order of the county court, and were signed by the presiding justice and sealed with the seal of the county. The deputy clerk also signed the clerk's name, with the knowledge of the presiding justice. These bonds, not meeting with favor, they were taken up and destroyed, and new bonds issued, corresponding in style and date with the old ones. The old clerk being then out of office, his name was signed by the deputy, who had become the clerk, the signatures on the coupons being lithographed. The statute made no provision as to the mode of executing the bonds. The county paid interest on the new bonds, and received and retained a certificate of stock. The agent of the county participated in all the proceedings. *Held*, that the bonds were valid in the hands of a *bona fide* holder. *McKee v. Vernon County*,* 3 Dill., 210.

§ 1520. The city of Fort Scott passed an ordinance for the issue of its bonds to a certain railroad upon several conditions. It afterwards passed a second ordinance reciting the first, and that the proposition submitted under the first ordinance had received the requisite majority, and that the conditions and requirements had been complied with, and ordaining that the city issue bonds in a certain amount. The court held that the plaintiff, in an action on the bonds, being presumed to be a *bona fide* holder, no irregularities in their issue could be set up in defense. *Keane v. Fort Scott*,* 1 Cent. L. J., 140.

§ 1521. Want of power.—There can be no *bona fide* holders without notice when there is no power to issue the bonds. *Lewis v. City of Shreveport*,* 3 Woods, 205; *Township of East Oakland v. Skinner*, 4 Otto, 255 (§§ 842-845); *Smith v. Town of Ontario*,* 15 Blatch., 267; *County of Dallas v. MacKenzie*, 4 Otto., 663.

§ 1522. Where a municipal corporation issues negotiable bonds without legislative authority, there can be no estoppel, arising from the acts of the city council, or its resolutions, or the negotiable form of the bonds, or recitals contained in the bonds, which will prevent inquiry into the authority of the city to issue them. Nor will the plea that the plaintiffs are *bona fide* holders avail, where the defense is want of power in the city to issue the bonds. *Chisholm v. City of Montgomery*,* 2 Woods, 584.

§ 1523. Bonds which are not issued in pursuance of express legislative authority, and in a mode prescribed by it, possess none of the qualities of commercial paper. *Hopper v. Town of Covington*,* 8 Fed. R., 777.

§ 1524. The only defense available against negotiable bonds in the hands of an innocent holder is the want of power to issue them. *Huidekoper v. Buchanan County*,* 3 Dill., 175.

§ 1525. There must be a special authority for the issue of municipal bonds; and if the authority exists, a *bona fide* holder is not affected by the omission of formalities and ceremonies, nor by fraud on the part of agents of the county; also, where any officer or tribunal is authorized to find the existence of certain facts necessary to the issue of bonds, a recital in the bonds issued by such officer or tribunal, that such facts exist, is conclusive in favor of a *bona fide* holder. *Ibid*.

§ 1526. Where a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority. *Miller v. Town of Berlin*,* 13 Blatch., 245; *Milner v. City of Pensacola*,* 2 Woods, 632; *San Antonio v. Mehaffy*,* 6 Otto, 312.

§ 1527. Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution; but if there is a want of power, no legal liability can be created. *Anthony v. County of Jasper*, 11 Otto, 693 (§§ 1250-54).

§ 1528. Where a county, having authority to do so, issues bonds, and they come into the hands of a *bona fide* holder, he is not required to prove the performance of any of the requisites necessary to give them validity. The want of such performance is a matter of defense, and the burden of proof is on the county. *County of Clay v. Society for Savings*, 14 Otto, 579 (§§ 1019-23).

§ 1529. The line of a railroad was located on the north side of the Missouri river, and only counties through which the railroad should run had any authority to subscribe to the capital stock. A county lying south of the river subscribed and issued bonds. *Held*, that the bonds were void in the hands of an innocent holder. *Sherrard v. Lafayette County*,* 3 Dill., 236.

§ 1530. Compliance with conditions.—Where the obligation of a municipal bond is made upon the express condition, recited in the bond, that the railroad in aid of which it was issued should be built to a certain point, such condition binds every holder of the bond and

the coupons. And it is not material whether the coupons contain the condition or not, it being sufficient that they refer to the bond. If this condition is broken the bonds are valueless. *Green v. Dyersburg*, 2 Flip., 477 (§§ 909-914).

§ 1531. Where a road was to be completed by a certain time, and the county court extended the time on application, and before the expiration of the extended time declared the road completed to its satisfaction and issued the bonds, *held*, that the county was estopped to allege that the road was not completed within the contract. *County of Randolph v. Post*, 3 Otto, 502 (§§ 915-917).

§ 1532. On the foreclosure of a mortgage on a railroad, including municipal bonds delivered to the company in payment for stock, the mortgagee is not a holder of the bonds in good faith, and without notice of equities, between the company and the city, arising from the failure on the part of the company to expend the proceeds of the bonds in the construction of the road within the county in which the city is situated, as required by the law of the state, the provisions of the submission to the voters and the specific agreement of the company. The company having done no work at all in the required county, and having never negotiated the bonds to raise funds, as they were allowed to do by the mortgage, the mortgagee must take subject to these equities of the city. *Foote v. Mount Pleasant*,* 1 McC., 101.

§ 1533. Granting the power to issue municipal bonds to aid in building a railroad, it is not competent to show, as against a *bona fide* holder, that the bonds were delivered by the agents of the town to the officers of the railroad company before any seals were affixed, and with dates and numbers of the bonds in blank, with the understanding that the bonds were not to be negotiated until certain conditions on the part of the company were fulfilled; but that, before these conditions were fulfilled, the officers of the company affixed seals to the bonds, filled up the blanks, and negotiated them. *Phelps v. Town of Yates*,* 16 Blatch., 192.

§ 1534. If a condition which was unauthorized by the act under which county bonds were issued in aid of a railway company were omitted to be printed upon the bonds, their validity in the hands of a third party is not impaired, whether he had notice of the condition or not. *Howard v. Crawford County*,* 1 Pittsb. R., 536.

§ 1535. Estoppel.—A board of education issued bonds under a law authorizing school districts to issue bonds, etc., for the purpose of building school houses. In a suit on the bonds, *held*, that the defendant, in issuing the bonds signed by its officers and sealed by its corporate seal, exercised the usual functions of a corporation, and was estopped to deny its corporate existence. *Bonham v. Board of Education*,* 4 Dill., 156.

§ 1536. Where a corporation is authorized to issue bonds, "or otherwise pledge the faith of the city," it is estopped to deny the validity of an unsealed promise to pay. The doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in law, and should not be applied where it will defeat the ends of justice, if such a result can be avoided. *San Antonio v. Mehaffy*,* 6 Otto, 312.

§ 1537. Where a county issues its bonds to a railroad company, and they have passed into the hands of innocent holders, the county is estopped to deny the corporate existence of the company. *Darlington v. La Clede County*,* 4 Dill., 200.

§ 1538. Conclusiveness of acts of officers.—Where it is made the duty of a county judge to pass upon a petition for a subscription to a railroad company, and he orders the subscription and an issue of bonds, his judgment cannot be attacked in a suit on the bonds by a *bona fide* holder. *Lyons v. Munson*,* 9 Otto, 684; *S. C.*, 9 Otto, 686; *Foote v. Hancock*,* 15 Blatch., 343; *Phelps v. Lewiston*,* 15 Blatch., 181.

§ 1539. Where bonds were issued to a railroad company pursuant to the provisions of its charter, they were held valid in the hands of innocent holders notwithstanding they were not issued in compliance with a prior special act applicable to the county. The power being shown to exist, the county court was made the judge as to compliance with preliminaries, and an innocent purchaser had a right to presume that all preliminary requirements had been complied with. *Burr v. Chariton County*,* 2 McC., 603.

§ 1540. Where a statute authorizes certain officers to issue bonds on the affidavit of the assessor that the assent of the voters has been obtained, it is not incumbent upon a *bona fide* holder of the bonds to prove that such assent was obtained. *McCall v. Town of Hancock*,* 10 Fed. R., 8; *Phelps v. Lewiston*,* 15 Blatch., 181; *Irwin v. Town of Ontario*,* 18 Blatch., 259.

§ 1541. Where a vote is necessary to render municipal bonds valid, an innocent holder is authorized to suppose that a vote was had. Where the local or municipal officers are made the judges to decide whether antecedent or preliminary steps or conditions have been complied with, their decision, stated or implied in the recitals, is conclusive in favor of an innocent holder. *Darlington v. La Clede County*,* 4 Dill., 200.

§ 1542. The commissioners of a county had authority to issue the bonds of the county,

provided that they should first submit the question to the voters of the county and a majority should be in favor of the issue. Pursuant to the required submission, a vote was had and the vote canvassed by the commissioners, a majority declared to be in favor of the issue and the bonds issued. Subsequently an additional return was made from one township which was not before the board when the canvass was made. Had it been, the result would have been different. Although the bonds contained no recitals, it was held that the action of the commissioners, in declaring the vote sufficient and issuing the bonds, was conclusive as between the county and innocent holders. The bonds containing no recitals, purchasers were bound to see to it that the requisite vote was had, but they were not bound to go behind the declaration of the commissioners that the vote was sufficient. *Block v. Commissioners, 9 Otto, 686 (§§ 1087-88).*

§ 1543. Election.—Where it is made the duty of a certain officer to determine whether a proper election was held, and he passes upon the question, makes the subscription and issues bonds, objections to the regularity of the election cannot be urged against a *bona fide* holder. *St. Joseph Township v. Rogers, 16 Wall., 644 (§§ 1674-77).*

§ 1544. Where bonds signed by the mayor and clerk of a city recite that they were issued by virtue of a city ordinance passed on a certain day, the city is estopped, as against *bona fide* purchasers of the bonds for value, to deny that action was not taken on a petition of two-thirds of the freeholders of the city. *Van Hostrup v. Madison City, 1 Wall., 291 (§§ 1196-97).*

§ 1545. That bonds, issued by a municipal corporation under legislative authority, were issued upon an insufficient vote of the citizens of the town, is no defense in an action on the bonds by *bona fide* holders. *Milner v. City of Pensacola,* 2 Woods, 692.*

§ 1546. On the 8th of June a town voted to make a subscription to a railroad, and to donate a right of way. On the 18th of July another meeting was held at which the proceedings of the previous meeting were rescinded and another donation voted. Subsequently the legislature passed an act ratifying and confirming subscriptions to the road in question, and especially the proceedings on the 8th of June. The bonds were duly issued, and purported to be issued pursuant to the election of June 8th, and in compliance with the law. *Held*, that they were valid in the hands of *bona fide* holders. *Portsmouth Savings Bank v. Town of Yellow Head,* 3 Biss., 474.*

§ 1547. In a suit, by a *bona fide* holder, on a bond which recites upon its face that it was issued in payment for subscription to the stock of the Cape Girardeau & State Line Railroad Company, and authorized by a vote of more than two-thirds of the voters of the township, at an election for that purpose at a certain time, it cannot be insisted in defense that the subscription was not valid, and that, in fact, two-thirds of the voters of the township did not vote for the subscription. And it makes no difference that the requirement of a two-thirds vote is a constitutional provision. *Westermann v. Cape Girardeau Co.,* 5 Dill., 112.*

§ 1548. *Lis pendens*.—The pendency of a suit is not constructive notice to the purchaser of negotiable paper which is the subject of such suit. *Preble v. Board of Supervisors,* 8 Biss., 358.*

§ 1549. It is no defense to bonds in the hands of an innocent holder that, in a suit against a former holder, such bonds had been declared void and a decree entered enjoining their negotiation; but one purchasing with knowledge of the proceedings in such suit is not an innocent holder, and is entitled to no protection. *Durant v. Iowa County,* Woolw., 69.*

§ 1550. Holders of negotiable bonds are not affected by the fact that they purchased during the pendency of a suit in which the law under which they were issued was held invalid, when they were not parties and had no knowledge of the pending suit. *Marshal v. Elgin,* 8 McC., 35.*

§ 1551. The *bona fides* of a purchaser of municipal bonds is not affected by the fact that he purchased during the pendency of proceedings to restrain the further issue, transfer or negotiation of the bonds. *Phelps v. Lewiston,* 15 Blatch., 131; County of Cass v. Gillett,* 10 Otto, 585.*

§ 1552. Municipal bonds were issued, in pursuance of law, by commissioners of a town in New York. After the issue of the bonds, and their negotiation, and after the assessors had levied a tax and, with the proceeds, paid interest on the bonds, the supreme court of New York issued a *certiorari* to the commissioners to review their conduct, and also a *certiorari* to the assessors to inquire into their acts. On the hearing on the writs the supreme court vacated the proceedings of both these bodies and the appointment of the commissioners. On appeal to the court of appeals, that court reversed the judgment below so far as it affected the commissioners, and dismissed the appeal as to the assessors, on the ground that the judgment as to them could have no effect on any future litigation as to the bonds, and as the judgment was harmless they would let it stand. In an action on the bonds by a purchaser in good faith without notice of these proceedings, it was held that evidence of these proceedings was improper, as it could not affect the rights of the purchaser. It was also held that evidence of

like *certiorari* proceedings, begun before the levy of the tax by the assessors, which had been set aside, was also inadmissible. *Phelps v. Lewiston*,* 15 Blatch., 181.

§ 1553. The town of Lansing had authority to issue bonds in aid of a railroad company, upon the judgment rendered by the county judge that the petition of the tax-payers for the issue of bonds represented a majority of the tax-payers and of the taxable property. Pending a *certiorari* to review the judgment of the county judge, upon which such judgment was afterwards reversed and annulled, the commissioners appointed by the judge for that purpose issued the bonds and delivered them to the company, the latter having due notice of the *certiorari* proceedings and giving a bond of indemnity. The holder of part of these bonds having shown himself to be a *bona fide* holder, was held entitled to recover, but the holder of other of the bonds, failing to establish his *bona fides*, was defeated. *Bailey v. Town of Lansing*,* 18 Blatch., 424.

§ 1554. A suit was brought by tax-payers, and a temporary injunction obtained, restraining the authorities from issuing or negotiating certain bonds. The injunction was dissolved, but in the final decree the bonds were declared void and directed to be delivered up and canceled. The bonds had been delivered to the railroad company before the suit was commenced, and after the dissolution of the injunction they were purchased by parties having no notice of the suit. *Held*, that such purchasers were not affected by the final decree. *Thompson v. Perrine*, 13 Otto, 806 (§§ 1678-83).

§ 1555. A suit was brought in which a decree was rendered restraining a county judge from issuing county bonds on the ground of irregularity in the issue. Soon after, the legislature enacted that all the proceedings of the county judge should be considered valid and legal, and all the bonds issued and thereafter to be issued were made legal and valid, and provided for the collection of a tax for their payment. Afterwards another suit was brought to restrain the county judge from collecting the tax, and to have the confirmatory law declared unconstitutional. The prayer was denied and the case affirmed by the state supreme court. Some two years thereafter another suit was brought for a similar purpose, and such proceedings were had that the supreme court declared all the proceedings and all the bonds utterly void. *Held*, that the doctrine of *lis pendens* does not apply to a purchaser of the bonds. *Lee County v. Rogers*, 7 Wall., 181.

§ 1556. Publication of law.—Where the legislature provides for the publication of all the laws, and the law under which bonds are issued is published accordingly, though after the bonds were issued, and the law is stated on the face of the bonds, by the certificate of the mayor, to be the authority under which the bonds are issued, the city is concluded by such representations as to its authority to issue the bonds, and cannot go behind them to show irregularities in the preliminary proceedings required by the law. *Luling v. City of Racine*,* 1 Biss., 314.

§ 1557. Legislative acts authorizing a city to issue bonds are considered local and private, and as taking effect from the date of their passage. And bonds issued under such an act cannot be impeached on the ground that they were issued before the publication of the act. But even if such law should be regarded as a general law, the bonds would be held valid in the hands of an innocent holder. *Ibid*.

§ 1558. Time of payment of bonds.—A city was authorized to issue bonds payable in twenty years. The bonds were issued in March, 1853, and made payable in February, 1873. *Held*, in a suit for interest (but not the first year's interest), that an objection that the bonds were made payable in less than twenty years was not tenable; that the city put its own construction upon the act, issued its bonds, paid interest on them and received certificates of stock, and it was therefore estopped to deny the validity of the bonds. *Ibid*.

§ 1559. Rate of interest.—A city is estopped, as against a *bona fide* holder, to allege that the recitals in the bonds as to the rate of interest do not correspond with the resolution of the board of trustees authorizing the subscription. *Mygatt v. City of Green Bay*,* 1 Biss., 292.

§ 1560. Miscellaneous.—County bonds issued in Missouri by a *de facto* county court, and sealed with the seal of the court and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court. *County of Ralls v. Douglass*,* 15 Otto, 728.

§ 1561. Nor can it be shown, as against innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter. *Ibid*.

§ 1562. In an action thereon by a *bona fide* holder for value of interest coupons, it is no defense that the amount of the bonds issued was in excess of the amount allowed by the act of the legislature authorizing such issue, which limited the amount of the issue to a certain proportion of the amount of the taxable property of the township. *Wilson v. Salamanca*,* 9 Otto, 499.

§ 1563. Where negotiable bonds of a corporation are placed in the hands of an agent to be disposed of for a specific purpose, a purchaser has a right to presume that the agent is acting

within the scope of his authority, and is not bound to inquire into the application he is to make of the proceeds of the sale. But if the purchaser has notice, he takes the bonds at his peril. *Chew v. Henrietta Mining and Smelting Co.*,* 1 McC., 222.

§ 1564. Where a party purchases bonds from an officer of the corporation, he has a right to presume that the officer is acting within the scope of his authority. And where the purchaser is a married woman, acting with reference to her separate estate, notice to her husband is not notice to her; nor is notice to the trustee of her separate property notice to her, where he is not her trustee for the particular transaction. *Ibid.*

§ 1565. The governor of a state has authority by statute to indorse, in behalf of the state, first mortgage railroad bonds bearing interest at the rate of eight per cent. *Held*, that the governor's indorsement of bonds bearing eight per cent. interest, in gold, is valid. Also, *held*, that if the bonds indorsed by the governor are not in fact the first lien on the road, this objection cannot be maintained against a *bona fide* holder of the bonds so indorsed. A *bona fide* holder in such a case has a right to presume that the indorsement is in accordance with the statute. *Young v. Montgomery & Eufaula Railroad Co.*,* 2 Woods, 605.

§ 1566. Where a railroad company executed a deed of trust, mortgaging its property, including county bonds, notice to the trustee in such deed does not affect the holder of the bonds with notice so as to deprive him of the character of a *bona fide* holder. *Commissioners of Johnson County v. Thayer*, 4 Otto, 631 (§§ 1030-36).

§ 1567. Bonds issued by a county in Iowa to a railroad company for stock in said company, and which county at the time the bonds were issued was held, by the settled adjudications of the highest courts of the state, to possess full power, under the constitution and laws, to issue the same, are ever after binding and valid upon the county issuing them, in the hands of a *bona fide* holder. (Decided without comment on authority of *Gelpcke v. The City of Dubuque*.) *Lee County v. Rogers*, 7 Wall., 181.

§ 1568. The holder of railroad bonds is chargeable with notice of what appears on the bonds, or the mortgage securing them, or in the laws of the state referred to; but where the mortgage securing railroad bonds showed on its face that it was intended to secure bonds at the rate of a specified sum per mile, a purchaser was held not chargeable, merely from the number of the bond, with notice that there had been an over issue, or that the bond purchased was one of the over issue. *Stanton v. Alabama R. Co.*, 2 Woods, 538.

§ 1569. A railroad company cannot avoid its bonds in the hands of a *bona fide* holder by showing that the same were issued in exchange for bonds of the state, to enable the stockholders of the company to employ the proceeds of the state bonds for their private benefit, and that they were so employed, and not for purposes legitimately within the object of the statute which authorized the exchange. *North Carolina R. Co. v. Drew*, 3 Woods, 692.

§ 1570. Where a receiver of a railroad, appointed upon the application of holders of its first mortgage bonds, was authorized to borrow money and to issue certificates therefor, which were to be a paramount lien on the property covered by the mortgage, provided that such certificates should not be disposed of below ninety cents on the dollar, and should not bear interest at a greater rate than eight per cent., and certificates payable to bearer were issued by him pursuant to such authority and referring thereto, and were disposed of at less than the minimum limit prescribed, *held*, that they were not negotiable instruments, and that the same were invalid in the hands of *bona fide* holders. *Stanton v. Alabama, etc., R. Co.*, 3 Woods, 506.

§ 1571. Where the supreme court has made a mistake of fact in passing on the *bona fides* of stockholders, the circuit court will not correct the mistake. It is no objection that the matter was referred to a master by an order requiring the parties to appear before him at a certain place and prove up their claims, and the proofs were made by depositions taken elsewhere and presented, with the bonds themselves, by agents of the parties, and the parties did not appear in person. *Kennicott v. The Supervisors*,* 6 Biss., 138. (This case is reversed in 16 Wall., 452; §§ 1458-64.)

§ 1572. The mere fact that the holder of municipal bonds purchased them from the railroad company to which they had been delivered for goods sold to the company will not affect the *bona fides* of the holder. *Ibid.*

XI. INJUNCTION.

SUMMARY — *Proceeding by tax-payers*, § 1573.

§ 1573. The board of freeholders of a county delivered its bonds to A. B. in payment for lands conveyed by A. B. for the building of a court-house. The bonds were, by the resolution of the board accepting the offer of A. B., to be paid out of the amount appropriated and limited for the expenses of the next fiscal year. No appropriation was made for the payment

of the bonds except this declaration. The expenditures for each fiscal year were restricted to the amount raised by tax for that year. Certain tax-payers were dissatisfied with the issue of the bonds without making definite appropriation for their payment, and at their petition the supreme court declared these proceedings void and set them aside. A. B. having afterwards brought suit on the bonds, other tax-payers brought suit to compel the board to reconvey the land and A. B. to deliver up the bonds. *Held*, that a decree was rightly rendered for these complainants. *Crampton v. Zabriskie*, §§ 1574, 1575.

[NOTES.— See §§ 1576–1586.]

CRAMPTON v. ZABRISKIE.

(11 Otto, 601–609. 1879.)

APPEAL from U. S. Circuit Court, District of New Jersey.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.— On the 14th of December, 1876, the Board of Chosen Freeholders of the county of Hudson, in New Jersey, passed a resolution to purchase of the defendant Crampton certain real property in Jersey City, upon which to erect a court-house and other buildings for the county, at the price of \$2,000 for every two thousand five hundred square feet, the price at which he had previously offered to sell the same, and to issue to him in payment thereof bonds of the county, payable out of the amount appropriated and limited for the expenses of the next fiscal year, the bonds to run for one year and to draw interest at the rate of seven per cent. per annum. The bonds were to be signed by the director at large and the collector of the county, and to be issued under its seal. On the 18th of December, Crampton executed and delivered to the board a conveyance of the property, which was accepted and recorded in the office of the register of deeds; and thereupon three bonds were executed and delivered to him, two of which were for the sum of \$75,000, and one was for \$75,720. No provision was made by the board for the payment of the bonds beyond the general declaration that they should be paid out of the amount appropriated and limited for the next fiscal year. By the law then in force the fiscal year commenced on the first day of December of each year, and the expenditures of the board were restricted to the amount raised by tax for that year, unless by the spread of an epidemic or a contagious disease a greater expenditure should be required; and the amount to be raised was to be determined at a meeting of the board to be held prior to July 15th of each year. Some of the resident tax-payers were dissatisfied with this issue of bonds without making definite provision for their payment by taxation, and accordingly obtained from the supreme court of the state a writ of *certiorari* to review the proceedings of the board. The court adjudged the proceedings invalid, and set the same aside. It does not appear that any attention was paid either by the board or Crampton to this judgment. The board did not reconvey or offer to reconvey the land to Crampton; nor did the latter return or offer to return to the board the bonds received by him. But, on the contrary, Crampton commenced an action in the circuit court of the United States to enforce their payment. The present suit, therefore, is brought by other tax-payers of the county to compel the board to reconvey the land and Crampton to return the bonds, and to enjoin the prosecution of the action to enforce their payment.

§ 1574. *In New Jersey, county authorities have no right to issue bonds payable otherwise than out of the revenues of the current fiscal year.*

The facts here stated are not contradicted; they are substantially admitted; and upon them the court below very properly rendered a decree for the com-

plainants. Indeed, upon the simple statement of the case, it would seem that there ought to be no question as to the invalidity of the proceedings of the board. The object of the statute of New Jersey defining and limiting its powers would be defeated if a debt could be contracted without present provision for its payment in advance of a tax levy, upon a simple declaration that out of the amount to be raised in a future fiscal year it should be paid. The law, in terms, limits the expenditures of the board, with a single exception, to the amount to be raised by taxation actually levied, not by promised taxation in the future. And, as if this limitation was not sufficient, it makes it a misdemeanor in any member of the board to incur obligations in excess of the amount thus provided. It would be difficult to express in a more emphatic way the will of the legislature that the board should not incur for the county any obligations beyond its income previously provided by taxation; in other words, that the expenses of the county should be based upon and never exceed moneys in its treasury, or taxes already levied and payable there.

§ 1575. *Restraint of county officers in the matter of issuing bonds by legal proceedings instituted by resident tax-payers.*

Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the law of municipal corporations.

Decree affirmed.

§ 1576. *Restraining suits on bonds.*—After suits against a town on a portion of its bonds, and judgments rendered, and one judgment paid, certain of the tax-payers brought a bill in the same court to restrain the prosecution of suits on the bonds, on the ground of preventing a multiplicity of suits, and alleging the bonds to be invalid for objections which might be urged at law if at all, and which had been repeatedly held by that court as of no force against a *bona fide* holder. The bill was dismissed. *Town of Mt. Zion v. Gillman*, 9 Biss., 479.

§ 1577. *Defense at law.*—A suit in equity cannot be maintained by the obligor of a municipal bond against the obligee to prevent him from proceeding at law upon the bond, where the grounds set forth in the bill are that the bond was issued without authority, in violation of law, and in fraud of the town, and that the obligee knew this when he took it; that he was not a *bona fide* holder of the bond and had no title thereto. The grounds stated constitute a perfect defense at law, and consequently equity will not interfere. *Grand Chute v. Winegar*, 15 Wall., 375.

§ 1578. *Non-residents.*—The decree of a county court perpetually enjoining the officers of a county from levying any taxes to pay county bonds does not bind residents of other states who were simply proceeded against as "unknown owners," and who were not served with process and had no notice except constructive notice of the pendency of the proceedings. *Empire v. Darlington*, 11 Otto, 87 (§§ 1218-20).

§ 1579. A non-resident tax-payer cannot maintain his bill to restrain the issue of county bonds and the levy of taxes to pay interest on like bonds already issued, where the authority to issue the bonds is clear, and his bill contains no allegations of fraudulent collusion against his interest, or clear departure from the line of imposed duty by the commissioners authorized to issue the bonds, and the only grounds relied on for relief are such as that the act required the road to be built to a certain town, whereas it did not reach the town by a quarter of a mile, and that the road was required to be first completed, whereas the turn-tables and water tanks had not been completed. *Adams v. Board of Co. Commissioners, McCahon, 249.*

§ 1580. A non-resident tax-payer cannot bring his suit to enjoin the issuing of county bonds to a railroad company, and to enjoin the collection of a tax to pay interest on bonds already issued, in the United States circuit court, without showing in his bill that there is in controversy, or in jeopardy, by the action of the respondents whom he desires to restrain, an amount exceeding \$500. The allegation in the bill that the amount "in controversy" exceeds \$500, and that the amount of the bonds is \$300,000, is not sufficient. The bill must state facts which show that the amount the plaintiff is liable to gain or lose exceeds \$500. The presumption as to amount, arising from the allegation that the plaintiff sues in behalf of all others similarly situated, is not to be conceded. *Ibid.*

§ 1581. Irregularities.—The law required that a special meeting of the board of supervisors should be held only by request of members, addressed to the clerk in writing, specifying the time and place, etc. A special meeting of the board, at which steps were taken to issue bonds, was held pursuant to a verbal request by the members. It did not appear that the board prescribed the manner of holding the election, or of giving the notice, or the form of the ballots, or any regulations relating to the election. The clerk of the board and the sheriff issued the notices and prescribed the form of the ballots, pursuant to a resolution of the board. Two ballots were printed on the same sheet of paper. *Held*, that these were irregularities sufficient to authorize an injunction enjoining the issuing of the bonds; that alien tax-payers were entitled to file a bill for such purpose. *Goedgen v. Supervisors, * 2 Biss., 328.*

§ 1582. It is the rule to reject all proof of errors in and about the election, or the issuing of the bonds, in actions by innocent holders. The objections should be made by tax-payers before the bonds are issued. *Ibid.*

§ 1583. As to time bonds may run.—Under a law which empowers county commissioners to submit to the vote of the county the question of borrowing money for public buildings, and provides that the proposition to the voters must be accompanied with a provision to levy a tax for the payment thereof, in addition to the usual taxes, and that no vote shall be valid unless it adopts the amount of tax to be levied; that the rate of no tax shall exceed three mills on the dollar on the county valuation in one year, and that the rate shall be such as to pay the debt in ten years; the county may be restrained from issuing bonds, to be used in aid of public buildings, payable in twenty years, in pursuance of a vote providing for an annual tax during that period. *Union Pacific R'y Co. v. Lincoln County, * 8 Dill., 300.*

§ 1584. Enjoining collection of taxes.—The proper officers will not be restrained from collecting taxes to meet township bonds, which recite that they are issued in pursuance of a certain election held and of certain acts, which are held to be constitutional and also to confer the power exercised by the township, when such bonds are in the hands of *bona fide* holders. *Bonham v. Needles, * 13 Otto, 648.*

§ 1585. Parties plaintiff.—A bill by tax-payers to restrain the delivery of bonds issued by the county must be filed in behalf of themselves and all others. If filed by certain of the tax-payers for themselves alone, it will be dismissed. *Packard v. Board of Commissioners, * 2 Colo. T'y, 338.*

§ 1586. Cloud on title.—The ordinance of the city of Portland, providing for the issue of interest coupons to railway bonds, payable half-yearly through a period of twenty years, and amounting in the aggregate to over \$300,000, is in conflict with the constitution of Oregon, requiring the acts of the legislature incorporating towns and cities to restrict their powers of contracting debts and loaning their credit, and the act incorporating the city of Portland limiting its power to contract debts to the amount of \$50,000. And a tax-payer may enjoin the issue of such interest coupons, on the ground that a cloud will be cast upon his title to his real estate by being sold for the payment of taxes to pay these coupons, and upon the further ground that such injunction will prevent a multiplicity of suits. *Coulson v. City of Portland, Deady, 481.*

XII. ENFORCING PAYMENT.

SUMMARY—*Entitled to payment out of general fund, § 1587.—Implied power to levy a tax; statute requiring provision for payment, § 1588.—Power to levy exhausted, §§ 1589, 1591.—What objections may be raised on application for a mandamus, § 1590.—Payment provided for by a special assessment, § 1592.—Levy of tax provided for, § 1593.—Bonds issued by a precinct, § 1594.—Mandamus the proper remedy; officers restrained from levying, § 1595.—Agreement as to funding bonds; relief at law, §§ 1596, 1597.—Bill against taxpayers, §§ 1598, 1599.—Restraining collection of taxes levied pursuant to a mandamus, § 1600.*

§ 1587. It is held that the holders of bonds, issued under authority of the provision in the charter of a railroad company, that "it shall be lawful for the corporate authorities of any city or town, or the county court of any county, desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year," are entitled to the payment of their judgments on the bonds, out of the general funds of the county, so far as the special tax provided for in the charter is insufficient for that purpose. *Mandamus* will lie to compel the justices of the county court to direct the county clerk to issue a warrant on the county treasurer for the balance of the judgments remaining unpaid. (WAITE, C. J., and MILLER and BRADLEY, JJ., dissented.) *United States v. County of Clark*, §§ 1601, 1602.

§ 1588. The power conferred on a municipal corporation to issue bonds in aid of a railroad, no other means being provided, implies the power to levy a tax for the payment of the bonds. And this, notwithstanding that the stock purchased with the bonds was, by the authorizing act, pledged for their redemption. This pledge was only a collateral security, and did not prevent the holder from looking to the city for payment. Statutes in force at the time, restraining cities and towns from creating any indebtedness without providing at the same time for the payment of the principal and interest, do not affect this construction. They are not limitations of the power of the legislature to authorize the creation of debts by cities upon other conditions. Having thus the power to levy a tax to pay a judgment on these bonds, the city owes the creditor the duty so to do. And the performance of such duty may be compelled by *mandamus*. *United States v. New Orleans*, §§ 1603-1608. See §§ 1629, 1637.

§ 1589. The charter of a railroad company in Missouri empowered the county court of any county to subscribe to the capital stock of said company, and to issue bonds therefor, and levy a tax to pay the same, not to exceed one twentieth of one per cent. on the assessed value of taxable property for each year. At the time the bonds under this act were issued, counties in Missouri were limited in taxation to one-half of one per cent. on the taxable value of the property in the county. This was subsequently made the limit by constitutional provision. It was decided that, the power of taxation being so limited by the special act and the general law at the time this debt was created, and the special tax of one-twentieth of one per cent. having been collected and applied to the judgment on the bonds, and no complaint being made as to the levy of the one-half of one per cent. for general purposes, the judgment creditors desiring a levy beyond these amounts, the court had no power to order a *mandamus* for the levy of an additional tax. The "general railroad law" in force at the time can confer no power of taxation, as in that act taxation was confined to subscriptions authorized by that act which require the assent of two-thirds of the qualified voters of the county. In this case no vote was required, the only check on the improvident action of the officials being the limit in taxation. *United States v. County of Macon*, §§ 1609-10. See § 1640.

§ 1590. In a proceeding by *mandamus* to compel the levy of a tax for the payment of a judgment rendered on interest coupons, no objections can be raised which could have been urged in the original suit. When the coupons are merged in the judgment, they carry with them into the judgment all the remedies which in law form a part of this contract obligation, and these remedies may still be enforced notwithstanding the change in the form of the debt. *Ralls County Court v. United States*, §§ 1611-14.

§ 1591. Where a judgment has been obtained on coupons to bonds issued under authority of a law empowering the county court to subscribe to the stock of a railroad company, and to issue bonds in payment, and to "take proper steps to protect the interest and credit of the county," *mandamus* will lie to compel payment of the judgment out of the county treasury, or, if that cannot be done, to levy a special tax. And this notwithstanding that there is a limit fixed by law to taxation by the county. *Ibid.* See § 1640.

§ 1592. The provision, in the act under which bonds are issued by a city for the improvement of its streets, that for the payment of said bonds assessment shall be made on the taxable

property chargeable therewith, that is, on all lots and pieces of ground to the center of the block extending along the street or avenue the distance improved; and the provision in the ordinance that the bonds shall be paid, principal and interest, solely from the special assessments to be made upon and collected solely from the lots and pieces of ground fronting upon the streets improved, will not prevent the holders of the bonds which have been placed in judgment from compelling by *mandamus* a tax upon all the taxable property of the city, on default of payment out of the special assessments. And this, although the act and the ordinance are referred to in the bonds. The city having by general laws ample authority to tax for all its municipal purposes, the above provisions are held to apply only between the city and its property holders. *United States v. Fort Scott*, § 1615.

§ 1598. One who obtains judgment on the bonds of a town in Wisconsin is entitled, on the non-payment of such judgment, to a *mandamus* to compel the assessment by the town clerk of a tax to satisfy the judgment, notwithstanding the act under which the bonds were issued provided that the requisite levy should be made by the supervisors of the town. This special act does not exclude the assessment by the town clerk under a general act. *Morgan v. Town Clerk*, § 1616.

§ 1594. By an act in Nebraska, any precinct in any organized county is given authority to vote to aid works of internal improvement, and entitled to all the privileges conferred on counties and cities by the same act. The county commissioners were to issue the special bonds for such precinct, and taxes to pay the same were to be levied on the property in the precinct. The precinct bonds were to be the same as any other bonds, and contain a statement showing their special nature. These precincts being mere political divisions, having no corporate capacity, not being able to contract, or to sue or be sued, and having no officers, a special judgment on the bonds, issued in accordance with this act, may be recovered against the county, to be collected out of taxes levied on the precinct. It makes no difference that the act provides for a *mandamus* to compel the levy of taxes, as a judgment must always precede a *mandamus* in the federal courts. *Davenport v. County of Dodge*, §§ 1617-18. See § 1636.

§ 1595. The issue of certain bonds by a county in Iowa was made valid by a subsequent act of the legislature. There was a judgment for plaintiff in the circuit court for that state. The judgment remains unsatisfied. The county has no property subject to execution. The property of a private citizen cannot be taken in Iowa to satisfy a judgment against a municipal corporation. The proper remedy of a judgment creditor in such a case, in the state court, is by *mandamus* to compel the proper officers of the county to levy a tax to pay the judgment. The court decides that the judgment creditor is entitled to a *mandamus* to compel the levy of a tax to pay his judgment, although the officers of the county have been restrained by a state court from levying such tax. *Weber v. Lee County*, § 1619. See § 1643.

§ 1596. The holders of bonds of the city of Little Rock surrendered them, taking new bonds instead, under a funding act and an agreement by which the amounts of the original bonds were reduced twenty-five per cent., and upon default of any instalment of interest due or the principal the twenty-five per cent. was to be forfeited and the holder entitled to the full amount of the original debt. It was also stipulated that the acceptance of the new bonds was not to be a waiver of any provisions of the act under which the surrendered bonds were issued. The holders of these new bonds, on default of payment, filed a bill in equity to compel payment of the amount due on the old bonds, on the ground that the supreme court of the state, by its construction of the provision of the funding act that the county court should levy a special tax to pay said bonds and interest, not to exceed the constitutional limit, had taken away their remedy at law. The court held that the action at law still remained, as it was competent for the holders of the bonds to make the agreement by which they were to be remitted to their rights on the original bonds, and retaining their rights under the act under which the surrendered bonds were issued. The constitution referred to in the funding act, being subsequent to the issue of the surrendered bonds, could not change the rights under the original act; and this notwithstanding the change in the form of the debt. *Mechanics' Nat. Bank v. County of Pulaski*, §§ 1620-21.

§ 1597. The remedy on another set of bonds, issued under the same funding act, and containing the same agreement, is also at law. The state court had declared the act, under which the surrendered bonds in this case were issued, invalid. But the new bonds were based on an existing debt. The surrendered bonds being subject to the constitutional limit of taxation referred to in the funding law, the agreement between the parties, before referred to, can be carried out by a levy up to the limit. *Ibid.*

§ 1598. Judgment was entered in this case on county bonds, and the county court, in obedience to a writ of *mandamus*, levied a tax, but returned that no qualified person could be found to collect the tax. The court then appointed a receiver, but he was compelled by threats of violence to resign his position. The complainants then filed a bill in equity against

the county and several prominent tax-debtors, praying that each tax-debtor be required to pay the amount assessed against him into court. *Held*, that equity had jurisdiction, though there was no such privity between the complainants and the tax-debtors as would authorize a suit at law; and that a decree be entered requiring each tax-debtor to pay the amount of his tax to the clerk of the court, and, on default, that execution issue. *Post v. Taylor County*, §§ 1622-23.

§ 1599. It is also suggested that if the amount due from the tax-debtors before the court is found inadequate to pay complainants' decree, another receiver would be appointed to collect from the other tax-payers of the county, and if they refused to pay, the receiver would be instructed to bring them all before the court by an ancillary petition, and a decree would be entered against them, and collection enforced by such process as the court should deem necessary—attachment for contempt, or an execution to the marshal to collect. *Ibid*.

§ 1600. In an action to restrain proceedings in the collection of taxes which have been levied and are in process of collection, in pursuance of writs of *mandamus* from the circuit court, for the payment of certain judgments against a city and two counties on their bonds, the complainants cannot rely upon want of consideration for the bonds on which the judgments were founded, or fraud in obtaining the bonds; since these are no defenses to the bonds in the hands of innocent holders, and since they were proper defenses, if good at all, to the actions in which the judgments were rendered. That the judgments in some of the suits were too large cannot afford a ground for the relief asked when the plaintiffs in these suits were different persons, and the judgments in which the supposed mistakes were made are not specified. That the judgment creditors have a decree for funds in the hands of the receiver of the circuit court, on account of the same debt for which the taxes are levied, is no ground for the relief, while such fund is still in litigation and has not been received by the judgment creditors. The judge will not grant the injunction on the ground that one of the counties contains a large amount of railroad property which is not assessed by the officers who are collecting this tax, as this property is exempt, by the statutes of the state, from all other taxes except one per cent. per annum paid into the state treasury. The constitution of the state requires that all taxation shall be uniform, but the judge refuses the injunction sought on this last ground, in view of the consequences of holding all the taxes levied void, and without considering whether the railroad property is exempt. *Muscatine v. Railroad Company*, §§ 1624-1628.

[NOTES.— See §§ 1629-1659.]

UNITED STATES *v.* COUNTY OF CLARK.

(6 Otto, 211-218. 1877.)

ERROR TO U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS.—This was a petition for a *mandamus*, requiring the county court and the justices thereof to direct the clerk of the county to draw a warrant on the county treasury for the balance due on a judgment rendered for interest due on county bonds. An execution had been issued, and returned that no property could be found. The defendants answered that the charter of the company prohibited the levy of more than one-twentieth of one per cent. each year for the payment of the bonds, and that they had levied that tax. The United States filed a demurrer, which was sustained. The petition was dismissed.

§ 1601. *Bonds issued by a county are a debt of that county, and a special tax authorized by the act to meet the bonds is a cumulative security unless otherwise declared by the act.*

Opinion by MR. JUSTICE STRONG.

The question presented by the record is, whether the relator is entitled to payment of his judgment out of the general funds of the county, so far as the special tax of one-twentieth of one per cent. is insufficient to pay it. And we think that he is thus entitled is plain enough, unless the act which gave the county authority to issue the bonds directs otherwise. That act gave plenary authority to the county to subscribe to the capital stock of the railroad company and to issue bonds therefor, but imposed no limit upon the amount which

it empowered a county to subscribe, and for the payment of which authority was given for the issue of county bonds. This was left to the discretion of the county court. So it has been held by the supreme court of the state. *State v. Shortridge*, 56 Mo., 126. A limitation was, however, prescribed for the special tax which was allowed to be levied. But that was a special tax, distinct from and in addition to the ordinary tax which, by other statutes, the county court was authorized to levy; probably supposed to be made necessary by the new liabilities the county might assume. There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the states, and more than once by the federal government. The act of congress of February 25, 1862 (12 Stat., 346), set apart the coin paid for duties on imported goods as a special fund for the payment of interest on the public debt and for the purchase of one per cent. thereof for a sinking fund; yet no one ever thought the obligation to pay the debt is limited by the amount of the duties collected. Limitations upon a special fund provided to aid in the payment of a debt are in no sense restrictions of the liability of the debtor. Why, then, must not the special tax of one-twentieth of one per cent. be regarded as merely an additional provision made for the payment of the new debt authorized, rather than as a denial to the creditors of any resort to the ordinary sources from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bonds in a worse situation than that of other creditors of the county? These bonds are a debt of the county as fully as is any other liability. Had the act which gave power to the county to issue them said nothing of any special tax, there could be no question that the holders of the bonds, like other creditors, would have a resort to the money in the county treasury collected for the discharge of its obligations; for it is by the law made the duty of the county court to order the payment out of the county treasury of any sum of money found by them to be due from the county. It would, therefore, have been the court's duty to direct its clerk to issue a warrant for payment, as in other cases. And surely it is not to be held, unless such a construction of the statute is absolutely necessary, that when the legislature authorized the county to incur the debt, it intended to deny to the creditor the right to look to the treasury of the county for its payment; in other words, that the debt was sanctioned, but that it was stripped of the usual incidents of a debt, and the debtor was relieved from attendant liabilities. And it is not to be inferred, from a provision giving the creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had no such provision been made. And that, too, in the absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute. Such is not a fair implication of its purpose. It accords neither with its letter nor with its spirit. Yet it is for such an implication the defendants contend, and upon it their case wholly rests.

§ 1602. *County bonds issued in pursuance of an act of the legislature constitute a debt of the county. Holders are entitled to payment out of the general funds of the county.*

The bonds, as we have said, and as is conceded, are an authorized debt of the county. The purpose for which they were authorized is manifest. It was to

furnish aid to the construction of a railroad in which the public, and especially the county of Clark, were thought to be interested. The bonds, it is to be presumed, were intended to be for sale in the market; and it was the obvious intent alike of the state, of the railroad company and of the county that they should bring the highest price possible. For this reason, probably, the tax of one-twentieth of one per cent. was authorized, with a view to give to them additional credit, to make them more salable, and to enable the railroad company or the county to obtain for them a larger price. Surely it could not have been to depreciate their value and make them almost worthless in the market. It was said during the argument, and not denied, that the taxable property of the county is valued at \$3,700,000. A tax of one-twentieth of one per cent. upon that sum, taking no account of exonerations and failure to collect, would yield only \$1,850, less than one-eighth of the annual interest of the debt authorized and incurred. It is incredible that the legislature intended to deny to the purchasers of the bonds any right to look for payment beyond such a meager provision; or if it was so intended, that the intention would not have been expressed in precise terms. In the absence of any express declaration that the creditor's right to claim payment shall not reach beyond the fund derived from the small special tax, we cannot think the legislature proposed rendering the bonds unsalable or almost worthless in the hands of those who might be so unfortunate as to hold them. Such an intention would have defeated the object sought to be secured by giving authority for their issue. Nor can we think that the legislature intended to set a trap for purchasers, and lead them to suppose they were obtaining valuable securities, when, in fact, they would obtain what was worth next to nothing. The statute justifies no implication of any such legislative intention. If it be said that the legislature, in limiting the special tax allowed, contemplated no issue of bonds beyond what one-twentieth of one per cent. would pay, and did not anticipate the improvidence of purchasers who might buy bonds issued in excess of that sum, it may be answered that still a larger issue was in fact authorized. Such an issue must, therefore, have been considered as possible. And it would be absurd to hold that the legislative intent was to allow the issue and sale of county bonds for a sum more than one hundred times larger than the debt acknowledged by them to be due, and more than one hundred times larger than the purchasers would be entitled to recover.

We have been referred to the cases of *Supervisors v. United States*, 18 Wall., 71, and *State v. Shortridge*, *supra*, as sustaining the construction of the statute contended for by the defendants. In fact, however, they afford it no support. In the former of these cases, we held that a statute of the state of Iowa conferred no power to levy a specific tax to pay a judgment rendered against a county on warrants for ordinary county expenditures, and we asserted that a *mandamus* will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they claim their powers. We adhere now to what we then decided. But we have in hand no such case. The present is not an attempt to enforce the levy of any special tax, or of any tax. It asserts no power in the county court to levy a tax, which the defendants deny they have. It claims only a right to share in the product of a tax confessedly authorized. We do not, therefore, perceive that the case has any applicability to the subject we have before us. And *State v. Shortridge*, though claimed to be in point, is equally inapplicable, when it is observed what the case was and what was decided. It was a suit

for a *mandamus* to compel the county court of Macon county to levy a tax for the payment of the principal and interest of several railroad bonds issued in payment of a subscription by the county to the capital stock of the Missouri & Mississippi Railroad Company. The bonds had been issued by virtue of a legislative act similar to that under which the bonds of the present relator were issued. The county had levied the special tax authorized by the act, and the application was for a *mandamus* to compel the levy of another tax specially for the payment of the bonds, in addition to that allowed; namely, that of one-twentieth of one per cent. The court refused the writ, holding that no other special tax was authorized by law than the one mentioned in the charter of the railroad company; and, as that had been levied, that there was no right to levy another. This was the only question before the court, and the decision is authority only to the extent of the case before it. The court does not appear to have decided that the county court could not levy a general tax for the expenses and liabilities of the county. It was only called upon to consider how far an extraordinary or special tax could be levied. The case called for nothing more; and, if more was intended by the judge who delivered the opinion, it was purely *obiter*. In the present case, as already said, there is no effort to enforce the levy of any special tax. Upon the whole, therefore, we think the relator is entitled to the *mandamus* for which he prays. Judgment reversed, with instructions to give judgment on the demurrer to the return against the respondents.

WAITE, C. J., and JUSTICES MILLER and BRADLEY dissented, the Chief Justice holding that the debt was payable from a particular fund, and that if the fund was deficient, the legislature could alone grant the necessary relief.

UNITED STATES *v.* NEW ORLEANS.

(8 Otto, 381-398. 1878.)

ERROR to U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—Morris Ranger, holding judgments against the city of New Orleans, recovered upon bonds issued by that city in aid of a railroad and under legislative authority, petitioned for a writ of *mandamus*, directed to the city, commanding a levy of taxes to pay those judgments. The petition alleged that the stock purchased with the bonds was pledged by law to the payment of the bonds, and that, disregarding the obligations growing out of that fact, the city had sold the stock, or a great portion of it. The city answered, admitting the sale of the stock by a preceding administration of the city, and the expenditure of its proceeds; and denied that any tax to pay the bonds had been authorized by the legislature of the state. To this answer there was a demurrer, which was overruled and the writ of *mandamus* refused.

Opinion by MR. JUSTICE FIELD.

The judge of the circuit court accompanied the judgment with an opinion giving the reasons of his decision, which were substantially those stated in the answer of the city; that the statute authorizing the issue of the bonds, upon which the judgments were recovered, made no provision for levying a tax to pay the principal, but intended that it should be paid out of the stock of the railroad company and its revenues; and that the proceeds from the sale of the stock had been already expended by the predecessors of the present city authorities. The court, adopting the view of the city authorities as to the construction of

the statute, and the supposed intention of the legislature, proceeded on the principle that the power of taxation belongs exclusively to the legislative branch of the government, and that the judiciary cannot direct a tax to be levied when none is authorized by the legislature; and that the issuing of a *mandamus* to apply the proceeds received from the sale of the stock would be a futile proceeding, they having been previously used for other purposes. A writ, said the court, could not issue commanding the performance of an admitted impossibility.

§ 1603. *The power of taxation is exclusively a legislative power, but may be delegated to municipal bodies.*

The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the state for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of those purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets, the construction of sidewalks, sewers and drains, the introduction of water, and the establishment of a fire and police department. In a city like New Orleans, situated on a navigable stream, or on a harbor of a lake or sea, their powers are usually enlarged, so as to embrace the building of wharves and docks or levees for the benefit of commerce, and they may extend also to the construction of roads leading to it, or the contributing of aid towards their construction. The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.

§ 1604. *Authority to a municipal body to issue bonds implies a grant of power to levy taxes to pay them.*

For the same reason, when authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess — so seldom, indeed, as to be exceptional — any means to discharge their pecuniary obligations except by taxation. "It is therefore to be inferred," as observed by this court in *Loan Association v. Topeka*, 20 Wall., 660, "that when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay

the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." The doctrine here stated is asserted by the supreme court of Pennsylvania in *Commonwealth v. Commissioners of Allegheny County*, 37 Penn. St., 277. That county was authorized by an act of the legislature to subscribe to the capital stock of a railroad company, and to issue its bonds in payment thereof. The interest on them being unpaid, a writ of *mandamus* was applied for to compel the commissioners of the county to make provision to pay it. The return of the officers set up, among other objections to the writ, that the act authorizing the subscription and issue of the bonds provided no means of payment, either of the principal or interest. To this defense the court said: "The act of 1843 authorized subscriptions by certain counties to be made as 'full as any individual could do,' without prescribing more precisely the terms. But by the fifth section of the act of April 18, 1843, counties subscribing are authorized to borrow money to pay for such subscriptions. We have decided that bonds or certificates of loan issued by a municipal corporation is an ordinary and appropriate mode of borrowing money, and the act of 1853 expressly authorized the issue of such securities. The subscriptions were accordingly made, and the bonds issued. Thus was a lawful debt incurred by the county; and as no other than the ordinary mode of extinguishing it, or of paying the interest thereon, was provided, it follows, of course, that the ordinary mode of raising the means must be resorted to, namely, to provide for it in the annual assessment of taxes for county purposes." Again, in the same case, the court said: "In the next place, it is averred that there is no authority to levy a tax for the payment of the interest by the county. We have already treated of this, and said that the authority to create the debt implies an obligation to pay it; and when no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way,—by the levy and collection of taxes."

In numerous cases, similar language is found in opinions of the state courts, not required, perhaps, to decide the point in judgment therein, but showing a recognition of the doctrine stated. Thus, in *Lowell v. Boston*, 111 Mass., 460, the supreme court of Massachusetts, in speaking of bonds which the legislature had authorized the city of Boston to issue, in order to raise funds to be loaned to individuals to aid them in rebuilding that portion of the city which was burned in the great fire of November, 1872, said: "The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized." To the same purport is the language of the supreme court of Wisconsin, in *Hasbrouck v. Milwaukee*, 25 Wis., 122. And in the recent case of *Parsons v. City of Charleston*, in the United States circuit court, the chief justice gave emphatic affirmation to the doctrine. *Hughes*, 282. Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it.

§ 1605. *Judgment upon municipal bonds is conclusive of their validity.*

In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed.

§ 1606. *Provision that stock for which bonds were issued should be pledged for their payment, held, merely collateral security.*

If the question were an open one, our conclusion would be the same. The act of 1854 provided that the railroad company should issue to the city certificates of stock for an amount equal to the amount of bonds received, and that the stock should remain "forever pledged for the redemption of said bonds." It is plain that this language was intended only to create a statutory pledge by way of collateral security for the payment of the bonds. It does not import that the holders of the bonds were to be thereby precluded from looking to the city, or that they were obliged to have recourse, in the first instance, to the pledge. The city, by the terms of the bonds, was primarily liable; and nothing in the language of the act in any respect affects this primary liability. The bondholder is not compelled to look to the security, but may proceed directly against the city without regard to it. Besides, as was justly observed by counsel, if we could seek the intention of the legislature from other considerations than the words of the statute, it would be still plainer that no such construction could be given to its language. The object of issuing the bonds for the stock was to aid the company in obtaining funds to build its road. If the stock had been available, the bonds would not have been needed; the stock would have been sold. But it was not available; and it is difficult to believe that the bonds would have been any more so, if their payment had been limited to the revenues and proceeds of the stock. The proposal of such a scheme for raising money would not have indicated much wisdom on the part of the legislature; to have assented to it would have indicated less on the part of the bondholders. And even if the bondholders had been required to look for payment of the bonds only to the revenues and proceeds of the stock, it comes with bad grace from the city, not to say evinces an insensibility to its obligations, to allege exemption from liability after its authorities have sold the stock and diverted the proceeds to other uses.

§ 1607. *A statute limiting the powers of municipal bodies does not circumscribe the operation of later statutes which by fair construction abrogate those limitations.*

This construction is not affected, as contended by counsel, by the statutes of 1852 and 1853, restraining cities and towns from creating any indebtedness without providing at the same time for the payment of the principal and interest. Those statutes were not limitations on the power of the legislature to authorize the creation of debts by cities upon other conditions. It does not follow that, because it was deemed expedient, as a general rule, to prohibit cities and towns from incurring debts on their own motion, without making provision for their payment, that the legislature might not authorize the incur-

ring of a particular obligation without such provision. And it will be found, upon examination, that the act of 1854 prescribed the details of the ordinance which should be passed by the city in the execution of the authority conferred, and that the ordinance passed conformed to them. *Butz v. Muscatine*, 8 Wall., 575; *Amey v. Allegheny*, 24 How., 364 (§§ 1237-39, *supra*); *Commonwealth v. Pittsburg*, 34 Penn. St., 496; *Commonwealth v. Commissioners*, 40 id., 348; *Commonwealth v. Perkins*, 43 id., 400; *Fosdick v. Perrysburg*, 4 Ohio St., 472. There is nothing, therefore, in the positions of counsel, to impair the validity of the bonds upon which the judgments were recovered, if we were at liberty to consider them on this application. But, as already said, the judgments are conclusive upon this point. Owing the debt, the city has the power to levy a tax for its payment. By its charter, in force when the bonds were issued, it was invested, in express terms, "with all the powers, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same."

§ 1608. *Where it is the duty of a municipal corporation to levy a tax, a writ of mandamus will lie to compel the performance of that duty.*

As already said, the power of taxation is a power incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the legislature empowers a corporation to do is presumably for its benefit, and may, in "the proper government of the same," be done. Having the power to levy a tax for the payment of the judgments of the relator, it was the duty of the city, through its authorities, to exercise the power. The payment was not a matter resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a *mandamus* should have been issued to enforce its performance. *Knox County v. Aspinwall*, 24 How., 376; *Von Hoffman v. City of Quincy*, 4 Wall., 535; *Benbow v. Iowa City*, 7 id., 313; *Supervisors v. Rogers*, id., 175; *Supervisors v. Durant*, 9 id., 415; *County of Cass v. Johnston*, 95 U. S., 360 (§§ 901-904, *supra*). The judgment of the court below must, therefore, be reversed and the cause remanded with directions to issue the writ as prayed in the petition of the relator; and it is so ordered.

UNITED STATES v. COUNTY OF MACON.

(9 Otto, 582-592. 1878.)

ERROR to U. S. Circuit Court, Western District of Missouri.

STATEMENT OF FACTS.—The relator recovered a judgment against the county of Macon on coupons detached from bonds issued by the county. This was an application to compel the levy of a tax. It was alleged, among other things, that the county had levied and collected taxes at the rate of one-half per cent. per annum to pay the interest, and that four instalments had been paid; that an execution had been issued and returned *nulla bona*. The county admitted the rendition of the judgment, but alleged that by the terms of the act incorporating the company the county was limited to a levy of one-twentieth of one per cent. upon the taxable value of the property for each year for the payment of the bonds; that such tax had been annually levied, but was not sufficient to pay the interest annually accruing on the bonds issued to pay the first subscription, there having been two subscriptions of \$175,000 each.

Opinion by WARRE, C. J.

In *United States v. County of Clark*, 96 U. S., 211 (§§ 1601-2, *supra*), we decided that bonds issued by counties under section 13 of the act to incorporate the Missouri & Mississippi Railroad Company were debts of the county, and that for any balance remaining due on account of principal or interest after the application of the proceeds of the special tax authorized by that section, the holders were entitled to payment out of the general funds of the county. In *Loan Association v. Topeka*, 20 Wall., 660 (§§ 1162-68, *supra*), we also decided that "it is to be inferred, when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." When the act to incorporate the Missouri & Mississippi Railroad Company was passed, the power of counties in the state of Missouri to tax for general purposes was limited by law to one-half of one per cent. on the taxable value of the property in the county. R. S. Mo. 1865, p. 96, sec. 7; p. 121, sec. 76. This limit has never since been increased, and the constitution of 1875, which is now in force, provides that this tax shall never exceed that rate in counties of the class of Macon. Art. 10, sec. 11. If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for the tax of one-twentieth of one per cent., and the case is thus brought directly within the maxim, *expressio unius est exclusio alterius*.

§ 1609. *Where the statute which authorizes the issuance of county bonds expressly limits the powers of the county to levy taxes for their payment, this court can afford the bondholder no relief.*

Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated and the debt incurred. The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent. has been

regularly levied, collected and applied, and no complaint is made as to the levy of the one-half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order.

Our attention has been directed to the general railroad law in force when the Missouri & Mississippi Railroad Company was incorporated and when the bonds in question were issued, and it is insisted that ample power is to be found there for the levy of the required tax. The power of taxation there granted is, as we think, clearly confined to subscriptions authorized by that act, which require the assent of two-thirds of the qualified voters of the county. Under such circumstances, it seems to have been considered proper to allow substantially unlimited power of taxation to pay a debt which the voters had directly authorized. In this case no such assent was required, and the tax-payers were protected against the improvident action of the official authorities by a limit upon the amount they should be required to pay in any one year. The general railroad act was in force when this company was incorporated, but its provisions seem not to have been satisfactory to the corporators. They wanted authority for counties to subscribe without an election, and on that account accepted the terms which were offered. As the bondholders claim under the corporation, they must submit to the conditions as to taxation which were substituted for those that would otherwise have existed.

§ 1610. *A judgment creditor of a county has no additional rights by reason of his judgment to cause taxes to be levied to pay it.*

We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment. This disposes of the case, and, without answering specifically the questions that have been certified, we affirm the judgment.

Judgment affirmed.

RALLS COUNTY COURT v. UNITED STATES.

(15 Otto, 739-739. 1881.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—Section 29 of the act to incorporate the St. Louis & Keokuk Railroad Company, approved February 16, 1857, is as follows: "It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company; and it may invest its funds in the stock of said company, and issue the bonds of said county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it and receive its dividends."

Under this authority, the county court of Ralls county subscribed \$200,000 to the stock of the company, and, during the years 1870 and 1871, issued bonds of the county to pay the subscription. Default having been made in the payment of coupons for interest attached to some of these bonds, Douglass brought suit against the county, in the circuit court of the United States for the eastern district of Missouri, for their recovery, and on the 16th of October, 1878, ob-

tained judgment for \$17,158.43. That judgment was affirmed in *County of Ralls v. Douglass*, 15 Otto, 728.

§ 1611. *Where a judgment has been rendered against a county on bonds, no defense impugning that judgment can be set up against a mandamus.*

After the judgment was rendered in the circuit court the present suit was begun by the United States, on his relation, to require the county court, by *mandamus*, to pay the amount due out of moneys in the treasury of the county; or, if that could not be done, to raise the necessary means by the levy of a special tax. In the return to the alternative writ many defenses were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to all these defenses, it is sufficient to say it was conclusively settled by the judgment which lies at the foundation of the present suit that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and, as such, entitled to payment out of any fund that could lawfully be raised for that purpose. It has been in effect so decided by the supreme court of Missouri in *State v. Rainey*, 74 Mo., 229, and the principle on which the decision rests is elementary. The present suit is in the nature of an execution, and its object is to enforce the payment, in some way provided by law, of the judgment which has been recovered. The only defenses that can be considered are those which may be presented in the proper course of judicial procedure against the collection of valid coupons, executed under the authority of law and reduced to judgment. While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt.

§ 1612. *A county authorized by law to contract a special liability can levy a special tax to meet that liability, unless it is restrained by a valid limitation of its taxing power.*

This brings us to consider what may be done to enforce the judgment. The county court insists that its power of taxation is limited to the levy of an annual tax of one-half of one per cent. on the taxable property in the county, and that as this tax has always been levied at the times provided by law, the duty of the court in the premises has been fully performed. The relator, on the contrary, claims that the limit of one-half of one per cent. only applies to taxes to defray the general expenses of the county, and that if the fund produced in this way is not sufficient to enable the county to pay his judgment, an additional tax must be levied and collected specifically for that purpose. This presents the real controversy we have to settle. When the charter of the St. Louis & Keokuk Railroad Company was granted, when the subscription was made to its stock by the county court, and when the bonds to pay the subscription were put out, there were limitations on the powers of the county court for the levy of taxes to defray the expenses of the county which confined the tax for a year to one-half of one per cent. or less. The question we have to consider is not whether this power has been reduced below that limit, but whether the limit is applicable to the obligation of the county created under the authority of the particular charter now in question. It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a state, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be in-

curred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is necessarily an ingredient of such a power to contract, as, ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation. This general doctrine has been so many times announced that it cannot be necessary now to do more than refer to *Loan Association v. Topeka*, 20 Wall., 655 (§§ 1162-68, *supra*), where the opinion was given by Mr. Justice Miller, and *United States v. New Orleans*, 98 U. S., 381 (§§ 1603-8, *supra*), in which Mr. Justice Field, speaking for the entire court, went elaborately over the whole subject. In *United States v. County of Macon*, 99 id., 582 (§§ 1609-10, *supra*), there was a special limitation on the power to tax, coupled with the authority to contract, and because the legislature saw fit to say how much of a tax in addition to that otherwise provided might be levied to meet the new and extraordinary obligation which was contemplated, it was held that a prohibition against anything more was necessarily to be inferred.

§ 1618. *A general law confining to a fixed per centum the annual tax "to defray expenses," etc., is not applicable to a debt contracted by a county by virtue of a special power.*

In the present case there is no such special limitation. The defense rests entirely on the power to tax to "defray the expenses of the county," which it has always been the policy of the state to restrict. The county court was, however, not only authorized to issue bonds, but to "take proper steps to protect the interest and credit of the county." It would seem as though nothing more was needed. As the commercial credit of the county, in respect to its negotiable bonds, could only be protected, under ordinary circumstances, by the prompt payment of both principal and interest at maturity, and there is nothing to show that payment was to be made in any other way than through taxation, it necessarily follows that power to tax to meet the payment was one of the essential elements of the power to protect the credit. If what the law requires to be done can only be done through taxation, then taxation is authorized to the extent that may be needed, unless it is otherwise expressly declared. The power to tax in such cases is not an implied power, but a duty growing out of the power to contract. The one power is as much express as the other. Here it seems to have been understood by the legislature that the ordinary taxes might not be enough to enable the county to meet the extraordinary obligation that was to be incurred, and so, without placing any restriction on the amount to be raised, the county court was expressly empowered to do *all* that was necessary to protect the credit of the county. We cannot agree to the position taken by the counsel for the plaintiff in error, that this power was exhausted when the bonds were issued to pay the subscription. The faith of the county, pledged by the subscription, was kept when the bonds were put out, but only by transferring the credit to be protected from the subscription to the bonds. The subscription was paid by the bonds; but the obligation to pay the bonds, principal and interest, when they matured, was legally substituted.

We have been referred to many instances in which statutes were passed authorizing special taxes to pay bonds which had long before been issued under original authority like that contained in the present charter; but this does not, in our opinion, change the case. Such legislation seems to have been procured out of abundant caution; but in none of the numerous cases in the Missouri

reports, to which our attention has been directed, is it anywhere said that the requisite tax could not have been levied but for such legislation. In *State v. Dallas County Court*, 72 Mo., 329, and some other cases before, it was held that such a provision as that contained in the charter of the St. Louis & Keokuk Railroad Company, now under consideration, was repealable; but none of the judges whose decisions have been published intimate even that if there had been no repeal there could not be a tax. It has been many times decided that county courts in Missouri, while acting as the governing bodies of their counties, which are nothing more than political subdivisions of the state, have no implied powers. Authority must be conferred on them by law to act, or they cannot act at all. This is not peculiar to the county officials of Missouri. The same principle applies to all municipal organizations in all the states, and in this respect it matters but little whether the organization exists as a full corporation or a *quasi* corporation. The point is that all such organizations for local government, by whatever name they may be called, have only such powers as the legislatures of their respective states see fit to delegate to them. But all powers that are delegated may be exercised in any proper way and at all proper times.

This makes it unnecessary to consider whether the power of taxation given by the general railroad laws in force when these bonds were made can be invoked in aid of the relator. It is enough that we find sufficient power in the charter of the company itself, without looking elsewhere. We ought, perhaps, to say, however, that the remark in the opinion in *United States v. County of Macon*, 99 U. S., 582, 591 (§§ 1609-10, *supra*), to the effect that the power of taxation granted by the general railroad laws was confined to subscriptions authorized by them, should be construed as made in a case where a special limitation on the power to tax was contained in the charter which authorized the issue of the bonds then in question, and that it was only necessary to decide that the railroad laws did not enlarge that power. The language there used may be broader than on further consideration we shall be willing to agree to. That case is authority on this point only to the extent it was necessary then to decide.

§ 1614. *Laws passed after bonds have been issued, limiting the taxing powers of counties, are inoperative as to such bonds.*

It follows from this that all laws of the state which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid, and that, under the well-settled rule of decision in this court, the circuit court had authority by *mandamus* to require the county court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent. The fact that money has once been raised by taxation to meet the payment, which has been lost, is no defense to this suit. The claim of the bondholders continues until payment is actually made to them. If the funds are lost after collection, and before they are paid over, the loss falls on the county and not the creditors. The writ, as issued, was properly in the alternative to pay from the money already raised, or levy a tax to raise more. It will be time enough to consider whether the command of the writ that the court *cause the tax to be collected* is in excess of the requirements of the law, when the justices of the court are called on to show why they have not obeyed the order. The same may be said of the order to draw the warrant on the treasurer. As at present informed, we see no irregu-

larity in anything that has been done. The judgment of the circuit court will be affirmed, and the cause remanded, with leave to the court to make such changes in the order originally entered as may have become necessary by reason of the time that has elapsed since the writ of error was brought; and it is so ordered.

UNITED STATES *v.* FORT SCOTT.

(9 Otto, 152-161. 1878.)

ERROR to U. S. Circuit Court, District of Kansas.

STATEMENT OF FACTS.—The city of Fort Scott, Kansas, issued bonds for the purpose of paying certain streets, and the ordinance authorizing their issue provided for their payment by assessments upon the property on the streets to be so improved, and upon the margin of the bonds was a reference to the ordinance prescribing this limitation. A holder of the bonds asked a *mandamus* to compel the levy of a tax on all the property of the city liable to taxation. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE HARLAN.

The vital question upon this writ of error is, whether the city is under a legal obligation to impose, in satisfaction of the relator's judgment, a tax upon all the taxable property of the city. If so, the judgment dismissing the information should be reversed; otherwise it must be affirmed. It is contended by counsel for the plaintiff that as the judgment for the debt has never been modified or reversed, the city is estopped, in this proceeding, to say that the relator was entitled only to a levy upon the property specially benefited. A determination of that question does not seem absolutely necessary in view of our conclusions upon other issues presented in the case. We therefore waive its consideration, and proceed to an examination of the statute of March 2, 1871, under which the bonds were issued. We are the more inclined to pursue this course because of his frank concession, that perhaps the purpose of the learned judge who framed the order of dismissal was to reserve the real question in controversy for determination when proceedings for *mandamus* should come before him.

§ 1615. *Limitations in the ordinance authorizing city bonds as to the mode of paying them, held not to limit the remedy of holders.*

In our examination of the statute of March 2, 1871, we are impressed with a strong conviction that the legislature intended to confer upon cities coming within its provisions the amplest authority, not only to incur obligations for all legitimate municipal purposes, but to meet promptly every obligation thus incurred. Unusual care seems to have been taken to guard the financial credit of such cities by provisions which, if enforced, would not only give confidence to creditors, but render municipal repudiation impossible. This care is manifested in the section which requires the council to establish a sinking fund for the redemption, at maturity, of "the bonded indebtedness of the city," that fund to be supplied by taxes, payable only in cash. It is further shown in the section which both authorizes and requires sufficient taxation annually on all taxable property within the city to meet the interest as it matures "on *all* the bonds of the city." It is still further indicated in the section which declares that the council "may . . . provide for the payment of the debts and expenses of the city." No express restriction is imposed as to the mode in which such provision may be made, except that, when necessary, "any and all indebtedness of

the city" may be met by issuing funding bonds, the interest upon which may be paid by taxation "on all the property of the city, in addition to other taxes." A faithful exercise of the powers thus conferred would seem to be sufficient to secure the prompt satisfaction of any municipal indebtedness incurred in accordance with the provisions of the statute of 1871. That the bonds for the amount of which the relator obtained judgment constitute a "debt," or a portion of "the bonded indebtedness" of the city, within the meaning of the statute, cannot well be doubted. The ordinance which required the improvements in question in terms directs that the cost thereof "shall be paid for in the bonds of the city," to be signed by the mayor, attested by the city clerk under the corporate seal of the city, and countersigned by the city treasurer. Further, each bond declares upon its face that it is a "special improvement bond of the city of Fort Scott, Kansas," and that the city, "for value received, acknowledges itself to owe, and promises to pay to the holder," the amount thereof. Still further, the statute under which the ordinance was framed authorizes the council to pay the cost of such special improvements by issuing "the bonds of the city." Finally, the bonds were negotiated by the city authorities, by whom the proceeds were received and expended under the direction of the council. They constitute, therefore, in every just sense, debts which the city, in its corporate capacity, is under a statutory and legal obligation to provide for in some effectual, substantial manner.

But, in behalf of the city, it is urged that the holder of these bonds must, by the terms of the statute, and the ordinance of January 22, 1872, look for payment exclusively to assessments upon the property specially improved and benefited. It is contended that such was the purpose of the city, of which the purchaser had constructive notice in the reference, in the marginal statement upon the bonds, both to sections 16 and 17 of the act of March 2, 1871, and to the ordinance passed by the council. To that interpretation of the contract we cannot yield our assent. It is true that section 17 declares that "for the payment of said bonds" assessments shall be made "upon the taxable property chargeable therewith;" that is, "on all lots and pieces of ground to the center of the block, extending along the street or avenue the distance improved." But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the city will not, under the authority derived from other sections of the statute, comply with *its* promise to pay the bonds, with interest, at maturity. As between the city and its tax-payers, it was certainly its duty, through the council, to provide, if practicable, payment by taxation upon the property improved, rather than upon all the taxable property within its corporate limits. But the duty to make such distribution of the burden of special improvements did not lessen its obligation, in accordance with its express agreement, to pay the interest and principal of the bonds at maturity. *Hitchcock v. Galveston*, 96 U. S., 341.

The main difficulty comes from the peculiar phraseology of the city ordinance prescribing the source from which the means for the payment of the bonds should be obtained. The statement in the ordinance that the bonds "shall be paid, principal and interest, solely from special assessments, to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the street the distance improved," should be regarded only as an expression, in emphatic terms, of the purpose and duty of the city, as between all its tax-payers, to impose the cost of the proposed improvements upon the property

specially benefited. There is no reason to presume that the ordinance was intended to mean more than the statute under which it was enacted. The general reference, upon the margin of the bonds, to the ordinance under which the improvement was projected should not, in view of the general powers of the council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the city, set forth in the body of the bonds, itself to pay the bonds, with their prescribed interest, at maturity. The agreement is that the city shall pay the interest and principal at maturity. There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the city should obtain, by special assessments upon the improved property, the means with which to make payment, or to withhold payment altogether, if the special assessments should prove inadequate for payment. Experience informs us that the city would have met with serious, if not insuperable, obstacles in its negotiations, had the bonds upon their face, in unmistakable terms, declared that the purchaser had no security beyond the assessments upon the particular property improved. If the corporate authorities intended such to be the contract with the holders of the bonds, the same good faith which underlies and pervades the statute of March 2, 1871, required an explicit avowal of such purpose in the bond itself, or, in some other form, by language, brought home to the purchaser, which could neither mislead nor be misunderstood.

In this case, it is alleged by the city that the special assessments required by the seventeenth section of the act of 1871 were duly made before the maturity of the bonds, and that all amounts collected in that mode have been promptly paid over by the city to holders of such bonds. But the unquestioned fact remains, that the bonds, with some interest, held by the relator, were not met at maturity as the city agreed that they should be. They are still unpaid. The special assessments made have, from some cause not explained in the answer of the city, proven wholly insufficient. Nor does it appear that they will ever prove sufficient for the payment of the relator's judgment. The corporate authorities repudiate all legal obligation upon the part of the city to provide payment in any other mode or from any other source, a position which we hold to be untenable and in violation of a plain duty imposed by statute. We are of opinion that the council has the power, under this statute, to provide for the payment of the relator's judgment by taxation upon all the taxable property within the city, and such should have been the judgment of the court below. A discharge of that duty will in nowise interfere with the right of the council to reimburse the city, if that be now possible, for all amounts thus paid, out of special assessments upon the property primarily chargeable with the cost of the work on account of which the bonds were issued. The judgment will be reversed, with directions for further proceedings in conformity with this opinion; and it is so ordered.

MORGAN v. TOWN CLERK.

(7 Wallace, 610-613. 1868.)

ERROR TO U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—This was an application for a *mandamus* to compel the town clerk to levy a tax to pay a judgment on town bonds. The statute under which the bonds were issued (act of 1853) provided that the supervisors of the town should annually levy a tax to pay the interest on the bonds. The act of 1858 provided that no execution should issue on any judgment against a

town, but that on the filing in the office of the town clerk of an exemplified copy of a judgment against a town, together with an affidavit, etc., it should then become the duty of the town clerk to assess the amount, etc., upon the taxable property, etc., the same to be collected as other town taxes. On account of the resignation of the supervisors, etc., Morgan failed in his proceeding under the act of 1853, and this proceeding was instituted under the act of 1858.

Opinion by MR. JUSTICE SWAYNE.

On the 9th of January, 1861, the plaintiff in error recovered a judgment against the defendant in error for \$1,540 damages, and for costs. The cause of action was overdue interest coupons attached to bonds issued by the town of Beloit in payment of its subscription to the stock of the Racine, Janesville & Mississippi Railroad Company, pursuant to chapter 12 of the local and private laws of Wisconsin, passed in 1853. The plaintiff in error instituted the proceedings in the court below to obtain a writ of *mandamus*, directed to the town clerk of the defendant, commanding him to assess the amount necessary to pay the judgment and interest, upon the taxable property of the town, and to place the assessment upon the next assessment and tax roll for collection. A statute of Wisconsin, ch. 15, § 77, Rev. Stat. of 1858, p. 186, forbids the issuing of an execution against a town, and expressly prescribes this mode of procedure.

§ 1616. *A special act for levy of tax to pay town bonds did not exclude a levy for such purpose under a general statute.*

Ample authority to issue the writ is given by the statute. The proceedings on the part of the plaintiff in error are in all things in strict conformity to its requirements. The power of the circuit court to issue writs of *mandamus* to state officers in proper cases is no longer an open question in this court; and it has been repeatedly held to be an appropriate remedy in the class of cases to which the one lying at the foundation of this proceeding belongs. *Commissioners of Knox Co. v. Aspinwall*, 24 How., 376; *Von Hoffman v. City of Quincy*, 4 Wall., 535; *Riggs v. Johnson County*, 6 id., 166. We learn from the record that the court below denied the writ upon the ground that the statute under which the bonds were issued provided that the requisite tax should be levied by the supervisors of the town, and that this remedy was exclusive of all others. There are several obvious answers to this view of the subject. We deem it sufficient to advert to one of them. In the case of *Bushnell v. Gates*, not yet reported [22 Wis., 210], this precise question, arising under the same circumstances, came before the supreme court of Wisconsin. It was held that the objection was untenable, that the statute authorizing the writ to go against the town clerk applied to the case, and that it was conclusive. If there could otherwise have been any doubt upon the question, this determination by the highest court of the state, giving a construction to the statute under consideration, is unanswerable. We need not further consider the subject. The judgment below is reversed. A mandate will be sent to the circuit court, directing that an order be entered in the case in conformity with this opinion.

DAVENPORT v. COUNTY OF DODGE.

(15 Otto, 237-243. 1881.)

ERROR to U. S. Circuit Court, District of Nebraska.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—By a statute of Nebraska, passed in 1869, “to enable counties, cities, towns and precincts to borrow money on their bonds, or to issue

bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purposes," the legal voters of counties and cities were authorized to vote bonds for such purposes, and upon a favorable vote the county commissioners in case of a county, and the city council in case of a city, were to issue the bonds as voted, which were to "continue a subsisting liability against said city or county" until paid. It was further made the duty of the proper officer annually to cause to be levied, collected and paid over to the holders of such bonds "a special tax on all taxable property within said county or city, sufficient to pay" the interest and principal as they fell due. Sections 6 and 7 of the act are as follows:

"SEC. 6. Any county or city which shall have issued its bonds in pursuance of this act shall be estopped from pleading want of consideration therefor, and the proper officers of such county or city may be compelled, by *mandamus* or otherwise, to levy the tax herein provided to pay the same.

"SEC. 7. Any precinct, in any organized county of this state, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds." General Statutes of Nebraska, 448.

Under the authority of section 2, bonds were issued by the county commissioners of Dodge county in the following form:

"UNITED STATES OF AMERICA,
"STATE OF NEBRASKA.

"It is hereby certified that Fremont precinct, in the county of Dodge, in the state of Nebraska, is indebted unto the bearer in the sum of \$1,000, payable on or before twenty years after date, with interest at the rate of ten per cent. per annum from date. Interest payable annually on the presentation of the proper coupons hereto annexed. Principal payable at the office of the county treasurer, in Fremont, Dodge county, Nebraska; interest payable at the Ocean National Bank in the city of New York.

"This bond is one of a series issued in pursuance of, and in accordance with, a vote of the electors of said Fremont precinct at a special election held on the 11th day of November, 1870, at which time the following proposition was submitted:

"Shall the county commissioners of Dodge county, Nebraska, issue their special bonds on Fremont precinct, in said county, to the amount not to exceed \$50,000, to be expended and appropriated by the county commissioners, or as much thereof as is necessary, in building a wagon bridge across the Platte river, in said precinct; said bonds to be made payable on or before twenty years after date, bearing interest at the rate of ten per cent. annum, payable annually? Which proposition was duly elected, adopted and accepted by a majority of the electors of said precinct voting in favor of the proposition.

"And whereas the Smith Bridge Company of Toledo, Ohio, have entered into a contract with said county commissioners to furnish the necessary materials, and to build and construct said bridge referred to in the foregoing proposition:

"Wherefore this bond, with others, is issued in pursuance thereof, as well as

under the provision of an act of the legislature of the state of Nebraska, approved February 15, 1869, entitled 'An act to enable counties, cities and precincts to borrow money on their bonds, to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purpose.'

"In witness whereof, we, the said county commissioners of said Dodge county, have hereunto set our hands, this 1st day of September, A. D. 1871.

"GEORGE F. BLANCHARD,

"A. C. BRIGGS,

"JOHN P. EATON,

"County Commissioners.

"Attest:

[SEAL.] "A. G. BRUGH, County Clerk."

Default having been made in the payment of sundry coupons attached to these bonds, Davenport, the plaintiff in error, brought suit against the county for the recovery thereof, in the circuit court of the United States for the district of Nebraska. The petition set forth the issue of the bonds according to the facts, and prayed judgment "for the sum of \$850 and costs of suit, said judgment to be collected by a tax upon the taxable property within the territory comprising said Fremont precinct at the time said bonds were voted and issued." The county demurred to the petition, and at the hearing the following questions arose: "1. Whether, upon the allegations of the amended petition filed in said court on the 12th day of May, 1881, the said county of Dodge is liable to a suit in which judgment can be rendered against said county of Dodge, on the bonds and coupons therein declared upon and set out." "2. Whether, upon the allegations of the said petition, the plaintiff is entitled to recover a judgment in form against the county of Dodge, to be satisfied or collected only by levy of a tax on the taxable property in Fremont precinct, as prayed for in said petition."

Upon these questions the opinions of the circuit justice and district judge holding the court were opposed, and that disagreement has been duly certified here. The opinion of the circuit justice being that the questions should be answered in the negative, the demurrer was sustained and judgment given for the defendant. From that judgment this writ of error has been brought, and the case is now here for determination on the certificate of division.

§ 1617. *Where bonds are issued by a county on account of "aid" voted by a precinct, suit should be brought against the county, and any judgment obtained be satisfied by tax upon the precinct.*

When county bonds are issued under the statute in question, it is expressly provided that they shall constitute a debt against the county, to be paid by the levy and collection of taxes on all the taxable property within the county. If aid is voted by a precinct, bonds also are to be issued, differing only from county bonds in that they are to be paid from taxes levied on property within a precinct. "As to the several duties of the county commissioners respecting them," says the supreme court of Nebraska, in *State v. Thorne*, 9 Neb., 458, 461, "the law makes no distinction whatever between precinct and county bonds. They must issue both, and when issued it is their duty to keep a record of the kinds and amounts, as well as the times and places of payment, and make provisions therefor, as the statute directs. In the case of precinct bonds the means of payment must be raised by a tax levied by the commissioners 'upon the property within the bounds of such precinct,' which must be collected in the same manner as is the ordinary county revenue, and through

the agency of the county treasurer, whose only duty in connection with the fund arising therefrom, when collected, is to hold it subject to the order of the county commissioners directing its application to the object for which it was intended. As before stated, the management of this sort of precinct indebtedness is made to conform to that of counties of like character. The sole distinction is that it concerns a distinct portion only instead of the whole body of the county. The money with which to meet the obligations of a precinct is raised and paid out with the same formality, and through precisely the same agencies, as are the ordinary county funds, and except when there is some special provision of statute authorizing it, payment therefrom can be legally made only on 'warrants by the county commissioners according to law.'"

A bond implies an obligor bound to do what it is agreed shall be done. Precincts in Nebraska are but political subdivisions of a county. They have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of precincts for political, administrative and judicial purposes, but they are in no sense the representatives of the people of the territory as a municipality. *State v. Dodge County*, 10 Neb., 20. Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the state. Their relation to a county is like that of a ward to a city. Having no corporate existence, no separate municipal authority, they cannot, says again the supreme court of the state, in the case last cited, "enter into contracts, directly or indirectly, nor assume obligations which a court might be called on to enforce." Hence, the precinct cannot become the obligor of precinct bonds, and we think it follows that the county, which does have a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty not only of issuing the bonds, but of providing for the payment of them, is the political entity bound by the obligation and charged with the debt created thereby. The only difference between the two kinds of debt is, that in one all the taxable property of the county is charged with its payment, and in the other only a part. In both the *mandamus* to enforce the levy and collection of the necessary taxes lies to the proper officers of the county alone. This remedy is expressly provided for, and thus the presumption that might otherwise arise of an intention to erect the precinct into a corporation for the purpose of these obligations, because, without it, the bonds could not be enforced, is rebutted. We think, therefore, that the special bonds which the county commissioners are to issue for the precincts are, in legal effect, the special bonds of the county, payable out of a special fund to be raised in a special way. Although the form of expression in the Nebraska statute is somewhat different from that in Missouri, which we were called on to consider in *County of Cass v. Johnston*, 95 U. S., 360 (§§ 901-904, *supra*), we think the legal effect of it is the same. In Missouri it was provided that the bonds should be in the name of the county; but in Nebraska there can be no bond except it be of the county, and as a bond is to be made, it necessarily follows that the county must make it. In express terms it is stated that precinct bonds shall be the same as other bonds, that is to say, county bonds, but must contain a statement of their special nature, which confines the area of taxable property to a part rather than the whole of the county. If there is nothing else in the case, therefore, we think it comes within *County of Cass v. Johnston*, *supra*, and that an action at law will lie in the courts of the United States against the county for the recovery of the special judgment

asked for. *County Commissioners v. Chandler*, 96 U. S., 205 (§ 1154, *supra*), was upon coupons attached to some of this same issue of bonds. Judgment had been rendered against the county in the court below, and that judgment was affirmed here. No one seemed to think then that the defense now relied on was good, for it was not mentioned in this court or below. The defense then made related only to the authority of a precinct to vote aid for the building of a toll-bridge.

§ 1618. *The courts of the United States cannot by mandamus compel the collection of a tax to pay county or township bonds until a judgment on such bonds shall have been obtained.*

It is contended, however, that as the statute which authorizes the creation of the liability provides a special remedy for its enforcement, this suit cannot be maintained. The remedy provided is by *mandamus* to compel the proper officers to levy the necessary tax. In *County of Greene v. Daniel*, 102 U. S., 187, a case similar to this in many of its features, we said a suit to get judgment on bonds or coupons was part of the necessary machinery which the courts of the United States must use in enforcing this remedy, and that the jurisdiction of those courts is not to be ousted simply because in the courts of the state the *mandamus* could be granted without a judgment. In the state courts the liability may, as we understand the case of *State v. Dodge County*, *supra*, be determined in the proceedings for the *mandamus*. Such is not, however, the rule in the courts of the United States, where the writ of *mandamus* is only granted in aid of an existing jurisdiction. In those courts the judgment at law is necessary to support the writ, which is in the nature of an execution to carry the judgment into effect. *County of Greene v. Daniel*, *supra*; *Graham v. Norton*, 15 Wall., 427; *Bath County v. Amy*, 13 id., 244. As the judgment asked for is special, and will only entitle the plaintiff to payment through the instrumentality of the special tax to be levied, the suit as it now stands is in reality only a way of getting the remedy the statute provides. The only execution that can issue on the judgment will be the *mandamus*. The supreme court of the state, in *State v. Dodge County*, *supra*, declined to issue a *mandamus* for the levy of taxes to pay a judgment in the circuit court of the United States on some of the coupons attached to this class of bonds, and in the opinion declared the judgment a nullity; but this we must understand to mean a nullity as the foundation of any proceedings in that court for its enforcement. To enable the courts of the United States to afford the remedy which the law has specially provided, such a judgment is a necessary preliminary. In fact, a judgment is but one of the steps in the proceeding to obtain the *mandamus*. The statute has given a remedy by *mandamus*, but has not undertaken to regulate the process by which it is to be secured. That depends on the practice established in the several tribunals from which it is to be obtained. The practice in the state courts requires one mode of proceeding, that in the courts of the United States another, but the result is the same in both, to wit, the order for the levy and collection of the requisite tax. It follows that each of the questions certified must be answered in the affirmative. Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

WEBER v. LEE COUNTY.

(6 Wallace, 210-213. 1867.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.— Bonds to the amount of \$450,000 were issued by the proper officers of Lee county in the state of Iowa, in favor of three railroad companies, in equal proportions. Recitals of the respective bonds were, that they were issued to some one of those railroad companies, pursuant to a vote of the people of the county, at an election held September 10, 1856, authorizing the county judge to make a subscription to the capital stock of the railroad, and issue the bonds for the amount of the subscription. Irregularities occurred in the preliminary proceedings, but the legislature of the state, on the 29th day of January, 1857, passed an act declaring, in substance and effect, that all of the votes taken in the county in the form of a joint or several proposition, whether the county would aid in the construction of one or more railroads, specifying the amount to be given to each, as a joint or several proposition, and the subscriptions made by the county, and the bonds of the county issued or to be issued in pursuance of those votes and subscriptions, should be regarded as legal and valid, and that such bonds, issued or to be issued under such votes and subscriptions, should be a valid lien upon the taxable property of the county. Second section of the same act also provided that the county judge, or other proper authority of the county, should levy and collect a tax to meet the payment of the principal and interest of such bonds; and that the county in any suit brought to recover the principal or interest of the bonds should not be allowed to plead that the same were usurious, irregular, or invalid, in consequence of the informalities cured by that act.

Determined, as it would seem, to cure all informalities, the legislature added a third section, which provides that all bonds issued by the county, in pursuance of any such vote of the people of the county, shall be valid and of full legal and binding force and effect, notwithstanding any informality or irregularity in the submission of the question to a vote of the people, or in the taking of the vote authorizing the subscription to such railroad and the issuing of such bonds. On their face they purport to have been issued under the authority of a vote of the people of the county, and therefore fall directly within the terms of the curative act of the general assembly. They are for \$1,000 each and are payable in twenty years from date, with interest at the rate of eight per cent., payable semi-annually, on the delivery of the interest coupons. Plaintiff was the holder of a large number of these bonds, and the corporation defendants failing to pay the interest as it accrued, he commenced an action of *assumpsit* against them to recover the same, in the circuit court of the United States for the district of Iowa, and the judges of the circuit court for that district being interested in the event of the suit, the same was, with the consent of the defendants, transferred to the circuit court of the United States for the northern district of Illinois. Defendants appeared and demurred to the declaration, and the judgment was for the plaintiff in the sum of \$18,207.92.

The undisputed facts are that the judgment remains unsatisfied; that the county has no property subject to execution; that the property of a private citizen cannot be taken in that state to satisfy a judgment against a municipal corporation; that the general laws of the state provide that where a judgment has been recovered against such a corporation, a tax must be levied to pay the

judgment; that the power to levy the special tax, as authorized in the curative act of the general assembly, has been by law transferred from the county judge to the defendants, and that they have neglected and refused to levy and collect any tax to pay the judgment. Unable to enforce the judgment, the plaintiff, being without other legal remedy, applied to the circuit court, in which he recovered judgment, for a writ of *mandamus* to compel the defendants to levy the special tax, as provided in the act of the general assembly. Adopting the usual course, the court issued the alternative writ and it was duly served. Due return was made by the defendants to the writ, in which they state that they refuse to levy the tax, and assign for cause that, at the suit of certain taxpayers of the county, they had previously been enjoined by the state court from levying any tax to pay the judgment, and allege, as matter of belief, that if they should obey the writ they would be subject to a penalty for contempt, and therefore that they cannot obey the writ and levy the tax.

Views of the plaintiff were, that the return was insufficient, and he accordingly moved the court to quash it, for the following reasons: 1. Because the decree of injunction, having been pleaded as a bar to the action to recover the interest, and the plea having been overruled in that suit, is not a sufficient answer to the application and alternative writ to enforce the judgment. 2. Because the relator was no party to the suit in which the injunction was obtained. Parties agree that the plaintiff was not a party to that suit. They were heard at a subsequent day, and the court overruled the motion to quash, discharged the rule for a peremptory writ, and rendered judgment for the defendants. Exceptions were duly taken by the plaintiff to the decision of the court in overruling the motion to quash, discharging the rule for a peremptory writ, and in rendering judgment in the case; and he, the plaintiff, sued out this writ of error.

§ 1619. *Mandamus is the proper remedy of a judgment creditor against a county in Iowa.*

Attention to the facts of the case as stated will show that the questions presented for decision are the same as those just decided in the preceding case. (a) Public property of a county in the state of Iowa is exempt from execution, and the act of the general assembly provides that the property of the citizen shall in no case be taken to satisfy the debt of the municipality. Proper remedy of the judgment creditor in such a case in the state court is by *mandamus* to compel the proper officers of the county to levy a tax to pay the judgment. Such a creditor, having recovered judgment in the circuit court, is entitled to the same remedy under the process acts passed by congress. *Mandamus*, when issued in such a case by the circuit court, is neither a prerogative writ nor a new suit. On the contrary, it is a writ authorized by the fourteenth section of the judiciary act, as necessary to the exercise of jurisdiction which has previously attached; and when issued in such a case, becomes the substitute for the ordinary process of execution to enforce the judgment. State courts cannot enjoin the process of proceedings in the circuit courts, not on account of any paramount jurisdiction in the latter, but because they are entirely independent in their sphere of action.

Judgment reversed and the cause remanded, with directions to grant the motion of the plaintiff and quash the return as insufficient, and for further proceedings in conformity to the opinion of the court.

MR. JUSTICE MILLER took no part in this judgment.

MERCHANTS' NATIONAL BANK OF LITTLE ROCK v. COUNTY OF PULASKI.

Circuit Court for Arkansas: 1 McCrary, 816-828. 1880.)

STATEMENT OF FACTS.—Plaintiff is the holder of bonds issued by the county of Pulaski, Arkansas. The bonds were originally issued with power vested in the county to levy a tax to pay coupons and bonds. Default of payment, however, having been made, an arrangement was entered into under an act for the funding of indebtedness, and the bonds were scaled down twenty-five per cent. and new bonds issued upon a contract that if the interest was not paid for a period of sixty days the remission of the twenty-five per cent. should be forfeited. Default of payment for more than sixty days was made on the new bonds. This bill was filed to set aside the new bond contract and for a decree for \$43,026.13, the amount alleged to be due upon the old bonds, and a demurrer was filed on the ground that the plaintiff's remedy, if any, was by an action at law.

Opinion by McCRARY, J.

The demurrer raises the question whether the complainant has an adequate remedy at law. The new bonds, as already stated, were given in lieu of two classes of bonds previously held by the complainant. I will consider the demurrer as it relates to each class.

§ 1620. *Remedy of creditors where, upon compromise, new county bonds have been substituted for old bonds upon condition that in case of default in the new the old contract shall be revived.*

1. As to the first class, to wit, bonds issued under the act of April 29, 1873, the contention of the complainant is that by the construction placed by the supreme court of Arkansas upon the act of March 6, 1877, it is deprived of the right to sue at law and recover judgment upon its debt, and to enforce the payment of the same by levy and collection of the taxes which the county agreed to levy and collect for that purpose, to wit, such taxes as were authorized by law when the original bonds were issued. The decision referred to is in the case of *Brodie v. McCabe* (not yet reported), which was a proceeding by tax-payers to enjoin the levy and collection of taxes in excess of the maximum allowed by the Arkansas constitution of 1874. Section 9 of article 16 of that constitution provides as follows: "No county shall levy a tax to exceed one-half of one per cent. for all purposes; but may levy an additional one-half of one per cent. to pay indebtedness existing at the time of the ratification of this constitution." Section 6 of the act of March 6, 1877, under which complainant's bonds were funded, and the new bonds now held by it were issued, provides that "it shall be the duty of the county courts issuing bonds under the provisions of this act to levy a special tax of sufficient amount to pay the principal and interest of said bonds as they shall become due, not to exceed the limit of taxation, together with all other taxes levied during that year, prescribed in the constitution of the state."

In commenting upon that clause of the act, the supreme court of Arkansas, in the case *supra*, observe that "those who took or might take these bonds evidently submitted to the constitutional limit of taxation under the present constitution;" and undoubtedly such is the fair presumption, unless the contrary is made to appear in any given case by the terms of the contract. It does not appear that any of the bonds issued under the act in question were before the court, and it certainly was not called upon to construe, and did not assume to pass upon, the written contracts under which the complainant claims. The

most the court could have intended to assert is that where a creditor of the county funds has bonds under the act of 1877, without any stipulation preserving the obligation of the original contract, those obligations are waived and substituted by such as are consistent with the constitution of 1874. But it was clearly within the power of the parties to agree that the non-payment of the compromise bonds, or of the interest thereon, for a specified period, should annul the new bonds, and restore the parties to their rights before the agreement of compromise was entered into. Such an agreement was not beyond the powers of the defendant corporation, as insisted by counsel for the defense. It would be an unwarranted enlargement of the doctrine of *ultra vires*, to hold that a municipal corporation owing an admitted, valid debt, and having the power to pay or compromise the same, may not bind itself by the terms of such a compromise agreement as that set out in the bill, and shown by the exhibits, in this case. What is that agreement? It is that the complainant shall remit twenty-five per cent. of its demand, and take new bonds for the balance, upon the condition that, if the new bonds are not met, interest and principal, as they mature, "their acceptance shall not discharge or release said county from any portion of its original indebtedness," and that the acceptance of the new bonds "is not to be a waiver by the holders thereof of any of the provisions of the act under which the surrendered bonds were issued." In other words, it is plainly a conditional settlement, to be void if not complied with by the county. By complying with it, the county can save twenty-five per cent. of the amount of the original debt. By default, it clearly becomes liable to pay the whole amount of the original debt, and also to levy all such taxes as were authorized by law, at the time the original bonds were issued, to raise funds for their payment.

It is well settled that where bonds of a county or a municipality are issued under authority of law and payable out of the proceeds of taxation, the law providing for such taxation enters into and becomes part of the contract, and cannot be subsequently repealed by the legislature or changed by constitutional amendment so as to deprive the bondholder of his remedy. At the time of the contract of compromise, therefore, the complainant had a perfect right to demand the levy for the payment of his bonds of whatever taxes were authorized by law for that purpose when such bonds were issued, even if the same should exceed the limit prescribed by the constitution of 1874. It is also well settled that a change in the form of the contract, or the substitution of one evidence of debt for another, does not ordinarily change the rights of parties. The complainant's debt against the county remained the same debt, notwithstanding the substitution of the new bonds for the old. It was, therefore, perfectly competent for the county to agree to the conditions to which I have adverted, and which are plainly stated in the writing set out with the bill. Whether, under the decision of the supreme court of the state, it is now within the power of the county court to levy and collect the taxes necessary to meet the interest on the compromise bonds, is immaterial. The contract, in effect, was that a failure on the part of the county, from any cause, to meet the interest or principal of said bonds, should render the compromise void, and leave the parties in the enjoyment of their rights under the original contract. A court of equity can never hold that the contract of compromise was effectual for the purpose of taking away the remedies existing under the original contracts, and not effectual for the purpose of securing the payment, in the manner provided, of the reduced amount represented by the new bonds.

From what has been said it will be seen that in my judgment the complainant has an adequate remedy at law. If payment of the past-due interest on the compromise bonds shall be refused on demand, the complainant can declare in an action at law upon the original bonds. No discovery is necessary, for the bill shows that the complainant can describe the bonds and other evidences of debt with sufficient particularity to enable it to prove the sum due thereon, and it can aver that they are in the possession of the county, or have been by it lost or destroyed. If, in such a suit, the county shall fail to produce said bonds upon being notified to do so, it will be competent for complainant to prove their contents by secondary evidence. The fact that the bonds surrendered to the county at the time of the compromise may appear to have been by it canceled, will not defeat the complainant's right of action. Proof may be offered, and will be admissible, to prove that the cancellation was in pursuance of the contract of compromise, and is of no force or effect.

§ 1621. *Where a valid evidence of debt, issued by a county, is surrendered by the holder and a new invalid evidence of debt issued instead, the legal rights of the creditor are not affected.*

As to the second class, to wit, bonds issued under the act of March, 1875, and the act supplementary thereto, these appear to have been issued in lieu of county scrip surrendered. Subsequently to their issue, the supreme court of Arkansas held that the said act of March, 1875, and the supplementary act, were void. Still, it is clear that complainant held a valid claim against the county, for, if the bonds were invalid, it was at liberty to seek its remedy upon the original debt represented by the surrendered scrip. It seems to be conceded by counsel on both sides that the bonds issued under the act of March, 1875, based, as they were, upon a valid, pre-existing debt, could lawfully be funded under the act of March 6, 1877. The point made by complainant's counsel is that the decision of the supreme court in *Brodie v. McCabe* does not permit the county to carry out the contract of compromise, as to these bonds, by carrying into them the obligations of the contracts upon which they are founded, and out of which they grew, to wit, the county scrip aforesaid. In this I think the counsel is wrong. The original debt, for which these bonds were issued, was subject to the limitations as to taxation, for its payment, contained in the ninth section of article 16 of the constitution of 1874. The supreme court has in that case decided that the bonds were issued subject to that limitation, and it has decided nothing more. The contract between the parties, referred to in the first part of this opinion, will, as respects this class of bonds, be carried out by a levy up to the limit of the constitution, for as to them the original contract provided no other or better remedy. It follows that the complainant's remedy, as to these bonds, is at law. The demurrer to the bill and amended bill is sustained.

POST v. TAYLOR COUNTY.

(Circuit Court for Kentucky: 2 Flippin, 518-524. 1879.)

Opinion by BAXTER, J.

STATEMENT OF FACTS.—It appears from the pleadings in the case that the defendant, Taylor county, issued its coupon bonds to aid in the construction of the Cumberland & Ohio Railroad. These bonds were put upon the market and sold. By the terms of the act under which they were issued the county court of that county was authorized and required, from time to time, to assess

and collect taxes, to be applied in payment of the interest on said bonds as the same matured. But this legal duty thus imposed by law was not performed. The interest not having been paid, the complainants, who were the holders of some of said bonds, brought suit and recovered judgment therefor in this court. On this judgment execution was issued and duly returned *nulla bona*. The county owned no property on which a levy could be made. Thereupon, and upon proper application by complainants, writs of *mandamus*, *nisi* and *peremptory*, were issued, commanding the county court, charged with the duty, to assess taxes for the payment of complainants' judgment; and in obedience to the mandate of this court it made and reported said assessment. But the county officers, in answer to said mandate, averred "that, after sincere and diligent effort, it (the county court) was unable to find any qualified person who would accept the office of collector, give the bond required by law, and undertake to collect said tax."

The court then, as we understand from the statement of the facts made in argument, appointed a receiver, vested with authority and charged with the duty of collecting said tax. But soon after entering upon the execution of his office he was induced by threats of violence to resign his position. Complainants thereupon filed this bill, to which Taylor county and several of the more prominent tax-debtors thereof were made defendants. Copy of the assessment, as made, is exhibited with and made a part of the bill, showing the amount assessed against each property holder. Complainants' prayer is that the said several tax-debtors, assessed as aforesaid, be required, by appropriate orders and decrees, to be made by this court in this case, to pay the amounts so severally assessed against them, into court in discharge of their said judgment.

Defendants answer and fully admit the allegations and equity of the bill. This admission is followed by a very frank and manly avowal on the part of the tax-debtors brought before the court, that they are all able, ready and willing to pay the amounts so assessed against them, provided there is some competent person to whom the payments can be legally made. But they go on to suggest and rely upon quite a number of legal barriers, which as they are advised, prevent them from doing so. They insist: First. That the assessment was not made at the time and in pursuance of the laws providing for the assessment of taxes by the county court. Second. If the assessment was valid, there is no privity between them and complainants, and hence they deny that, "by reason or virtue of said assessment or levy, or both, they became indebted to said county in the sum so levied, or in any other sum," for complainants' use or benefit. Third. They contend that by law none but a collector duly appointed, who shall execute bond, etc., is authorized to receive and execute receipts for such taxes; and, Fourth. They say "that by and under the provisions of the charter of said railroad company," each and every tax-payer "is, upon the payment of such tax, a conditional stockholder of the capital stock of said company to the amount of the tax so paid; that before any such tax-payer is under any legal obligation under said charter to pay any such tax, the collector of such tax shall tender to him a receipt for the amount thereof, and upon such payment said tax-payer can legally demand, and is entitled to receive, from said railroad company, on surrender of such receipt, certificates of stock in said company equal in amount to the tax paid for which a receipt is surrendered; and no tax-payer is under any legal obligation to pay such tax unless thereby he is, by the collection of said tax, armed with the means therefor of becoming

a stockholder in said company; and that no collector attempted to be appointed by this court for such purpose could furnish the tax-payer with a receipt therefor, which would entitle him to demand and receive stock in said company." These defenses are supplemented by repeated and very earnest denials of the power of this court to give a remedy in the premises.

The avowed willingness of the defendants to pay is heartily commended. The justice and validity of complainants' demands are explicitly admitted. The bonds were issued in pursuance of law at the request and for the benefit of the people of the county. The money realized from the sale of these bonds was applied in the construction of a great public enterprise from which they expect to derive pecuniary and other advantages. Of course they are, as they ought to be, ready and willing to pay, and are only restrained from paying because there is, as they are advised, no one legally competent to receive the taxes admitted to be due from them. Their case calls for commiseration. A breach of plighted public faith is a calamity to any community. While it does injustice to the creditor, it dishonors the delinquents. If persisted in it will — slowly it may be, but certainly — contaminate the public morals, and superinduce untold pecuniary and social evils. The willingness, therefore, of defendants to pay, is dictated as well by a sagacious regard for their own interest as by a love of justice and an honest desire to pay their creditors, and they will, I know, be gratified at the announcement that, in the opinion of this court, the legal difficulties, which they by their answer suggest as being in the way of a prompt payment of the taxes assessed against them, are more fanciful than real. The bonds from which the coupons were taken, constituting the foundation of the decree rendered by this court, are valid obligations; at least it has been so adjudicated, and it is now too late for inquiry into that question. The taxes sued for were levied in obedience to the mandate of this court, and this question is *res adjudicata* also. By the terms of the law under which they were issued it is the duty of the county court to levy and collect a tax from the property of the citizens of the county and apply the same to the payment of the interest for which complainants have judgment. This was the contract. The pleadings show that the officers of the county sincerely and in good faith endeavored to discharge the duty thus enjoined upon them. But they have been unable to do so. No one competent will give bond and undertake the collection. It is rather an anomaly that, in a community "able, ready and willing" to pay taxes to meet its public obligations, no one can be found who is competent and willing, for a just compensation, to collect and apply the same. But such we see, from the record in this case, is the existing condition of things in Taylor county. They would if they could, but they cannot. This court undertook to lift them out of their embarrassment by the appointment of a receiver to do what the county court was, for the reasons stated, unable to do. But by threats of violence he was deterred from performing his duties.

§ 1622. *A court of equity has jurisdiction to enforce (as against tax-payers) the collection of a tax assessed against a county to pay the coupons on its bonds.*

As a *dernier resort*, complainants filed this bill, in which they brought some of the tax-debtors of the county personally before the court. The case made brings it within well established equity jurisdiction. Equity regards the substance of things, and eschews the technicalities of the common law. There is no such privity between complainants and the defendant tax-debtors as would authorize a suit at law. No such privity is necessary to the maintenance of this suit. Under the law, it is the legal duty of the county court to assess the

taxes and apply the same in payment of the interest as it accrued on the county bonds. This legal duty imposed on that tribunal a trust for the benefit of the county creditors. But, for the reasons stated, it could not execute the trust.

§ 1623. *A court of equity, having acquired jurisdiction to enforce the collection of special taxes, will proceed to do so. Mode to be adopted.*

Upon this admitted state of the case, the complainants have a clear equity to come into this court and invoke its assistance to force the tax-debtors to pay the county, to the end that the county may pay complainants. Such is the theory upon which complainants' equity rests, and which gives jurisdiction to this court. Having, on this ground, obtained jurisdiction, the court is bound to do full justice, and will, in the exercise of its judicial authority, direct the payment of the taxes so assessed into the registry of the court, to be applied in satisfaction of complainants' decree. Parties thus paying will be acquitted and fully discharged from all further liability on that account. There is not the slightest danger that they, or any of them, will ever be called upon to repay the same; and payment thus made will insure to the payers the same interest in the capital stock of the railroad company, conferred on them by the charter thereof, as if made to one acting as county collector. Without pursuing the discussion further, we are of the opinion that the several defenses pleaded and relied on in the answer are untenable and immaterial. They are impertinent, and complainants' exception thereto will be sustained. A decree will be entered authorizing and requiring each tax-debtor to be made a defendant in this case, to pay to the clerk of this court, within ninety (90) days, the amount of tax assessed against him, as shown by the copy of the assessment roll filed, and, in the event he fails to do so, an execution will issue for the same.

If it shall turn out, as it is manifest it will, that the amount due from the defendants is inadequate to pay complainants' decree, and complainants ask for it, another receiver will be appointed and authorized to collect the taxes assessed for the purpose against other property holders of the county, not parties to this cause. They will be allowed reasonable time in which to pay. If they shall not, within reasonable time, pay the sums severally assessed against them, the receiver will be instructed to bring them all before the court by an ancillary petition to be filed in this cause, when a decree will be rendered against each of them for the amount so owing by them, with costs, and collection will be coerced by such further appropriate decrees and process as may seem to the court proper and necessary. This, we think, may be done by attachment for contempt, or by execution to the marshal for the collection of the same.

It may not be improper to say that this court feels bound, if necessary, to exhaust all its powers in the enforcement of its lawful decrees, and it will not hesitate to exert them.

MUSCATINE v. RAILROAD COMPANY.

(Circuit Court for Iowa: 1 Dillon, 536-544. 1870.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—These are applications to me as a judge of the supreme court and of the circuit court of the United States for the district of Iowa, for injunctions to restrain further proceedings in the collection of certain taxes which have been assessed against citizens of the counties mentioned and

of the city of Muscatine. These taxes have been levied and are in process of collection in pursuance of writs of *mandamus* from the circuit court for the payment of numerous judgments against the city and the two counties aforesaid. A bill of complaint in each case has been filed, and the answers, though not filed, are before me and sworn to, and are supported by affidavits. These will be sent to the clerk by me, to be filed with the bills of complaint.

The bills in the cases of the city and county of Muscatine seek relief upon substantially the same grounds and will be considered together. These grounds are: 1. That the bonds on which the judgments are founded, and for the payment of which the taxes are levied, were without consideration and obtained by fraud. 2. That the judgments are for more than they ought to be. 3. That the judgment creditors have a decree for funds now in the hands of the receiver of the circuit court on account of the same debt for which the taxes are levied.

§ 1624. *Matters, such as fraud, which should have been pleaded as a defense, are not sufficient grounds after judgment to cause a court of equity to enjoin process upon such judgment.*

In regard to the first ground of relief, it may very well be doubted whether the bill shows any fraud or failure of consideration which should be a defense to the bonds either in law or equity. When the allegations are examined closely they seem to amount to [no?] more than a failure of the railroad company to which the bonds were first issued to comply with certain promises made at the time of the transaction. If, however, they could be held sufficient as allegations of fraud or failure of consideration, there are two very sufficient answers to them in this application. 1. They are no defense to the bonds in the hands of innocent holders. 2. They were proper defenses, if good at all, to the action in which the judgments were rendered, and cannot be set up against the enforcement of these judgments now.

§ 1625. *Remedy where judgment is for too large an amount.*

3. The judgments as to which these injunctions are sought are numerous, and the plaintiffs in them are different persons in most of the cases. The bill alleges that in some of these judgments, without specifying which, the amounts are too large. That is shown by the absence of coupons from the clerk's office in which the judgments are found, and that a rate of interest too large was calculated in some cases. The judgments in which these supposed mistakes were made are not specified. Indeed, the complainants say they have no means of determining in which of the judgments the mistakes were made, but they arrive at the conclusion that judgments on the whole have been rendered for more than the corporations were liable in *these suits*, by a conjectural calculation based on the coupons not sued on and the amount originally issued. A court of chancery can hardly be expected to restrain the collection of the judgment of A. B. because there is error in the judgment of C. D., nor can the force of this proposition be avoided by alleging that there is error in the judgment of A. B. or C. D., and therefore both of them shall be enjoined. Besides, as the only error worth notice is one of clerical mistake, and one which never could have been made without gross carelessness on the part of the complainants in this suit, the only remedy is to apply to the court to correct the calculations. The absence of the coupons for which the judgment was rendered from the clerk's office cannot be assumed to imply that they were not present when the judgment was rendered, though it is certainly true that they should then have been canceled and filed.

§ 1626. *Right of bondholders to resort to different funds at the same time.*

4. In regard to the funds in the hands of the receiver in the Mark Howard case, it is certainly true that, when paid to the judgment creditors, it will operate as a discharge of so much of the judgments on which the tax proceedings are based as those creditors shall receive on account of these judgments. The fund is one which was designed to go to the county and city, as well as other stockholders in the railroad company. Before it came to their hands it was seized and held to answer these judgments against the city and county, and if appropriated to that purpose, pays so much of that debt. But the judgment creditors have not received that fund as yet. It is still in litigation. They are pursuing their remedy against it, as also against the city and county at the same time. This they have an undoubted right to do, and especially against the latter, as they are the primary obligors. It is also provided in the decree that when the debt is paid, the city and county shall be subrogated to all the rights of these judgment creditors in regard thereto. The right of the creditor to pursue his remedy in each case until satisfaction of his debt is clear upon all the authorities, and no harm can come to the present complainants from this course, as upon payment from either fund, whether complete or partial, on application to the circuit court the judgment creditors will be restrained from any further use of their judgments or decrees to the prejudice of these complainants. It is proper to add that the portion of this fund which any of these creditors may receive can in no case exceed one-sixth of the amount of the judgments which they are seeking to collect of the city and county.

§ 1627. *A judgment upon municipal bonds concludes all matters which could be litigated in the action.*

In the case of the citizens of Louisa county the usual allegations of fraud in obtaining the bonds by the parties to whom they were originally issued are made. This is concluded by the judgment on those bonds. It is further alleged that Fellows, the principal judgment creditor, bought his bonds after the courts of Iowa had judicially held them void. This defense cannot now be set up against the judgment. The allegation is expressly denied in the answer, and this is supported by the affidavit of a witness, who says he knows Fellows purchased before such a decision was made. It is further alleged that two railroad corporations have in Louisa county a large amount of valuable property, amounting to one-fourth of the taxable property within the county, which is not assessed by the officers who are collecting this tax, although by law it is liable to its share of the tax. As the tax complained of is being collected under the order of the federal court, and as the evident tendency of all that has been said by the supreme court in regard to these corporation debts implies that no interference by state courts will be permitted in enforcing the tax, the statement here made presents a very grave question for the consideration of the court which is collecting the tax by its agents. I have had more difficulty on this point than on any which has been presented in these applications.

§ 1628. *The collection of a tax will not be enjoined because all property liable is not taxed.*

A statute of Iowa exempts railroad property from all other taxes except one per cent. per annum paid into the state treasury. The constitution of the state declares that all taxation shall be uniform. Whether this constitutional provision (the exact terms of which I have not attempted to state) renders the statute void is a question upon which the supreme court of this state has twice, as I am informed, been equally divided. If the question was presented to the cir-

cuit court by way of supervisory control over the officers, who, under its command, are collecting this tax, whether this railroad property should be assessed the same as other property, I confess I do not see how it could avoid deciding it. But, instead of an order to assess the property, I am asked to declare all other assessments void because it is not assessed. This, it will be seen, is a very different question, and it is clear that I can only enjoin its collection on the ground that it is void. The case of *Gilman v. Sheboygan*, 2 Black, 510, is relied on as authority for the latter proposition. In that case, after the city of Sheboygan had issued bonds in aid of a railroad, the legislature of that state passed an act, declaring that the tax to pay these bonds should be assessed exclusively on the real estate of the city. The constitution of Wisconsin has a provision similar to the one referred to in the constitution of Iowa, and the supreme court of the United States held that this attempt to make a part only of the taxable property of the city responsible for this particular debt was a violation of the constitution which rendered the tax levied under that statute void.

In the case before us there is no attempt to render any species of property liable to taxation for any specific debt, or class of debts, but an exemption of the railroad from all other burdens, in consideration of a definite sum, which may be more or less than its share of such burden. Whether this exemption be forbidden by the constitution or not, I am quite clear that it does not render void the tax which is levied upon other property. The case of *Gilman v. Sheboygan* does not go so far as this, either in the facts on which it is grounded or the reasons by which the judgment was sustained. There is a manifest difference between an attempt to impose the entire burden of a debt already incurred by a municipality, upon a particular species of property, and the attempt to exempt a species of property from all other taxation, in consideration of a sum supposed to be its just share of the general public burden. It is not inappropriate to look to the consequences of holding that this failure to assess the railroads renders all other tax void. It applies to the tax assessed for all other purposes as well as this tax. Every non-resident holder of property in the state could apply to me and insist on an injunction against the tax on his property. And if the state judges believe it to be void, they would be bound on the same principle to suspend the collection of all taxes throughout the entire state. A proposition which leads inevitably to such a result cannot be sound. I cannot therefore grant an injunction on this ground, whether the railroad property is liable to taxation or not. It is alleged that the officers are collecting the penalties for failure to pay the tax, according to this law as it stood before the act of last winter, which provides that only seven per cent. should be collected in this class of cases. Whether this is right or not, I do not pretend to decide. It is matter for application to the court for direction, and I am informed that the course pursued is one prescribed by the court at its last term. It is clearly no foundation for an injunction.

Injunction denied.

§ 1629. In general.—When a federal court has rendered judgment on county bonds it may issue a *mandamus* to compel the county court to provide for the payment of such judgment. *United States v. Buchanan County*,* 5 Dill., 285. See § 1588.

§ 1630. The holder of a county warrant may compel the payment thereof by *mandamus*, if there is sufficient money in the treasury. *Thomas v. Smith*,* 1 Mont. T'y, 21.

§ 1631. Courts have power by *mandamus* to compel municipal corporations to levy a tax to pay their debts. *United States v. City of Sterling*,* 2 Biss., 408.

§ 1632. Where city authorities have power to levy additional taxes on taking a vote of the

people, it is their duty to take such vote if the ordinary levy is not sufficient to meet the maturing municipal obligations; and failing in this, they will be compelled by *mandamus*. *Ibid*.

§ 1633. When action will lie.—An action can be maintained in the federal courts against a municipal corporation of Michigan on its bonds, although the state courts hold that no action in such a case is necessary, the proper proceeding being by *mandamus* to compel the proper officer of the corporation to do his duty. *Chickaming v. Carpenter*, * 16 Otto, 663.

§ 1634. In the federal courts a *mandamus* will not lie to compel the payment of bonds and coupons until they are reduced to judgment, though the rule may be otherwise in the state courts. *County of Greene v. Daniel*, * 12 Otto, 187.

§ 1635. Action lies to recover interest.—A statute permitting a town to issue its bonds in aid of a railway provided that the commissioners named to issue the bonds in behalf of the town should annually report to the supervisors of the county what sum would be necessary to be levied to pay the principal and interest on the bonds, and that sum should be collected on the property of the town and paid to the commissioners. *Held*, that, notwithstanding these provisions, an action was maintainable against the town to recover interest due on coupons to bonds thus issued. *Town of Queensbury v. Culver*, 19 Wall., 83 (§§ 854-857).

§ 1636. Bonds issued on behalf of a township.—The holder of bonds, issued under the act of March 28, 1868, of Missouri, by a county court in the name of the county, on behalf of one of its townships, may recover a judgment thereon against the county, to be enforced, if necessary, not by execution against the county, but by *mandamus* against the county court, to compel it to levy upon the property in the township the special tax which the law has enjoined as a duty. The bonds are not the debt of the county, but the county is a trustee for the township, which has no corporate capacity and against which no judgment can be rendered. *Jordan v. Cass County*, * 3 Dill., 185. See § 1594.

§ 1637. Implied power to levy a tax.—Where the charter of a railroad company authorizes a county to subscribe for the stock of the company, and issue bonds in payment therefor, and take proper steps to protect the credit of the county, it is held that the power given to the county to create the debt implies the power to levy a special tax to pay the debt; and there being nothing in the statutes of the state to refute the implication, the holders of the bonds are entitled to have a special tax levied, if necessary, to raise a fund for the payment of the principal and interest of their bonds. *United States v. Lincoln County*, * 5 Dill., 184. See § 1588.

§ 1638. The general railroad law of the state of Missouri, of 1853, provided for the levy of a tax to pay the principal and interest of county bonds issued for stock in railroad companies. The act made all railroad companies thereafter chartered subject to its provisions with regard to subscription to stock, unless their charters should contain the contrary. In 1857 the charter of the St. Louis & Keokuk Railroad Company provided for the subscription to its stock by counties, and the issuing of county bonds in payment therefor, but was silent as to taxes in payment of these bonds. It is held that there being nothing in this charter contrary to the provisions in the act of 1853, the provisions of that act have the same force and effect as if they were contained in this charter, and the holders of the bonds issued in pursuance of this charter are entitled to a special tax to be levied for the payment of their bonds. *Ibid*.

§ 1639. Bonds were issued by a city under the general powers in its charter, but there was no special requirement in the charter or elsewhere for the levy of a tax to provide the means of payment. *Held*, that where a city is authorized to contract a debt there is an implied power to levy a tax to pay it, unless the contrary expressly appears; and a *mandamus* will issue in such case to compel the city to levy the tax. *Ex parte Parsons*, * 1 Hughes, 282.

§ 1640. Exhausting taxing power for other purposes.—The officers of the city of Mobile issued its bonds to a railroad company, under authority of an ordinance, reciting that the city shall be bound to appropriate sufficient money from its treasury to pay interest on these bonds, to be raised by general or special tax. This ordinance was confirmed by the legislature. It is held that the ordinance is a contract with the holders of the bonds; and the ordinance having been passed while a constitutional provision limiting the taxing power of the city was in force, it was not competent for the legislature, by a subsequent act, to exhaust the taxing power of the city for other purposes. The bondholders are entitled to have all the taxing power of the city exercised, if necessary, to secure the performance of their contract. It is no objection that the city owes interest to prior creditors, while it expresses no intention to levy a tax for the payment of it. *Sibley v. City of Mobile*, * 3 Woods, 535. See §§ 1589, 1591, 1654.

§ 1641. Practice.—It is the practice in the eighth circuit, in enforcing judgments on bonds, to require the levy of a tax at the general annual levy, and not to require a special assessment unless the circumstances of the case require it. (*Per DILLON, J.*) *United States v. Vernon County*, * 3 Dill., 281.

§ 1642. Where a bondholder has recovered a judgment against the county, and execution has been returned *nulla bona*, it is the duty of the county to levy a tax to pay the judgment; if the creditor takes a warrant he is not required to wait his turn to get his money in the order that warrants are presented. *Ibid*.

§ 1643. **Must obey a mandamus notwithstanding an injunction.**—County bonds issued in pursuance of a vote of the people, and under authority of a law already held valid by the supreme court of the state, are not invalidated by a subsequent decision of the same court holding the act unconstitutional, the bonds invalid, and restraining the board of supervisors from levying a tax, already authorized, for the payment of the bonds. The board of supervisors, notwithstanding this injunction, are bound to obey a *mandamus* from a federal court to levy a tax to pay a judgment on these bonds rendered in that court, and the court will issue an attachment if the *mandamus* is not obeyed. *United States v. Supervisors of Lee County*, 2 Biss., 77. See § 1595.

§ 1644. Where a judgment has been obtained in a federal court upon municipal bonds, the right of the creditor to enforce payment thereof by *mandamus* cannot be affected by an injunction previously issued by a state court. *Riggs v. Johnson County*, 6 Wall., 185. This is true whether the creditor was a party to the proceeding in which the injunction was issued or not, and no matter when the injunction was issued. *The Supervisors v. Durant*, 9 Wall., 417.

§ 1645. **Change in charter.**—It is no defense to an action on the bonds of a municipal corporation, issued under authority of law, that there has been a change in the charter of the corporation, when such change does not amount to an extinguishment of the corporation, but is simply a reorganization of the city government in pursuance of an act of the legislature intended to secure uniformity in county, township and municipal governments, and not intended to annul previous liabilities. *Broughton v. Pensacola*, 8 Otto, 266.

§ 1646. **Judgment conclusive.**—In a proceeding by *mandamus* to compel the levy and collection of a tax to pay a judgment rendered on municipal bonds, there can be no inquiry into the regularity of the issue of the bonds. The judgment at law is conclusive. *The Mayor v. Lord*, 9 Wall., 409.

§ 1647. **Repeal of law authorizing taxes.**—At the time certain municipal bonds were issued the laws in force authorized and required the collection of taxes sufficient in amount to meet the interest as it accrued. A law subsequently passed restricted the amount which could be raised by taxation to a sum insufficient to meet the interest. *Held*, that such subsequent law impaired the obligation of the contract with the bondholders, and was void; that the laws relating to the collection of taxes in force at the time of the issue of the bonds remained in force for the purposes of raising money to pay interest thereon, notwithstanding such subsequent law. *Von Hoffman v. City of Quincy*, 4 Wall., 554.

§ 1648. When at the time of issuing municipal bonds laws are in force providing for the levying of taxes to pay the indebtedness they represent, such laws cannot be repealed unless some other adequate remedy is provided for the bondholders. *City of Galena v. Amy*, 5 Wall., 709; *Riggs v. Johnson County*, 6 Wall., 194.

§ 1649. The act of March 8, 1879, of the state of Missouri, which takes away the power of the county courts to levy taxes for the payment of county bonds, and requires that court to act upon the order of the circuit court, is held to change the duty of levying taxes from a ministerial duty to a judicial duty, so that the duty can no longer be enforced by *mandamus*. It is therefore void so far as it affects the remedy of holders of bonds, issued before its passage, as impairing the obligation of contracts. *United States v. Lincoln Co.*,* 5 Dill., 184; *United States v. Johnson County*, 5 Dill., 184.

§ 1650. Laws in force at the time bonds are issued, and which provide for their payment, form part of the contract, and cannot be repealed to the prejudice of a holder of such bonds. But it is otherwise in respect to laws passed after the bonds are issued; they form no part of the contract. *Foote v. County Court of Howard County*,* 1 McC., 218.

§ 1651. The "Funding Act" of the state of Virginia, of March 30, 1871, enacting that the owners of bonds, stocks and interest certificates of the state might fund two-thirds of the same, and two-thirds of the interest due up to a certain date, into six per cent. coupon bonds of the state, which should be receivable at and after maturity for all taxes, debts, dues and demands due the state, created a contract between the state and the holders of the new bonds. A subsequent act requiring the tax levied on the bonds to be deducted from the coupons, when tendered in payment of taxes, does not affect the holder of coupons who does not own the bonds to which they belong, and he may compel the collector by *mandamus* to receive his coupons in payment of taxes, without deducting taxes on the bonds. *Hartman v. Greenhow*, 12 Otto, 672.

§ 1652. **Equity jurisdiction.**—On the refusal to pay corporation bonds, the appropriate proceeding is by suit at law and not by a proceeding in equity. It cannot afford a ground of

equity jurisdiction that the commissioners, against whom alone a suit at law could be brought, have resigned, when the suit in equity is against these very persons. Specific performance cannot be decreed in such a case, there being a right to sue at law. There is no power in equity to enforce a lien here, because the bondholders have no lien where there has been no tax assessed for the payment of the bonds. Equity jurisdiction failing, the federal courts cannot treat the bill as a petition for *mandamus*. The power to compel a tax in this case does not belong to the federal courts. *Heine v. The Levee Commissioners*, 19 Wall., 655. Affirming 1 Woods, 246. See §§ 1596, 1597.

§ 1653. *Trust fund.*—Certain taxes were collected by the authorities of Ralls county, under a law of the state, for the purpose of paying the interest on certain bonds issued by the county to aid in the construction of a certain railroad. After the collection of the taxes, litigation arose as to the validity of the bonds, and the county, under the requirement of law to invest or loan this money on the event of such litigation, loaned a certain amount thereof to A. B., and took his bond for the repayment of the sum after a certain date. Upon judgment on the bonds of the county, and under the execution upon such judgment, A. B. was served with process of garnishment. Judgment was rendered against the garnishee A. B., although his bond to the county was not yet due. The money was considered as a trust fund for the payment of interest on the bonds, and the bondholders were entitled to have it so applied on the determination that the bonds were valid. *George v. Ralls County*,* 3 McC., 181.

§ 1654. *Taxing power exhausted.*—The charter of a railroad company authorized the county court of any county to subscribe to its stock, and issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year. The statutory limit of taxation for general purposes at the time was one-half of one per cent. The one-twentieth of one per cent. yearly having been collected and applied to the payment of the bonds, it was held that a *mandamus* could not be ordered to compel payment of a judgment on the bonds out of the classified revenues of the county. But a *mandamus* was issued for a warrant upon the general funds of the county, to be paid out of the collection from year to year of the one-twentieth and the one-half of one per cent. *United States v. County of Knox*,* 2 McC., 625. Although a county may not be authorized to levy a tax sufficient to pay the amount due on bonds, still the holder is entitled to judgment, to be made out of the property of the county subject to its payment. *County of Moultrie v. Fairfield*, 15 Otto, 370 (§§ 893-896). See §§ 1589, 1591, 1640.

§ 1655. *Enjoining diversion of fund.*—Where a fund has been raised by taxation to pay interest on city bonds, an injunction will issue to restrain the city from diverting the fund to other uses. *Ranger v. New Orleans*,* 2 Woods, 128.

§ 1656. Where it appears that the interest on city bonds has been paid for a series of years, and it further appears that for taxes at the time due nothing can be collected unless the city receives scrip in payment, an application to enjoin the city from refusing such scrip is addressed to the discretion of the court, and an injunction will be refused. *Ibid.*

§ 1657. Where the holders of the bonds of a city have the right by law to prevent the issue of other bonds by the city except on compliance with certain conditions, and they neglect to exact a compliance with such conditions in the issuing of other bonds by the city, they will not be entitled to an injunction to enjoin the city from applying funds collected by taxation to the payment of such latter bonds in the hands of innocent holders, leaving their own unpaid. *Ibid.*

§ 1658. An act of the legislature which provides for the issuing of bonds by a city, and which also provides for the raising of a fund by taxation, and setting it aside for the payment of interest on the bonds, is a contract by the state and the city with the holders of the bonds. And the bondholders are entitled to an injunction restraining the city from using the fund so collected and set apart for any other purpose than the payment to them of their interest. Certain of the bondholders having consented to the use of the fund by the city, upon payment to them of one-half of their interest, the court will not restrain the use by the city of so much of the fund thus released. *Maenhaut v. New Orleans*,* 2 Woods, 108.

§ 1659. The legislature of Louisiana authorized the city of New Orleans to issue bonds, and provided that the common council should annually, etc., pass an ordinance to raise the sum of \$650,000, by a special tax on real estate and slaves, to be called the consolidated loan tax, and that the city should not issue other bonds, etc., without a vote of a majority of the qualified voters. The holders of a part of the bonds issued filed a bill, alleging that a certain sum had been collected and deposited to the credit of the consolidated loan, and praying an injunction restraining the city from diverting the fund to any other purpose than the payment of the interest on the bonds. The court granted the injunction *pendente lite*, and made it perpetual on final hearing. It was also held that the parties were entitled (1) to a specific performance of the contract as contained in the statute above referred to, and (2) to the levy,

collection and exclusive application to the payment of principal and interest of the bonds, of the sum of \$650,000, to be levied upon the real estate of the city, the statute under which the bonds were issued being a valid and binding contract, not to be affected by any subsequent legislation. But it was further held, (1) that the remedy of the applicants was at law — the recovery of a judgment, and a *mandamus* to compel the levy and collection of a tax; (2) that the claimants were not entitled to priority of payment out of all taxes raised on real estate, and to an injunction forbidding the application of taxes so raised to any purpose whatever until their claims were satisfied; that they were not entitled to such priority or such relief, as against holders of bonds subsequently issued, out of all taxes raised on real estate. *Maenhaut v. City of New Orleans*,* 8 Woods, 1.

XIII. RATIFICATION; CURATIVE LAWS.

SUMMARY — *Power to enact curative laws*, § 1660. — *Curative by implication*, § 1661. — *State decisions; bonds in excess of statutory limit*, § 1662. — *Power to authorize subscriptions*, § 1663. — *Legislative recognition of validity of scrip*, § 1664. — *Election held before passage of act*, § 1665. — *Exchange of bonds for stock*, § 1666. — *Election not ordered by proper officers*, § 1667.

§ 1660. Where the legislature has power to authorize a municipality to subscribe and issue bonds, it may also pass curative laws for the purpose of rendering valid bonds which were illegal in their inception. *Thompson v. Perrine*, §§ 1678-1680; *St. Joseph Township v. Rogers*, §§ 1674-1677; *Thomson v. Lee County*, §§ 1669-1672; *Campbell v. City of Kenosha*, § 1673.

§ 1661. A statute may operate as a curative act by implication. *Campbell v. City of Kenosha*, § 1673.

§ 1662. Where the highest court of a state decides that bonds issued by a municipality are void because issued in violation of provisions of the state constitution, the supreme court will follow such decision. So it is held that where bonds were issued for an amount in excess of that allowed by law, the bonds were not rendered valid by a curative act. *Township of Elmwood v. Marcy*, § 1668.

§ 1663. A municipal corporation cannot legally subscribe for stock unless authorized by the legislature. But the legislature, unless restrained by the organic law, may authorize a subscription to the stock of a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. *Thomson v. Lee County*, §§ 1669-1672.

§ 1664. Where the legislature, in amending the charter of the city, provided for the election of a railroad commissioner, and made it his duty to provide for the payment of all scrip issued to the railroad company, this was held to be a recognition of the validity of the scrip. *Campbell v. City of Kenosha*, § 1673.

§ 1665. Where an election is held before the passage of the act conferring the authority, and such act provides that such election shall be sufficient, no objection on this ground can be urged against the bonds. *St. Joseph Township v. Rogers*, §§ 1674-1677.

§ 1666. A town had authority to subscribe to the stock of a railway company, and to issue bonds which were to be sold at not less than par. It exchanged the bonds for stock, and they passed into the hands of a holder with notice of that fact. *Held*, that, although by the decisions of the state courts the exchange invalidated the bonds in the hands of the purchaser, yet the legislature had power to pass a curative act, and that a party purchasing after the passage of such an act could recover. *Thompson v. Perrine*, §§ 1678-1682.

§ 1667. Objection that the election for the purpose of voting a subscription was ordered by the county court instead of by the supervisors cannot be made against a *bona fide* holder, where it appears that the election and issuing of the bonds were regular in every other particular, especially after a ratification by the county by the payment of interest, etc. *Supervisors v. Schenck*, §§ 1683-1686.

[NOTES.—See §§ 1637-1706.]

TOWNSHIP OF ELMWOOD v. MARCY.

(2 Otto, 289-299. 1875.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—The question in this case was whether there was lawful authority to issue the bonds. An election was called on February 11, 1869,

to be held on March 16, 1869, pursuant to the charter of the company. On February 16, 1869, notice was given of another election, to be held at the same time and place as the first. The first election resulted in favor of a subscription of \$35,000 (the maximum amount permitted by law), and the second in favor of an additional subscription of \$40,000. Before the elections were held, to wit, on March 9, 1869, the charter of the road was amended so as to permit towns through which the road might thereafter be located to vote a subscription of \$100,000. (The road was located in the town in question at the time the elections were called.) After the elections (April 17, 1869) the legislature passed an act confirming the subscription for \$40,000. The bonds were issued after the passage of this act.

Opinion by MR. JUSTICE DAVIS.

The questions arising upon this record were elaborately considered in *Marshall v. Silliman*, 61 Ill., 218, and the doctrines there announced were recognized and enforced in *Wiley v. Silliman*, 62 id., 170. The last case involved the validity of the identical bonds in question here; but both were, in all substantial particulars, alike. They were bills in equity to enjoin the collection of taxes for the payment of interest, and the court decided that the law of March 9th gave no power to issue the bonds. The opinion affirms that, when the notice for the vote was posted, the charter of the company only authorized a subscription for \$35,000; that the notice under which the vote for the \$40,000 was taken was a mere call for a special town meeting, signed only by twelve voters, which did not seek to follow the provisions of the charter, as, indeed, it could not, since the power under them was already exhausted, and that the proceeding was utterly void. That law is disposed of in these words: "It is true that on the 9th of March, 1869, the legislature passed another act authorizing towns to subscribe \$100,000; but a new notice was not given. The charter required twenty days' notice, and only seven intervened between the passage of the act and the vote."

§ 1668. *A curative act cannot validate void municipal bonds.*

It was insisted, however, that the curative act of April 17th, passed after the vote had been taken, gave validity to the bonds. On this ground counsel placed their chief reliance, and to it the court directed its principal attention. The act was direct and positive, and left nothing to inference. It was intended, so far as the legislature could do it, to make the bonds binding on the township, and collectible in the same manner as if the subscription had been authorized by the charter, and voted for in accordance with its terms. The court held it to be a violation of the fifth section of the ninth article of the constitution of 1848, which declares "that the corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The decision was placed on the ground that, this section having been intended as a limitation upon the law-making power, the legislature could not grant the right of corporate taxation to any but the corporate authorities, nor coerce a municipality to incur a debt by the issue of its bonds. In the opinion of the court the act was an effort to do both these things, as it attempted to confer that right upon persons who were not by themselves the corporate authorities in the sense of the constitution, and to compel the town to issue its bonds for railroad stock by declaring a void proceeding to be a valid subscription. Counsel argued that the act might be treated as vesting an un-

conditional authority in the supervisors and town clerk to issue the bonds, and cited *President & Trustees of Town of Keithsburg v. Frick*, 34 Ill., 405, which recognizes that the legislature can constitutionally bestow upon the trustees of a town the power, if they think proper to exercise it, to subscribe for stock in a railroad company, without requiring the subject to be submitted to a vote of the people. The court, adhering to the doctrines of that case, but distinguishing it from the one under consideration, and referring to *Lovington v. Wilder*, 53 Ill., 302, as an authority in point, said, "that the town supervisor and clerk who issued the bonds in controversy do not represent a township as the board of trustees represent an incorporated town, or the common council a city. The supervisor and town clerk are but a part of the corporation. They have no power of taxation, nor power of themselves to bind the city in any way." But, even if these two officers could be recognized as the corporate authorities, the court observed "that they cannot be said to have voluntarily incurred this debt in behalf of the town. The act gave them no discretion. It declared the subscription shall be binding and may be collected; and left to the town authorities only the ministerial function of executing the behest of the legislature." The main doctrines of these cases were not new, but had been settled by the repeated adjudications of the supreme court; and that learned tribunal has given no decision at variance with them.

In *Harward v. St. Clair Drainage Co.*, 53 Ill., 130, the clause of the constitution under consideration in *Marshall v. Silliman* and *Wiley v. Silliman* was construed to be a limitation upon the power of the legislature to grant the right of corporate or local taxation to any other persons than the corporate or local authorities of the municipality or district to be taxed. To the same effect are *Hessler v. Drainage Co.*, 53 id., 105, and *Lovington v. Wilder*, id., 302. *The People v. Mayor of Chicago*, 51 id., 17, decides that the legislature could not compel a municipal corporation, without its consent, to issue bonds or incur a debt for a merely corporate purpose. So far as we can see, the only new point determined in the cases we have first cited is that it is not competent for the legislature to single out the supervisor and town clerk, and confer on them powers which the constitution limits to the corporate authorities as an aggregate body.

We are not called upon to vindicate the decisions of the supreme court of Illinois in these cases, or approve the reasoning by which it reached its conclusions. If the questions before us had never been passed upon by it, some of my brethren who agree to this opinion might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because the laws which authorized their issue were in violation of a peculiar provision of the constitution of Illinois. We have always followed the highest court of the state in its construction of its own constitution and laws. It is only where they have been construed differently at different times, that, in cases like this, we have adopted as a rule of action the first decision, and rejected the last. This has been done on the ground that rights acquired on the strength of the former decision ought not to be lost by a change of opinion in the court; but, where the construction has been fixed by an unbroken series of decisions, the courts of the United States accept and apply it in cases before them. If a different rule were observed, it is not difficult to see that great mischief would ensue. There has been no conflict of judicial opinion in Illinois on the controlling question in this suit, but, on the contrary, settled uniformity. As these concurring decisions of the

court of last resort in that state are grounded on the construction of its constitution and statutes, it is the duty of this court to conform to them.

Judgment reversed, and new trial ordered.

JUSTICES STRONG, CLIFFORD and SWAYNE dissented, the points made by the former being that the act of April 17, 1869, cured all irregularities in the \$40,000 subscription; also, that said act was constitutional. (Cooley, Const. Lim., 371; St. Joseph Township v. Rogers, 16 Wall., 666; Keithsburg v. Frick, 34 Ill., 405; McMillan v. Lee County, 3 Ia., 317; Marshall v. Silliman, 61 Ill., 218; Wiley v. Silliman, 62 id., 170, cited and reviewed.)

THOMSON v. LEE COUNTY.

(3 Wallace, 327-332. 1865.)

STATEMENT OF FACTS.—This case comes up on writ of error to the federal court of Iowa. Lee county, in that state, under legislative authority, issued bonds with coupons attached in aid of railroads, etc. Thomson having become the owner of certain coupons brought suit upon them. All the material facts appear in the opinion of the court.

Opinion by MR. JUSTICE DAVIS.

There is hardly any question connected with the species of securities on which this suit was brought that has not been discussed and decided by this court; and it is unnecessary to do more in this opinion than reaffirm the general doctrines of the court on the subject, so far as they apply to the case in hand, without attempting to restate the reasons which were given for our decisions.

§ 1669. *A municipal corporation or county cannot legislate except by delegated authority.*

A county or other municipal corporation has no inherent right of legislation, and cannot subscribe for stock in a public improvement, unless authorized to do so by the legislature. Such a corporation acts wholly under a delegated authority, and can exercise no power which is not in express terms, or by fair implication, conferred upon it. But the legislature of a state, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner that the objects can be attained, either with or without the sanction of the popular vote.

§ 1670. *The statutes of a state as expounded by its highest courts at the time a contract is made are the law of that contract. Subsequent decisions cannot invalidate it.*

It is insisted that the constitution of Iowa did lay a restraint on the legislature, and that consequently the county of Lee could have no right, under the constitution and laws of the state, to execute and issue the bonds in controversy. And we understand that the highest court of the state of Iowa, at the present time, adopt that view of the question; but when these bonds were issued, the courts of that state held that there was no defect of constitutional power, and that the legislature could lawfully authorize municipal corporations to subscribe to the capital stock of railroad companies. If the bonds in suit had been executed since the last decision in Iowa, they would be controlled by it; but the change in judicial decision cannot be allowed to render invalid contracts

which, when made, were held to be lawful. The courts of Iowa having, when these bonds were issued, construed their constitution and laws so as to give them force and vitality, cannot, by a subsequent and contrary construction, destroy them.

§ 1671. *It is competent for a legislature, by a subsequent law, to validate an act of a county imperfectly executed under a power.*

But it is argued that when the county of Lee voted to take the stock for which these bonds were given they attempted the exercise of a power which had not been delegated to them, or executed it so defectively that their proceedings were without authority of law and void. It is not instructive to inquire into the different laws of Iowa under which this power is claimed to exist, because the legislature of that state, on the 28th day of January, 1857, by an act of confirmation, legalized the issue of these bonds. If the legislature could authorize this ratification the bonds are valid, notwithstanding the submission of the question to the vote of the people, or the manner of taking the vote may have been informal or irregular. This act of confirmation, very soon after its passage, underwent an examination in the courts of Iowa, and it was held that the legislature possessed the power to pass it, and that the bonds were valid and binding on the county. *McMillen v. County Judge*, 6 Ia., 391. It is difficult to see how *this* power could be questioned after the supreme court of the state had decided that there was no written limitation which inhibited the legislature from conferring on cities and counties the right to take stock in a company organized to build a railroad or other work of public improvement. If the legislature possessed the power to authorize the act to be done, it could, by a retrospective act, cure the evils which existed because the power thus conferred had been irregularly executed. The question with the legislature was one of policy, and the determination made by it was conclusive.

§ 1672. *Coupons detached from bonds are negotiable paper; and holder may sue without being the owner of the bonds.*

Bonds with coupons, payable to bearer, are negotiable securities and pass by delivery, and, in fact, have all the qualities and incidents of commercial paper. It is not necessary that the holder of coupons, in order to recover on them, should own the bonds from which they are detached. The coupons are drawn so that they can be separated from the bonds, and, like the bonds, are negotiable; and the owner of them can sue without the production of the bonds to which they were attached, or without being interested in them. The foregoing views dispose of all the questions presented in this record, and it is unnecessary to refer in detail to the charge of the circuit court. Judgment reversed, with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

CAMPBELL v. CITY OF KENOSHA.

(5 Wallace, 194-205. 1866.)

ERROR to U. S. Circuit Court, District of Wisconsin.

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—The species of securities on which this suit is brought has been frequently before this court for consideration, and there are very few questions connected with them that have not been decided. This action involves the validity of the bonds or scrip issued by the defendant in aid of the Kenosha & Beloit Railroad Company. In Wisconsin there is nothing in the

organic law restraining the legislature from conferring on municipal corporations the power to subscribe for stock in a railroad or other work of public improvement; and the highest court of the state has sustained the validity of securities given for such purposes by towns and cities benefited by their construction, where the power to do so had been granted by the general assembly. *Clark v. City of Janesville*, 10 Wis., 136; *Bushnell v. City of Beloit*, id., 195.

But it is insisted the bonds in controversy were executed and issued without the authority of law previously conferred, and, therefore, the city of Kenosha must be relieved from their payment. The question presented is an important one; but, in our opinion, easily solved, when the whole legislation on the subject is taken into consideration. On the 22d day of March, 1853, an act of the legislature was passed authorizing the city, if a majority of the people voted for it, to issue its corporate bonds, not exceeding \$150,000, to aid in the construction of the Kenosha & Beloit Railroad, and to levy taxes to pay for them; and provision was made that the railroad company should secure the city, by a lien on its property, when the bonds were executed and delivered to them. This law conferred full power on the city to contract an indebtedness (limited in amount) for the promotion of a work of internal improvement of common benefit to all its inhabitants. A majority of the people did vote to extend the required aid, and the city issued its obligations and delivered them to the company, taking in exchange certificates of stock and indemnity against loss. All parties rested in the belief that these proceedings were according to law, and the securities were negotiated in good faith, and the city received the benefit of them. So far as the corporate authorities could ratify them, they have done it by a series of unmistakable acts,—by voting to levy taxes; redeeming a portion of the securities first issued, and exchanging the residue for new ones; issuing scrip in settlement of unpaid interest, and selling the securities received from the company by way of indemnity. The city also, in pursuance of an express act of the legislature, evidently passed to protect the very interests created by the subscription to the capital stock of the road, elected a commissioner to represent it in the meeting of the board of directors, vote its shares of stock, and exercise a general oversight over its affairs in connection with the road.

But it is insisted that the holders of these bonds or *scrip* (which is the form the securities assumed) cannot recover, because the common council, in submitting to the legal voters the question of whether a tax of \$150,000 should be levied and collected to aid the Kenosha & Beloit Railroad, declared, by ordinance, that the question was submitted in accordance with the provisions of section 8 of "An act to amend the charter of the city," approved March 23, 1853, and section 44 of "An act to incorporate the city," approved February 8, 1850. It is unnecessary to notice the latter named section, as the consideration of the first one is alone material to the subject of this inquiry. Section 8 of the amended charter authorizes the city council of Kenosha to levy and collect special taxes to any amount, and for any purpose, which may be considered essential to promote or secure the common interest of the city; and it is contended that it is in conflict with the third section of the eleventh article of the Wisconsin constitution, and that the proceedings of the common council under it cannot be sustained. The Wisconsin constitution provides that the legislature, in organizing municipal corporations, shall restrict their power to tax, assess, borrow money, contract debts and loan their credit. The provision was a wise one, and has undoubtedly tended to prevent abuses on the part of incorporated cities and villages in levying taxes and raising money.

The supreme court of the state, in the interpretation of the foregoing provision of the constitution (*Foster v. City of Kenosha*, 12 Wis., 616), has declared that the legislature could not confer on a municipal corporation unlimited power to levy taxes and raise money beyond what was proper for purely municipal purposes; and as this was attempted to be done in section 8 of the amended charter of the city of Kenosha, that the taxes levied under it, to aid the Kenosha & Beloit Railroad, were unauthorized, and the city authorities could be restrained from collecting them at the instance of a party interested. This is the extent of the decision. The learned court expressly declined to decide whether the scrip issued by the common council to aid the road was valid or not. In fact, the whole decision is based on the unconstitutionality of section 8, above referred to, which, as it purported to confer upon the city unlimited powers to levy taxes and borrow money, was in violation of the constitution of the state. The court say that "the suit was by Foster in his own behalf, and in behalf of other land owners, to restrain the city of Kenosha from collecting a special tax of \$18,625, levied by the city upon the real estate therein situated, for the purpose of paying a debt originally contracted by the stock subscriptions of the city to the Kenosha & Beloit Railroad Company." This is all that appears in the report of the case as to the character of the suit. It is apparent that the special act of the legislature authorizing the subscription, and the further amendment to the charter of the city substantially ratifying it, were not before the court. They are not referred to in the opinion of the court, and the fair presumption is that they were not referred to in the pleadings, as the purpose which the complainant had in view did not require that they should be. We are, therefore, unembarrassed by any adverse decision upon the character of the securities in suit, and the question of their validity is an open one for discussion and decision.

It is manifest that the common council of Kenosha did not attempt the exercise of the unlimited power to raise money conferred on them, because they limited the amount to be raised to the exact sum which the legislature, by an express act, authorized. Under the provisions of this act, ample power was given to accomplish the object which the city had in view—aiding to build a railroad which would bring trade and travel to it. By the very terms of this act, the subscription of \$150,000 could be made, and taxes levied to pay for it, if the people voted in favor of it. It is conceded, if the submission had been in words under the special act, instead of the amended charter, all controversy would be at an end. It is argued, notwithstanding there was complete authority to raise the money, and levy the taxes under a valid law, yet, as the common council, in taking the vote, named a provision of their charter which is invalid, that therefore not only the payment of the tax can be avoided, but also the payment of the scrip. Whether this position is well taken or not the necessities of the case do not require to be decided, for, in our opinion, subsequent legislation has cured all antecedent irregularities.

§ 1673. *Statute construed to be a curative act, and held effectual to validate city bonds.*

In 1857, after the scrip had been issued to the railroad company, under the proceedings of the common council, the legislature passed a revised charter for the city. Among other things, provision was made for the election of a railroad commissioner, annually, as a city officer. There had been previous legislation in relation to this officer, but his duties and powers by the revised charter were much enlarged. He was constituted, *ex-officio*, a member of the board of

directors of the Kenosha & Beloit Railroad, with power of voting as an individual stockholder, and, in addition, was required to receive from the city treasurer all moneys which were paid on account of the tax for the road, and commanded to redeem all scrip which had been issued to the company as the same became due, making such provision for it, or recommending such measures to the common council as he should deem necessary for the benefit of the tax-payers of the city. This is not in terms a curative act, but it has that effect by fair implication. It is not doubted the legislature could, by a direct act of confirmation, legalize the issue of this scrip, notwithstanding the submission of the question to the vote of the people was under the wrong law. If by a direct act, equally in any other way, if the intention of the legislature to legalize clearly appears. It is conceded the legislature had the right to authorize the city of Kenosha to take stock in a railroad, issue bonds to pay for it, and provide for their redemption by the levy and collection of a tax. It did authorize these things to be done, if the people approved them; but as their sanction was obtained in the wrong way, thereby involving the legality of their proceedings, good faith and sound policy required, at the hands of the legislature, a full legislative recognition of the legality of the subscription and the issue of the scrip. This was done by the provisions of the revised charter of 1857.

Of such importance did the legislature consider the interests of Kenosha in the railroad to Beloit, that a commissioner of the dignity of a city officer was deemed necessary to look to them. And that the legislature intended to ratify the proceedings of the common council, which resulted in the subscription of stock to the railroad, and issue of scrip, is very clear, else why was the commissioner directed to provide for the payment of the scrip as it matured? The words of the law are imperative. The commissioner *shall* redeem the scrip. Surely the legislature would not command this to be done unless it intended to recognize the validity of the scrip. "To redeem all scrip which had been issued to said railroad company as the same became due"—the very words of the law—can mean nothing else than that such issue of scrip had received legislative sanction, and, in the opinion of the law-makers, ought to be paid. If this is so, the ratification of the disputed proceedings of the common council is as complete as if they had been particularly named, and their issue of scrip is relieved from all taint of illegality.

After the revised charter was given to the city, the common council, at different times, and in various ways, recognized the validity of the scrip, and finally, in June, 1859, settled with some of the holders of it, who were willing to extend the time for payment—taking up the old securities and issuing new. This suit is brought upon the scrip received on that settlement, and we think the learned court below erred in excluding it from the jury.

The judgment of the circuit court is reversed, with costs, and the cause is remanded to the court below, with instructions to issue a *venire de novo*.

ST. JOSEPH TOWNSHIP v. ROGERS.

(16 Wallace, 644-667. 1872.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Bonds, payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a

power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid, even in the hands of innocent holders. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications; but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any, or all, of those recitals are incorrect will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which it is alleged was not fulfilled.

On the 28th of February, 1867, the legislature amended the articles of association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and enacted that any incorporated town or township, in counties acting under the township organization law, along the route of said railroad, may subscribe to the capital stock of said company in any sum not exceeding \$250,000. 2 Private Laws 1867, 761. No such subscription, however, it was enacted, shall be made until the question has been submitted to the legal voters of such town or township in which the subscription is proposed to be made. Regulations are also enacted for taking the sense of the legal voters upon such a proposition, which provide that the clerk of the town or township, upon the presentation to him of a petition stating the amount proposed to be subscribed, signed by at least ten citizens who are legal voters and tax-payers therein, shall post up notices in at least three public places in the municipality, not less than thirty days before the day of holding such election, notifying the legal voters thereof to meet at the usual place of holding elections, or some other convenient place named in the notice, for the purpose of voting for or against such subscription. Prior to the passage of that act, however, an election was held in that township to determine whether the municipality would subscribe \$25,000 to the capital stock of that railroad company, and the proofs show that a majority of all the legal voters of the township voting at the election voted for the subscription — sixty-two votes being cast in favor of the subscription and seventeen against the proposition. Pursuant to the vote at that election the supervisor of the township subscribed, in the name of the municipality, \$25,000 to the capital stock of that railroad company, and executed, in the name of the township, the bonds held by the plaintiff, bearing interest at ten per cent. per annum, payable in ten years from date, which bonds were signed by the party issuing the same as such supervisor, and were attested by the clerk of the township.

Objection is made to the preliminary proceedings because the election approving the subscription was held before the act was passed giving such authority to such municipalities, but two answers are made to that objection, either of which is decisive:

1. By the act conferring that authority it is provided that where elections may have already been held, and a majority of the legal voters of the township were in favor of a subscription to said railroad, then and in that case no other election need be had, and the amount so voted for shall be subscribed as in the act is provided; and the provision is that such elections are legal and valid as if the act had been in force at the time thereof, and that all the provisions had been fulfilled. 2 Private Laws (1867), 762.

2. Because the legislature passed a subsequent act declaring such subscriptions legal and obligatory. Some of the township officers, it seems, failed to keep a full and perfect record of elections called and held to authorize such subscriptions, and that the clerks of the townships failed in some instances to file the necessary certificate with the county clerk, as required by the fifteenth section of the prior act. Omissions and defects of the kind becoming known, the legislature, on the 25th of February, 1869, enacted that where such informalities and neglect may have occurred and bonds have been issued, or may hereafter be issued, to aid in the construction of said railroad, that no such neglect or omission shall in any way invalidate or impair the collection of said bonds, principal or interest, as they may respectively fall due, and that all assessments that are now made for the payment of the principal or interest are hereby legalized, and the township collectors and county treasurers are hereby authorized and empowered to enforce the collection and payment of said tax as is now provided by law for the collection of all other taxes. Bonds to the amount of the subscription were accordingly issued, bearing date October 1, 1867, signed by the supervisor and countersigned by the clerk, and each bond contains the recital that it is issued under and by virtue of the aforesaid law of the state, entitled an act to amend the articles of association of the said railroad company, and to extend the powers of and confer a charter upon the same, and in accordance with the vote of the electors of said township at the special election held August 14, 1866, pursuant to said act, and pledges the faith of the township for the payment of the said principal sum and interest as stipulated in the instrument.

Evidence was introduced by the defendants showing that there is no record of the supposed election, when it is alleged that the question of the proposed subscription was submitted to the legal voters of the township, and that no such certificate as that required by the act conferring the authority to subscribe for the stock of the said company is on file in the office of the county clerk, but the plaintiff proved that the alleged meeting was notified, called and held, and that sixty-two votes were given in favor of the subscription and seventeen against it, as announced at the election. Two instructions were given by the court to the jury, to which the defendants excepted: (1) That the election held as described in the evidence was validated by the act of the 28th of February, 1867, so as to authorize the defendants to subscribe for the stock of the railroad company and to issue the bonds in question, and that the bonds having been issued for the stock subscribed, are binding on the defendants in the hands of a *bona fide* holder. (2) That the recitals in the bonds estop the defendants from denying the fact of a valid election as against a *bona fide* holder of the bonds or coupons thereto annexed. Under the instructions of the court the jury returned a verdict for the plaintiff, and the court rendered judgment on the verdict.

§ 1674. *Laws authorizing municipal corporations to subscribe for stock in railroad companies, and to issue bonds to aid in the construction of railroads, are not unconstitutional.*

Repeated decisions of the state courts have established the rule that the legislature has the constitutional right to authorize municipal corporations to subscribe for the stock of a railroad company, and to issue their bonds to aid in the construction of such an intended improvement; that the supervisors of the municipality have the power, in case such a subscription is authorized, to subscribe for the stock of the railroad company, and to call an election to ascertain the will of the legal voters in that behalf. *Prettyman v. Supervisors*, 19 Ill.,

406; *Robertson v. Rockford*, 21 id., 451; *Perkins v. Lewis*, 24 id., 208; *Johnson v. Stark Co.*, id., 85; *Keithsburg v. Frick*, 34 id., 405; *Commissioners v. Nichols*, 14 Ohio St., 260. Such corporations are created by the legislature, and they derive all their powers from the source of their creation, and those powers are at all times subject to the control of the legislature. Everywhere the construction and repair of highways within their limits are regarded as among the usual purposes of their creation, and the expenses of accomplishing those objects are among their usual and ordinary burdens. Railways also, as matter of usage founded on experience, are so far considered by the courts as in the nature of improved highways and as indispensable to the public interest and the successful pursuit, even of local business, that the legislature may authorize the towns and counties of a state through which the railway passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same to aid the railway company in constructing or completing such a public improvement. Legislation of the kind may be prohibited by a state constitution; but it is settled everywhere that such an act is not in contravention of any implied limitation of the power of a state to pass laws to promote the usual purposes of municipal corporations. *Rogers v. Burlington*, 3 Wall., 663 (§§ 837-841, *supra*); *Freeport v. Supervisors*, 41 Ill., 495; *Butler v. Dunham*, 27 id., 474.

§ 1675. *Defective subscriptions by municipal corporations, for stock in railroad companies, may be ratified by subsequent legislation.*

Argument to show that defective subscriptions of the kind may in all cases be ratified where the legislature could have originally conferred the power is certainly unnecessary, as the question is authoritatively settled by the decisions of the supreme court of the state, and of this court, in repeated instances. *Cowgill v. Long*, 15 Ill., 203; *Keithsburg v. Frick*, 34 id., 405; *Thomson v. Lee County*, 3 Wall., 327 (§§ 1669-72, *supra*); *The City v. Lamson*, 9 id., 477 (§§ 1730-34, *infra*); *Watson v. Mercer*, 8 Pet., 111; *Bissell v. Jeffersonville*, 24 How., 295 (§§ 1449-50, *supra*). Suppose that is so, still it is insisted by the defendants that the election held to ascertain whether the legal voters of the township would authorize the subscription was irregular and a nullity: (1) Because a majority of the legal voters of the township did not vote at the meeting notified and held for that purpose. (2) Because the meeting was notified and held before the act was passed providing for such an election.

§ 1676. *"A majority of the legal voters of a township" means a majority of those voting.*

Responsive to the first objection, it is insisted by the plaintiff that the legislature, in adopting the phrase "a majority of the legal voters of the township," intended to require only a majority of the legal voters of the township voting at the election notified and held to ascertain whether the proposition to subscribe for the stock of the company should be adopted or rejected, and the court is of the opinion that such is the true meaning of the enactment, as the question would necessarily be determined by a count of ballots. *People v. Warfield*, 20 Ill., 163; *People v. Garner*, 47 id., 246; *People v. Wiant*, 48 id., 263; *Railroad v. Davidson County*, 1 Sneed, 692; *Angell & Ames on Corp.*, 9th ed., §§ 499, 500; *Bridgeport v. Railroad*, 15 Conn., 475; *Talbot v. Dent*, 9 B. Mon., 526; *State v. The Mayor*, 37 Mo., 272. Tested by these considerations, it is clear that an election was held within the meaning of the act of the legislature, and that a majority of the legal voters of the township did vote in favor of the subscription, as the proofs show that a meeting was called and

held, and that the majority of the legal voters voting at the meeting voted in favor of the proposition.

Sufficient has already been remarked to show that the second objection cannot avail the defendants, as the same act provided to the effect that if the election had already been held and a majority of the legal voters had voted in favor of the subscription, no other election need be held, and that the amount so voted shall be subscribed, as provided in the same act. Mistakes and irregularities are of frequent occurrence in municipal elections, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of the legislative authority. Even if the legislature may by a subsequent act validate and confirm previous acts of a municipal corporation, otherwise invalid, still the defendants insist that a prior legislative act will not have any such effect, which cannot be admitted, as it would be competent for the legislature to authorize a municipal corporation to make such a subscription without requiring any such preliminary election.

§ 1677. *An act construed to cure mistakes and irregularities in the issue of township bonds.*

Concede, however, that a prior act is insufficient to dispense with the preliminary election, still the concession cannot benefit the defendants, as it is clear that the subsequent act entirely obviates all the mistakes and irregularities in the prior proceedings, as it provides that where such informalities and neglect may have occurred, and bonds have been issued, or may hereafter be issued, to aid in the construction of said railroad, no such neglect or omission on the part of township officers shall in any way invalidate or impair the collection of said bonds, principal or interest, as they may respectively fall due. 3 Private Laws (1869), 274; *Thomson v. Lee County*, 3 Wall., 327 (§§ 1669-72, *supra*); *Gelpcke v. Dubuque*, 1 id., 220; *People v. Mitchell*, 35 N. Y., 551. Authorities to support that proposition are hardly necessary, but another answer may be given to the objection quite as satisfactory as either of the others, which is that the fourteenth section of the act makes it the duty of the supervisor who executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription; and inasmuch as he passed upon that question and subscribed for the stock and subsequently executed and delivered the bonds, it is clearly too late to question their validity where it appears, as in this case, that they are in the hands of an innocent holder. Private Laws (1867), 762; *Com'rs of Knox County v. Aspinwall*, 21 How., 544 (§§ 1413-18, *supra*). Non-compliance with one of the conditions was clearly shown in that case, as the notices of the election as required by law had not been given in any form, but the decision was that the question as to the sufficiency of the notice and the ascertainment of the fact whether the majority of the votes had been cast in favor of the subscription was necessarily left to the inquiry and judgment of the county board, as no other tribunal was provided for the purpose; and the court held that after the authority had been executed, the bonds issued, and they had passed into the hands of innocent holders, it was too late, even in a direct proceeding, to call the power in question, and that it was beyond all doubt too late to call the power in question to the prejudice of a *bona fide* holder of the bonds in a collateral way, which is attempted to be done in the case before the court. *Supervisors v. Schenck*, 5 Wall., 783 (§§ 1683-86, *infra*).

Exactly the same principles were applied in the case of *Royal British Bank v. Turquand*, 5 Ell. & Bl., 259, in which the opinion was given by the chief justice. He said the bond sued upon in the case is allowed to be under the seal of the company and to be their deed; consequently a *prima facie* case is made for the plaintiff, as the defendants having executed the bond have no defense under the plea of *non est factum*, and consequently the *onus* is cast upon them of showing that the bond is unlawful and void. No illegality appears on the face of the bond or condition, which shows that the plea, in order that it may be supported, must allege facts to establish illegality, but the plea makes no charge of fraud against the plaintiff and states no facts from which fraud may be inferred. Want of authority to execute the bond, it was conceded, would be an answer to the action; but it was denied that a mere excess of authority by the directors would have that effect, unless it appeared that the plaintiff had knowledge of that fact, as the presumption would be, from what appeared on the face of the bond, that it was issued by lawful authority; and the court held that the plaintiff was entitled to recover, as he had advanced his money in good faith for the use of the company, giving credit to the representations of the directors that they had authority to execute the instrument. Dissatisfied with the judgment the defendant brought a writ of error in the exchequer chamber, where the case was reargued, but the court of errors unanimously affirmed the judgment. Same Case, 6 Ell. & Bl., 331.

Viewed in any reasonable light, the court is of the opinion that the plaintiff is an innocent holder for value, and that the loss, even if the supervisor failed in his duty to his constituents, cannot be cast upon the *bona fide* creditors of the township. *MacLae v. Sutherland*, 25 Eng. L. & Eq., 114.

Judgment affirmed.

JUSTICES MILLER and FIELD did not sit in the case.

THOMPSON v. PERRINE.

(18 Otto, 806-820. 1880.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Perrine brought suit against the town of Thompson, in Sullivan county, New York, on the coupons of certain bonds issued by the county commissioners in the name of the township of Thompson. Plaintiff had bought from Gulick & Van Kleeck, for cash, July 20, 1875. The bonds were issued under an act of the legislature authorizing certain towns to take stock in a railroad and issue and sell bonds at par to pay for such stock. This act was passed in 1869, and soon after that time the entire issue of bonds were delivered to the railroad company. The company disposed of them for less than par to various parties, from one of whom Gulick & Van Kleeck bought the bonds which they sold to plaintiff and on which this suit is brought. In April, 1871, the legislature of New York passed an act to legalize and confirm the acts of the commissioners and to "legalize and confirm all bonds . . . now held or owned by *bona fide* purchasers." There was judgment for the plaintiff.

§ 1678. *An exchange of bonds for stock is in violation of a statute forbidding the bonds to be disposed of for less than par.*

Opinion by MR. JUSTICE HARLAN.

Although the act of 1868 required all bonds issued under its authority to be disposed of for not less than par, and their proceeds invested in the stock of the

company, the commissioners exchanged those issued by the town of Thompson directly with the railroad company for an equal amount of the latter's stock. This was in violation of the statute as construed by the court of appeals of New York in several cases to which we had occasion to refer in *Scipio v. Wright*, 101 U. S., 665 (§§ 1041-43, *supra*). We there held—following the decisions of the state court, some of which were made long prior to the passage of the particular enactment now under examination—that a purchaser of town bonds, having notice that they were exchanged for stock in a railroad company, in violation of a statute similar to that of 1863, was not a *bona fide* holder, and could not enforce the payment of them. We perceive no reason to qualify that ruling, and therefore proceed to the consideration of other questions not embraced by it. It is apparent, upon the face of the act of 1871, that the legislature was advised of the fact that the commissioners had departed from the statute of 1863 in exchanging the bonds for stock in the railroad company. And its manifest intention was not only to ratify and confirm such exchange, but to protect any holder of the bonds, who became such in good faith, for a valuable consideration, against any defense arising out of defects or omissions in the consents of tax-payers, provided the exchange was at the par value of the bonds and the issue did not exceed the amount authorized by law.

The main argument of counsel for the town is embraced by the following propositions: First. That the consents of tax-payers were not such as the acts of 1868 and 1869 required. Second. That the bonds were exchanged for stock, in violation of the statute; and since they recite, upon their face, that they were issued "for value received in the stock of the Monticello & Port Jervis Railway Company," there could be no *bona fide* holders thereof in the commercial sense. Third. That they were not issued under the seals of the commissioners, as required by the statute. Fourth. It was beyond the power of the legislature, by subsequent enactment, to make them valid obligations against the town, without its assent given in proper form. Fifth. That no such assent was given.

§ 1679. *Act held effectual to validate bonds.*

If it be conceded that the consents were insufficient; that a seal was necessary as evidence of the official authority of the commissioners; that the recitals on the bonds, reasonably construed, gave notice to purchasers that they had been illegally exchanged for stock, when they should have been disposed of or sold at not less than their par value, and the proceeds invested in the stock of the company,—the town is, nevertheless, liable, if the curative act of April 28, 1871, was within the constitutional power of the legislature to pass. While this question, in some of its aspects, may be one of general jurisprudence,—involving a consideration of the limits which, under our form of government, are placed upon legislative and judicial power,—it is proper to inquire as to the course of decisions in the highest court of New York upon the authority of the legislature to pass such an act. This becomes necessary in view of the fact that the court of appeals of that state has adjudged the act, in its main features, to be unconstitutional. That adjudication, it is contended, is conclusive of the rights of parties in this case. As we are unable to give our assent to this view, it is due to that learned tribunal that we should state, with some fulness, the reasons for the conclusion which we have reached.

§ 1680. *Cases cited. New York decisions.*

Prior to the year 1858 the question arose in several cases pending in different inferior courts of New York as to the constitutional power of the legislature to

authorize or require municipal corporations to subscribe for stock in railroad companies, or to issue bonds therefor. The decisions disclosed a conflict of opinion among judges of recognized ability. The question finally came before the court of appeals in the year 1858, in *Bank of Rome v. Rome*, 18 N. Y., 38. It was there ruled that the state constitution did not, in terms, or by necessary intendment, restrain the legislature from conferring upon municipal authorities the power to subscribe to the stock of a railroad corporation, and by taxation to raise the necessary funds for the payment thereof. That decision was approved in 19 N. Y., 20. In *People v. Mitchell*, 35 id., 551, decided in 1866, the court quote, with approval, our decision in *Thompson v. Lee County*, 3 Wall., 327 (§§ 1669-72, *supra*), where, speaking by Mr. Justice Davis, we said that although a county or other municipal corporation has no inherent right of legislation, and can exercise no power not conferred upon it, in express terms, or by fair implication, the legislature, "unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan," and that such authority "can be conferred in such a manner that the objects can be attained, either with or without the sanction of the popular vote." The decision in *People v. Mitchell* is important in other aspects of the present case. The main question was as to the validity of a confirmatory statute, the object of which was to cure the defects in certain affidavits filed in proof of the consent of tax-payers to a proposed municipal subscription of stock in a railroad company. The statute declared that the affidavits should be valid and conclusive proof in all courts and for all purposes, to authorize and uphold the respective subscriptions of the stock and the issue of bonds to the amount specified therein, and that the bonds should be valid and binding on the municipality issuing them, without reference to the form or the sufficiency of the affidavits. The court, referring to the confirmatory statute, said that "it was within the scope of legislative authority to modify the limitations and restrictions in the antecedent acts on this subject, to dispense with prior conditions, and to charge the commissioners with defined and imperative duties." And it quotes with approval our language in *Thomson v. Lee County*, where, referring to a curative statute passed by the Iowa legislature, we further remarked that, "if the legislature possessed the power to authorize an act to be done, it could, by a retrospective act, cure the evils which existed, because the power thus conferred had been irregularly executed."

Thus stood the doctrines of the state court upon the question of municipal subscriptions and as to the power of the legislature by retrospective enactment to cure defects in the exercise of powers granted to municipal corporations, when the act of April 28, 1871, was passed. But in 1873 the court of appeals decided *People v. Batchellor*, 53 N. Y., 128. That was a case of municipal subscription to a railroad corporation under an act passed in 1867, similar, in its main features, to the one passed in 1868 in reference to the Monticello & Port Jervis Railroad Company. It was claimed that the statute had not been complied with in obtaining consents from tax-payers. A subsequent act of the legislature required the subscription to be made upon the consents filed, which the court found not to be such as were prescribed by the statute under which they had been obtained. Without any subscription having been made, or bonds issued, a *mandamus* was sued out to compel the town to become a stockholder in the company, and to issue its bonds in payment of the subscription price of the stock. The court held that the consents of the tax-payers did not

embrace such an issue of bonds as the subsequent act required; and that the legislature could not compel a municipal corporation to subscribe stock or issue bonds in aid of the construction of the road of a company, which, although public as to its franchise, was private as to the ownership of its property and its relations to its stockholders. The opinion was concurred in by four of the judges, one concurred in the result, one dissented, and one did not vote.

In *Town of Duanesburgh v. Jenkins*, 57 id., 177, decided in 1874 by the commission of appeals,—of concurrent jurisdiction and equal authority with the court of appeals,—the court, by Johnson, J., reviewed the prior cases in the court of appeals involving the questions discussed in *People v. Batchellor*. In reference to the latter case it was intimated that the language of the court upon some of those questions was not in harmony with its previous decisions, and that the opinion should be limited to the point adjudged upon the facts existing in that case. After a careful analysis of those decisions, the conclusions announced were that the authority of the legislature to enable towns and other civil divisions of the state to subscribe for stock and issue bonds in aid of a railroad company had been established by numerous decisions of the highest court of the state; that there was no distinction in principle between a law authorizing a town, upon a popular vote, to subscribe for such stock and issue bonds therefor, and a law directing the same thing to be done; that when the authority to subscribe was made to depend upon the consent of the town, it was in the discretion of the legislature to prescribe how such consent shall be given; and that, if it originally rested with the legislature to fix the terms on which the towns might act, the same power could remit a part of the conditions imposed, or heal any defects which may have occurred in the performance by the town of those conditions. Much of the language in that case is strikingly applicable to the one in hand. Said the court: "In this case the commissioner has been regularly appointed under the statute, by whom bonds were to be issued and stock subscribed for, provided certain consents were obtained and proofs filed according to the requirements of the several acts upon the subject. Consents were obtained, and proofs were made and filed, which are now on the one side claimed to be, and on the other are denied to be, in conformity to the law. The commissioner meanwhile executed the bonds, subscribed for stock, and delivered the bonds to the company in payment of the subscription, complying with the requirements of the statute in all respects, if the requisite consents had been given and proof made. The only officer of the town who had any duty in the premises acted by signing the bonds; and the legislature, seeing the whole matter, released the conditions which it had imposed, and declared his assent binding upon the town, if the bonds had been issued and the road had been built, and the bonds in that case obligatory. As it might have authorized action in this way and on these conditions by the town originally, I see no objections to giving effect to its ratification of the action of the town, and holding its consent thus expressed effectual." Again said the court: "In this case the proper officer of the town has acted, the bonds have been issued and the stock subscribed for. The objection is that the proof of preliminary consents by tax-payers is defective. The action of the legislature is, in my judgment, sufficient to heal this defect, and to sanction the action of the town commissioner in binding the town, the whole consideration to the town having been received in the completion of the road and the issuing of the stock for its benefit."

In *Williams v. Town of Duanesburgh*, 66 N. Y., 129, decided in May, 1876,

the court of appeals of New York recognized the correctness of the principles announced in *People v. Mitchell* and *Town of Duanesburgh v. Jenkins*, citing, among other authorities, *Gelpcke v. Dubuque*, 1 Wall., 175 (§§ 1367-70, *supra*); *Thomson v. Lee County*, 3 id., 327 (§§ 1669-72, *supra*); *Beloit v. Morgan*, 7 id., 619, and *St. Joseph Township v. Rogers*, 16 id., 644 (§§ 1674-77, *supra*). Alluding to the statutes for bonding towns in aid of railroads, the court held that the legislature could overlook the defective execution of the power conferred, and, by retroactive legislation, cure defects in the action of municipalities under those statutes. The legislature may, said the court, "by subsequent legislation, when there has been a failure to perform conditions precedent, and the bonds have been issued, dispense with such conditions, and ratify and confirm, and make valid and obligatory upon the municipality, bonds issued without such performance,—at least it may do so in cases where the municipality has, through the construction of the road, or by the receipt of the stock of the company in exchange for the bonds, received the benefit which the statute contemplated as the equivalent for the liability it was authorized to incur. The officers authorized under these statutes to issue the bonds are public agents, and the legislature, looking over the whole matter, may, when in its judgment justice requires it, ratify and confirm their acts, which otherwise would be valid. In this case the legislature could originally have authorized the bonds of the town of Duanesburgh to be issued under the precise circumstances existing when they were issued, and if the acts of the commissioner have, by subsequent legislation, been ratified, it is equivalent authority to do what has been done." It is worthy of remark, in this connection, that Allen, J., had held, in *Clark v. City of Rochester*, 13 How. Pr. (N. Y.), 204, decided in 1856, that the legislature had no power, under the constitution, to delegate to, or confer upon, municipal corporations authority to subscribe for or to hold stock in railroad corporations, and to issue bonds in payment therefor. Nevertheless, in *Williams v. Town of Duanesburgh* (Church, C. J., concurring with him), he recognized *Town of Duanesburgh v. Jenkins* as authority, and as declaratory of the law.

But it is contended that the court of appeals of New York, in the later case of *Horton v. Town of Thompson*, 71 N. Y., 513, has decided the identical statute under examination to be unconstitutional, and that this court is bound by the decision. The case was commenced about the time the circuit court of the United States for the southern district of New York sustained the validity of that statute, and gave judgment against the town for the amount of some of the bonds embraced in the issue of \$148,000. *Cooper v. Town of Thompson*, 13 Blatch., 434. *Horton v. Town of Thompson* was decided in the supreme court of the state after the present action was instituted. It was a suit upon two interest coupons of \$35 each, belonging to the same issue of bonds. It was finally determined in the court of appeals shortly before the trial of this case in the court below. The questions raised were, whether the consent of the tax-payers was defective in not naming the railroad to the construction of which the fund should be applied; and whether the validating act of April 28, 1871, in so far as it declared the exchange of bonds for stock to be legal, was not unconstitutional. Upon the first question the court said that as the consent was sufficiently comprehensive in its terms to embrace the road in question, and inasmuch as the legislature might legally have authorized it to be in the form in which it was actually given, the act of 1871 "probably cured the defect in its form." But the court, passing that question as one that need not be finally determined, held, upon the authority of *People v. Batchellor*, that the legisla-

ture had no power to authorize or direct the commissioners originally to contract the debt without any consent or action upon the part of the town; and, that since the consent of the tax-payers was not given for an issue of bonds to be exchanged for stock, the legislature could not validate the bonds and make them binding obligations upon the town, in the hands at least of those who were informed, by their recitals, that in violation of the statute they had been exchanged for stock in the railroad company. Four of the judges concurred in the opinion and three dissented. It is to be observed that the court does not refer to or overrule *Bank of Rome v. Rome*, *People v. Mitchell*, *Town of Duanesburgh v. Jenkins*, or *Williams v. Town of Duanesburgh*, *supra*.

§ 1681. *The legislature of a state, having power to authorize municipal bodies to issue bonds, can, by subsequent legislation, cure defects or omissions in the exercise of such authority.*

We are unable to reconcile *Horton v. Town of Thompson*, upon the points now raised, with the doctrines of those cases or of others decided in the court of appeals prior to *People v. Batchellor*. It certainly cannot be said that there is such an established, fixed construction by that court of statutes similar to those of 1868 and 1869, or to the confirmatory act of 1871, as obliges us to follow *Horton v. Town of Thompson*, or that will justify any one in saying that the present question is finally at rest in the courts of that state. But independently of any such consideration, there are conclusive reasons why we cannot, in opposition to our own views of the law, as expressed in numerous cases, accept the principles of that case as decisive of the rights of the present parties. When the act of April 28, 1871, was passed, it was the established doctrine of the highest court of New York, as it was of this court, that the legislature, unless restrained by the organic law of the state, could authorize or require a municipal corporation, with or without the consent of the people, to aid, by a subscription of capital stock, in the construction of a railroad, having connection with the public interests of the people within the limits of such municipality, and to provide for payment by an issue of bonds or by taxation; that defects or omissions, upon the part of such municipal corporation or its officers, in the execution of the power conferred or in the performance of the duty imposed, could be cured by subsequent legislation — certainly where the corporation had received the benefits which the original subscription was designed to secure. As, therefore, the legislature might, in the original act under which these bonds were issued, have authorized or required the bonds to be exchanged directly with the railroad company for capital stock, it could ratify and confirm such exchange, even where originally illegal, so as to make them binding obligations upon the town in favor of all who then held, or might thereafter acquire them, in good faith or for a valuable consideration. It is, therefore, an immaterial circumstance that the recitals in the bonds may have furnished notice that they were issued originally in violation of the statute. That was the very difficulty which the act of 1871 was designed to remove, and, as matter of law it was removed, if regard be had to the settled doctrines of this court, or to the decisions of the highest court of the state rendered previously to and which were unmodified at the passage of that act. It results that from that moment the bonds, by whomsoever held, whether by the railroad company or by others, became binding obligations upon the town, as much so as if they had originally been sold and their proceeds invested in the stock of the railroad company, as required by the acts of 1868 and 1869. If the rights of those holding the bonds were in any degree affected by the subsequent de-

cision in *People v. Batchellor*, the later decision in *Town of Duaneburgh v. Jenkins* restored the law, so far as the courts of New York were concerned, as it undoubtedly was declared to be at the time the act of 1871 was passed. The defendant in error acquired the bonds in suit in 1875, before the decision in *Horton v. Town of Thompson*, and when, according to the principles announced in *Town of Duaneburgh v. Jenkins* and many prior cases in the court of appeals, the act of 1871 must have been sustained as a valid exercise of legislative power. He purchased them for value at public auction in the city of New York, without notice of any defense thereto, or of the pendency of any suit involving their validity. If the recitals in the bonds gave notice that the acts of 1868 and 1869 forbade their exchange for stock and required them to be sold and their proceeds invested in such stock, the purchaser is also presumed to have known, not only that such exchange had been legalized by the act of 1871, but that the authority of the legislature to pass that act was sustained by the decisions of the highest court of the state rendered prior to its passage. His rights, therefore, should not be affected by a decision rendered after they accrued, which decision is in conflict with the law, as declared not only by this court in numerous cases, but by the highest court of the state, at and before the time he purchased the bonds.

§ 1682. *Rights of a bona fide holder for value. County of Warren v. Marcy, 97 U. S., 96, reaffirmed.*

The assignments of error present another question which it is our duty to notice. The town pleaded in bar of the action a judgment of the supreme court of the state in an action commenced in June, 1869, by the attorney-general of the state, on the relation of Charles Kilbourne and others, tax-payers, against the commissioners of the town of Thompson, F. C. Crowley, C. L. Colt, William D. Colt, the Monticello & Port Jervis Railway Company, and the town of Thompson. A temporary injunction was obtained on 24th June, 1869, restraining the respondents and each of them from using, loaning or selling the bonds and from executing any other bonds based upon the consents given by the tax-payers. But that injunction was vacated and set aside on 27th July, 1869. A final decree was rendered in 1872, by which the bonds were declared to be null and void, and they as well as the certificates of stock exchanged therefor directed to be delivered up, by the respective parties, and canceled. The general ground upon which the decree rested was that the provisions of the act under which they were issued were not complied with. From that judgment no writ of error or appeal seems to have been prosecuted. We have already seen that the entire issue of bonds was delivered to the railroad before the commencement of that action, that is, in May, 1869; and that after the dissolution of the injunction, to wit, in September and November, 1869, a large portion of the bonds had found their way into the hands of others who purchased them for value and without any notice of the pendency of the suit in the supreme court. There is an insuperable difficulty in the way of plaintiff in error using the judgment in that case to defeat the present action. The bonds were negotiable securities, which had passed from the town before the action in the supreme court of the state was commenced. Those who purchased them, in the market, pending that litigation, or after it terminated, without notice of the suit, and in good faith, for value, could not be affected by the final decree. Had the complainants caused them to be surrendered to the custody of the court, pending the suit, they could have been canceled in pursuance of the directions contained in the final decree. But the actual custody of

the railroad company was never disturbed, nor sought to be disturbed. The knowledge by its officers of the objects of the action, or of the terms of the final decree, could not affect a *bona fide* purchaser for value who had no such knowledge. Our decision in *County of Warren v. Marcy*, 97 U. S., 96 (§§ 1454-57, *supra*), which is partly based upon adjudications in the courts of New York (*Murray v. Lylburn*, 2 Johns. Ch. (N. Y.), 441, and *Leitch v. Wells*, 48 N. Y., 585), is conclusive upon this branch of the case.

It is scarcely necessary to say that the decree of the supreme court of the state can derive no special force, as against the defendant in error, by reason of the third section of the act of April 28, 1871. That section only protected from the operation of the act any action or proceeding at law, commenced or pending at the time of its passage. That provision furnishes, perhaps, an explanation of the failure of the supreme court, in its opinion, to refer to the act of 1871, which had passed before its final decree was entered. The purpose of the third section was only to require existing actions or proceedings at law to be determined without reference to that act, and does not affect the rights of a *bona fide* purchaser who was not a party to the suit, and was without notice of its pendency. We perceive no error in the record.

Judgment affirmed.

SUPERVISORS v. SCHENCK.

(5 Wallace, 772-785. 1866.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Counties in the state of Illinois may purchase or subscribe for shares in the capital stock of any railroad company incorporated or organized under any law of the state, in any sum not exceeding \$100,000. Pursuant to that law the corporation defendants, on the 12th day of September, 1856, issued, as alleged in the first count of the declaration, thirty bonds, each for \$1,000, payable to the Western Air Line Railroad Company, or order, in twenty years from date, with interest coupons annexed, stipulating for the payment to bearer of interest annually at the rate of six per centum per annum. Same count alleged that the plaintiff, on the 1st day of July, 1857, became the legal holder of those bonds, with the coupons thereto attached, by due indorsement and delivery.

Present suit, which was an action of *assumpsit*, was brought by the plaintiff to recover one year's interest on those bonds, which fell due on the 12th day of September, 1865, nine years after the bonds were issued and eight years after the plaintiff became the holder of the same, for value, and in the usual course of business. The authority of counties to purchase or subscribe for such shares and issue such bonds is subject to certain conditions or regulations, one of which is that a majority of the qualified voters of the county must first vote for such subscription or purchase. Provision is also made for proper notice to the electors of the time and place of the meeting for that purpose, and the requirement is that the notice must specify the company in which the stock is proposed to be subscribed, the amount proposed to be taken, the time the bonds are to run, and the rate of interest the bonds are to bear.

Defendants appeared and filed a special plea, and rested their defense entirely upon the allegations of that plea. Substance of the defense was that the bonds were issued without authority, and were invalid, because the election to pro-

cure the consent of a majority of the qualified voters of the county was ordered to be held by the county court of the county, and not by the board of supervisors of the county, as required by law; but they admitted, among other things, that the election was properly conducted, and that the returns were duly made, and that the proceedings, in all other respects, were regular and correct.

Replication of the plaintiff alleged that the bonds and coupons were executed and delivered in payment of a like number of shares of stock in the railroad company; that the shares of the stock were received by the defendants in payment for the bonds, and that the defendants have ever since held and owned the same, and by virtue thereof have participated in the election of the officers of the company, and in all other benefits and advantages attending such ownership. He also alleged that the transfer of the bonds to him was for a valuable consideration, and without notice of any defect in the preliminary proceedings, and that the defendants, having paid the interest annually accruing on the bonds to the amount of \$6,000, have thereby ratified and confirmed the same as binding and obligatory. Defendants demurred, and the plaintiff joined in demurrer. Circuit court overruled the demurrer, and rendered judgment for the plaintiff, and the defendants removed the cause into this court.

I. Bonds to the amount of \$100,000 were issued by the defendants, of which the bonds specified in the declaration were a part, and the railroad company, at the same time, transferred stock to them in the same amount. Decision of the circuit court in overruling the demurrer is the only error assigned in the record, and the single question presented in the case is whether the bonds specified in the declaration, and which were indorsed and delivered before maturity, are void in the hands of the plaintiff, who is the holder for value, and without notice of any defect in the proceedings, because the order for the election in which the majority of the qualified voters of the county voted to subscribe for the stock of the railroad company and purchase the shares was made by the county court and not by the supervisors of the county.

Before examining that question it may be well to mention some of the further admissions of the defendants, as exhibited in their special plea. They therein admit, in express terms, that the notices of the election were duly published; that the election was held; that the required number of qualified votes were given on the 5th day of April, 1853, and that the board of supervisors of the county, on the 14th day of November, 1854, made an order, and recorded it, that the county do subscribe \$100,000 to the stock of the company named in the bonds; and that the board, on the same day, passed another order to empower the chairman of the board to make the subscription, and that he made the subscription and purchased the shares on the following day. These admissions of the plea or answer are followed by others of equal importance, to wit: That the chairman and clerk of the board did afterwards issue, by the order of the board, the bonds of the county, as alleged in the declaration, and that the same were duly delivered to the railroad company, in payment for a like number of the stock shares of the company.

§ 1683. *Circumstances estopping a county to urge irregularities in the issue of its bonds held by bona fide purchasers. (a)*

Looking at these several admissions, it is obvious that the sole objection to the validity of the bonds, even *inter partes*, arises from the fact alleged in the

plea, and not directly denied in the replication, that the order for the election was passed by the county court of the county, and not by the board of supervisors. Express authority is conferred upon counties in that state to subscribe for shares, or purchase the same, in any railroad company incorporated and organized under the laws of the state, in any amount not exceeding the sum already specified, and the supreme court of the state have settled the doctrine in a series of decisions that the law of the state conferring such authority is constitutional and valid. 2 Statutes, 1072; *Prettyman v. Tazewell*, 19 Ill., 406; *Johnson v. Stark Co.*, 24 id., 75; *Butler v. Dunham*, 27 id., 474. Power in the county, therefore, to make the subscription, purchase the shares, and issue the bonds in this case, if the proceedings were regular, is placed beyond all question. Support to that proposition is hardly necessary, as it is settled by the decisions of this court, as well as by the highest judicial authority of the state, and stands confessed. *Rogers v. Burlington*, 3 Wall., 663 (§§ 837-841, *supra*).

Notices of the time and place of the election, in due form of law, were duly published, and the meeting was formally held at the time appointed, and at the usual place for such elections. Returns of the election were duly made, and the admission of the plea warrants the conclusion that they show that a majority of the qualified voters voted for the subscription. Compliance, therefore, is shown with every provision of the original law which authorized counties to make such subscriptions and purchase shares in the capital stock of railroad companies. Orders for such elections were required under that law to be made by the county court of the proper county, and the provision was that the stock so subscribed or purchased should be under the control of the county court making such subscription or purchase, in all respects, as stock owned by individuals. 2 Statutes, 1072. Prior to the date of the order for the election in this case, however, the township organization law was passed, which provides that the powers of a county as a body politic can only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted. Id., 1146. None of the other provisions of the prior law are repealed, nor is there any change in the regulations, except that the order for the election is required to be made by the board of supervisors, and not by the county court of the county. The objection is that the order in this case was made as under the prior law, but the notices, in regular form, were duly published, and the election was held, and the board of supervisors of the county ratified the proceedings by subscribing for the stock, issuing the bonds, accepting the shares in payment of the same, and by participating ever after in the election of the officers of the company and in the management of its affairs, as owners to that extent of the stock of the company.

§ 1684. *Corporation bound by the ratification of an act which it was competent to perform.*

Throughout they appear to have adopted the order and the results of the election as rightfully authorized acts, and for the period of ten years the county has held the stock as their own property, and have voluntarily enjoyed all the benefits of absolute legal ownership, without any complaint or any attempt to enjoin the proceedings.

Preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in cases where the corporation will be held to be forever concluded, if they remain silent and suffer the shares to be purchased, the bonds to be issued, and the securities to be exchanged. Nothing of the kind was at-

tempted in this case, and the defendants have never rescinded, or attempted to rescind, the contract, and have never returned, or offered to return, the evidences of their ownership of the shares in the stock of the company, but have annually acknowledged the validity of the bonds by voting taxes for the payment of the accruing interest, and have actually paid the same to the amount of \$6,000. Judge Story said there was no maxim, where it does not prejudice the rights of strangers, better settled in reason and law than *Omnis ratihabitio retrotrahitur et mandata priori æquiparatur*, and it is equally well settled that the maxim is as applicable to corporations in matters of simple contract as to other contracting parties. Questions of ratification most frequently arise in respect to the acts or omissions of agents, but the general rule is the same in all cases where the act done was one which it was competent for the party attempted to be charged to do. When the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings or omissions reach. Story on Ag., ed. 1863, § 239; *Fleckner v. Bank of United States*, 8 Wheat., 363 (BANKS, §§ 20-27); *New York & N. H. R. Co. v. Schuyler*, 34 N. Y., 49.

Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made, nor when the supposed acts of ratification were performed, or if the contract was illegal, immoral, or against public policy. Like an individual, a corporation may ratify the acts of its agents done in excess of authority, and such ratification may, in many cases, be inferred from acquiescence in those acts, as well as from express adoption. *Hoyt v. Thompson*, 19 N. Y., 218. Such ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved, and intended to adopt, what had been done in his name; and it was held in *Peterson v. Mayor of New York*, 17 id., 453, that the principle is as applicable to corporations as to individuals. Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. *Bank of United States v. Dandridge*, 12 Wheat., 70. All of the acts of the board of supervisors of the county in making the subscription, purchasing the shares, issuing the bonds, and exchanging the securities, appear to have been open and well known to the corporation, and yet they constantly suffered themselves to be represented in the choice of officers and in the management of all the affairs of the railroad company, and have voluntarily voted taxes for the payment of the yearly interest on the bonds, and *actually paid the same*, as admitted in the special plea.

§ 1685. *What will amount to a ratification.*

Examined in the light of those suggestions, it would be difficult to imagine a case where the rule that a subsequent ratification is as good as a previous authority can be more justly applicable than in the case under consideration. *Mills v. Gleason*, 11 Wis., 490; *Angell & Ames on Corp.*, 8th ed., §§ 237, 304; 2 *Kent's Comm.*, 11th ed., 348; *Bissel v. Railroad*, 22 N. Y., 284. So, where shares in a railroad company were received by the officers of a county in exchange for their bonds, and were never returned, and the proper officers of the

county voted for directors at two elections, and the supervisors paid two annual instalments of interest, the supreme court of Illinois held that those acts, unexplained, were as satisfactory evidence of a design to ratify the issue of the bonds as if it had been done by an order of the supervisors. *Johnson v. Stark Co.*, 24 Ill., 75.

Direct decision to the same effect was also made by that court in *Keithsburg v. Frick*, 34 id., 421, which is the latest reported decision upon the subject. Views of the court in that case were that the acts of the supervisors in issuing the bonds and putting them upon the market, and by levying taxes and paying interest for a series of years, estopped the county from setting up any irregularity in their issue, and this court has, in repeated instances, affirmed the same doctrine. Leading case in this court is that of *Knox County v. Aspinwall*, 21 How., 544 (§§ 1413-18, *supra*), which was very fully considered by the court. Alleged defect in that case was that the notices of the election, as required by law, had not been given in any form, but the decision was that the question as to the sufficiency of the notice, and the ascertainment of the fact whether the majority of votes had been cast in favor of the subscription, was necessarily left to the inquiry and judgment of the county board, as no other tribunal was provided for the purpose. Intimation of the court was that their decision might not be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power and before the rights and interests of third parties had attached. But the court held that after the authority had been executed, the stock subscribed, the bonds issued, and in the hands of innocent holders, it was too late, *even in a direct proceeding*, to call the power in question; much less, say the court, can it be called in question to the prejudice of a *bona fide* holder of the bonds in a collateral way. Similar views were expressed by this court in the case of *Bissell v. Jeffersonville*, 24 id., 299 (§§ 1449-50, *supra*), and in many others referred to by the plaintiff. *Moran v. Miami Co.*, 2 Black, 725 (§§ 1439-42, *supra*). When a corporation has power, under any circumstances, to issue negotiable securities, the decision of this court is that the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. *Gelpcke v. Dubuque*, 1 Wall., 203 (§§ 1367-70, *supra*). State courts in other states have decided in the same way, as well where the controversy was between the original parties as in favor of indorsers and holders, without notice of the alleged defect. *Savings Co. v. New London*, 29 Conn., 174; *Tash v. Adams*, 10 Cush., 252.

§ 1686. *Bona fide holder of commercial paper.*

Argument of the defendants proceeds upon the ground that, if they can show that the order for the election emanated from the wrong source, the plaintiff, although an innocent holder for value, cannot recover; but it is clear that in a case like the present, where the power to issue the bonds was fully vested in the corporation, the proposition cannot be sustained. On the contrary, it is settled law that a negotiable security of a corporation, which, upon its face, appears to have been duly issued by such corporation and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was, in point of fact, issued for a purpose and at a place not authorized by the charter of the corporation. *Stoney v. Life Ins. Co.*, 11 Paige Ch., 635; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y., 129; *Goodman v. Simonds*, 20 How., 365 (*Bills*

AND NOTES, §§ 420-425); *Thomson v. Lee County*, 3 Wall., 327 (§§ 1669-72, *supra*). Attention is drawn to the fact that in a recent case, not yet reported, the supreme court of the state have held that these bonds are void, even in the hands of an innocent holder; but inasmuch as the power to issue the bonds was fully conferred by law, the question of their validity in the hands of innocent holders without notice is a question of commercial law where the state adjudications, although entitled to great respect, do not furnish the rule of decision in this court. Prior decisions of the state court were in accordance with the decisions of this court, and as those decisions were supposed to be correct expositions of the law of the state at the period when these bonds were issued, the latter adjudications cannot control the judgment in this case.

Judgment affirmed, with costs.

§ 1687. **Ratification.**—Where a town has paid interest on its bonds for a number of years, and has accepted and retained the stock of the railroad company to which the bonds were issued, and the bonds have passed from hand to hand in the market, the town is estopped to deny the validity of the bonds. *First Nat. Bank v. Town of Walcott*, * 7 Fed. R., 892; *S. C.*, 19 Blatch., 870; *Whiting v. Town of Potter*, * 18 Blatch., 165; *County of Clay v. Society for Savings*, 14 Otto, 579 (§§ 1019-29).

§ 1688. A municipal corporation will not be heard to allege that it has not made its bonds or the interest coupons payable at the time directed by statute, while it retains the stock it received in exchange for them. *Munson v. Town of Lyons*, * 12 Blatch., 539.

§ 1689. Where a town issues bonds, accepts stock in the railroad company, pays interest on the bonds for three years, and the road is built and put in operation, the town must be held to have ratified the issue of the bonds. *Irwin v. Town of Ontario*, * 18 Blatch., 259.

§ 1690. After bonds are issued and interest paid without objection, it is too late to object that the road was located a short distance from the town, the location being a practical compliance with what was required. *Commissioners of Johnson County v. Thayer*, 4 Otto, 681 (§§ 1030-36).

§ 1691. The supreme court is not bound by state decisions holding municipal bonds void after they have been issued, interest paid and the road built. *Ibid.*

§ 1692. Where bonds are absolutely void — issued without authority of law — the payment of interest for ten years will not estop the town from denying their validity. *Leslie v. Town of Urbana*, * 8 Biss., 435.

§ 1693. Where a county has issued its bonds to a railroad company and received its stock therefor, and held it for a number of years and sold it, it cannot set up as a defense to an action on the bonds, that the company to which the bonds were issued was not in existence when the vote was had, or when the bonds were issued, when in fact the company had been in existence several years and had, just before it received the bonds, changed its name on consolidation with another company. *County of Leavenworth v. Barnes*, 4 Otto, 70 (§§ 1024-26).

§ 1694. Where a city has repeatedly recognized the validity of its bonds, and has paid interest on them for a series of years, the finding should be in favor of the legality of the bonds unless it appear beyond all doubt that their issue was void. *Portsmouth Savings Bank v. City of Springfield*, * 4 Fed. R., 276.

§ 1695. Where bonds are issued without authority, the city is not estopped to deny their validity, and the illegal issue cannot be ratified. *Lewis v. City of Shreveport*, * 8 Woods, 205.

§ 1696. Where there is a total want of power to issue municipal bonds, there can be no estoppel arising from payment by the city of interest on the bonds, or from the acts of the officers of the city in dealing with the property mortgaged to the city to secure the payment of the bonds. *Parkersburg v. Brown*, * 16 Otto, 487.

§ 1697. Where a city has power to issue bonds, it may take them up and issue renewal bonds; and although there may have been irregularities in the issue of the bonds, still, after the lapse of a great many years, the reception and use of the consideration by the city, the payment of interest, etc., the city ought not to deny their validity. *Portsmouth Savings Bank v. City of Springfield*, * 4 Fed. R., 276.

§ 1698. **Curative acts.**—Where the legislature has power to authorize the issue of bonds, it may ratify and confirm an irregular issue. *Portsmouth Savings Bank v. Town of Yellow Head*, * 3 Biss., 474; *County of Jasper v. Ballou*, 13 Otto, 745 (§§ 1270-71).

§ 1699. Where a debt contracted by a city is invalid because the statute under which it was contracted did not limit the amount, the debt may be rendered valid by a subsequent act. *The City v. Lamson*, 9 Wall., 477 (§§ 1780-84).

§ 1700. Where bonds appear on their face to have been issued contrary to the act authorizing them, they may be rendered valid by an act of the legislature, and the original and subsequent holders will be *bona fide* holders. *Cooper v. Town of Thompson*,* 13 Blatch., 434.

§ 1701. In this case it was held that the legislature cannot render valid bonds issued without authority of law—following a decision of the supreme court of the state rather than a prior decision of the supreme court of the United States. *Leslie v. Town of Urbana*,* 8 Biss., 435.

§ 1702. A statute which does not purport in its title or body to be a curative act, but appears, on comparison with another act, to be intended to change the mode of levying and collecting taxes, is held not to have the effect to make binding obligations bonds which would otherwise be void. *January v. Johnson County*,* 3 Dill., 402. See §§ 1361, 1362.

§ 1703. The town of Beloit, in Wisconsin, issued its bonds to aid in the building of a railroad, under authority actual or supposed. The town of Beloit was afterwards chartered as a city, and its charter provided that all principal and interest on bonds theretofore issued by the town of Beloit for railroad stock or other purposes, when the same or any portion thereof should become due, should be paid by the city and town of Beloit, in the same proportions as if said town and city had not been dissolved. It was decided that this act was equivalent to original authority to issue the bonds, and cured all defects of power, if such existed, and all irregularities in their issue. *Beloit v. Morgan*,* 7 Wall., 619.

§ 1704. A county was authorized to issue and sell bonds, and invest the proceeds in the stock of a railroad company. The bonds were issued, and, instead of being sold, were exchanged directly for stock. *Held*, that an act of the state legislature, ratifying and confirming the transaction, was valid. (*Thompson v. Perrine*, 13 Otto, 806, affirmed.) *Thompson v. Perrine*,* 16 Otto, 589; *Cooper v. Town of Thompson*,* 13 Blatch., 434.

§ 1705. Bonds issued to a railroad company, which was organized under an act which construed a former act, are valid, though without the later act the organization of the railroad company would have been illegal. *Stebbins v. County Commissioners*,* 2 McC., 196.

§ 1706. Where an act of 1868 authorized the issue of bonds in aid of railroad companies, and the company to which bonds were issued organized in 1873, under an act passed in 1873 construing and declaring the meaning of an act of 1867, *held*, that the bonds were valid. *Ibid*.

XIV. STATE DECISIONS.

SUMMARY—*Later decisions not followed*, § 1707.

§ 1707. Where bonds were held valid at the time they were issued, and long afterwards, a later decision of the state court holding them invalid will not be followed by the supreme court. *Douglass v. Pike County*, §§ 1708-1711.

[NOTES.—See §§ 1712-1722.]

DOUGLASS v. COUNTY OF PIKE.

(11 Otto, 677-688. 1879.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS.—Douglass sued the county of Pike on a lot of overdue coupons detached from bonds issued by it in aid of a railroad, and on behalf of a township in that county. There was a judgment for defendant on demurrer to the plaintiff's declaration.

§ 1708. *The act of the Missouri legislature of March 23, 1868, "to facilitate the construction of railroads," is constitutional.*

Opinion by WAITE, C. J.

We are asked to reconsider our decision in *County of Cass v. Johnston*, 95 U. S., 360 (§§ 901-904, *supra*), because since that case the supreme court of Missouri, in *State v. Brassfield*, 67 Mo., 331, and *Webb v. La Fayette County*, *id.*, 353, has held the township aid act, which we sustained, to be unconstitutional. The question presented, as we view it, is not so much whether these late decisions are right, as whether they should be followed in cases having reference to bonds put out and in the hands of innocent purchasers when they

were announced. In the Cass County case we said that the supreme court of the state had often been called on to construe and give effect to the act, and had never before that time in a single instance expressed even a doubt as to its validity. We have again examined all the cases, and find that what we then said was true. Judge Dillon, who filled the office of circuit judge in the eighth circuit with such distinguished ability during nearly all the time the act was in operation, from its original passage until after the recent decisions, remarked in *Westerman v. Cape Girardeau County*, 7 Cent. L. J., 354: "A hundred cases—and I do not think I exaggerate—have been brought on these township bonds in the federal courts of this state, and prior to the decision in *Harshman v. Bates Co.*, 92 U. S., 569 (§§ 899, 900, *supra*), none of the able lawyers defending these cases ever made a point that the act of March 23, 1868, was unconstitutional." The reason is obvious. At the very outset it was thought best to take the opinion of the supreme court of the state on that subject. The act went into operation in 1868, and in 1869 *State v. Linn County*, 44 Mo., 504, was decided. There a township had voted to subscribe to the stock of a railroad company, and the county court had made the subscription; but after this was done the court refused "to deliver the bonds, for the alleged reason only, that the act under which the subscription was made was unconstitutional and void." An application was then made for a *mandamus* to compel the delivery of the bonds; and the only questions presented by the counsel for the respondent in the argument of the case, as shown by the report, were those of constitutionality, and especially was it urged that the act was repugnant to article 11, section 14, which, quoting from the opinion, "declares the general assembly shall not authorize any county, city or town to become a stockholder in, or loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." All the objections presented were considered by the court, and in conclusion it was said: "The county court having made the subscription, the company is entitled to the bonds." It is quite true that the precise objection which has since been raised was not then urged or considered; but the alleged discrepancy between the act and the constitution was just as apparent then as it is now, and Judge Dillon, in *Foote v. Johnson County*, 6 Cent. L. J., 346, says: "Suits in great numbers on these township bonds have been brought in the circuit court of the United States for this district, and they have been defended by the ablest lawyers in the state, upon every ground that they conceived open to them; but this difference between the phraseology of the constitution and the act, so patent that it could not escape attention, was never presented or urged in any case, so far as either of us recollect, as invalidating the act." In *County of Cass v. Johnston*, we attributed this to the fact that in other cases it had been substantially decided that the language of the act and that of the constitution were in legal effect the same, and we at that time took occasion to look somewhat critically into the rulings on that subject. We have again examined that question, and are satisfied with the correctness of our former conclusion. It is thought, however, that we did not give sufficient effect to *State v. Sutterfield*, 54 Mo., 391. As to that, we said the question presented related to another clause of the constitution, and that the decision was placed expressly on the ground of a difference between the two provisions. In this it is urged we were in error. The clause of the constitution there under consideration was art. 4, sec. 30, which is: "The general assembly shall have no power to

remove the county seat of any county unless two-thirds of the qualified voters of the county, at a general election, shall vote in favor of such removal." Under this provision of the constitution a statute was passed providing for elections in such cases, to the effect, "if it shall appear by such election that two-thirds of the legally registered voters of said county are in favor of the removal of the county seat of such county, then," etc. In the opinion the court say: "There is no doubt that in general, when an election is held to determine the choice of a candidate, or the determination of some question of public policy, the plurality required by law, whether it be a bare majority, or two-thirds or three-fourths, is determined by the result of the vote cast, without regard to the number declining to vote; and this is upon the ground that a failure to vote is assumed, or may be presumed, to be an acquiescence in whatever result may be produced by the action of those who feel a sufficient interest in the election to go to the polls and vote, and for the further reason that in most cases there is no mode by which the number of absentees can be ascertained. . . . Our constitution, in regard to the proposed removal of county seats, it seems to me, hardly admits of two constructions. It prohibits the legislature from removing them unless two-thirds of the qualified voters shall, at a general election, vote for the removal. The words do not imply an acquiescence or negative sanction, or a negative assent inferred from absence, but a positive vote in the affirmative, and the number of votes required is specifically named, and there is no difficulty in ascertaining what that number is, since the same constitution provides for a registration and points out who are qualified voters; and the statute in this case uses the words 'legally registered voters,' and requires two-thirds of them to vote for the change." The court then refers to *Bassett v. Mayor of St. Joseph*, 37 Mo., 270; *State v. Binder*, 38 id., 450, and *State v. Winkelmeier*, 35 id., 103, and says: "In none of these cases, however, was there any examination of, or construction given to, the precise language of the constitutional provision now under consideration.

. . . The present case, however, presents very different considerations. The question of removing county seats was regarded by the framers of the constitution as of sufficient importance to require very stringent provisions in that instrument, and an examination of the laws in force on this subject, at the time of the adoption of the new constitution, will show the great importance of requiring a strict compliance with its provisions." We think, then, we were not in error in supposing that the court believed there was an essential difference between the two provisions of the constitution, and especially so as the judge who delivered the opinion of the court in *State v. Sutterfield*, by his dissent in the later cases of *State v. Brassfield* and *Webb v. La Fayette County*, clearly indicates his disapproval of the effect upon the question now under consideration which was then given that case.

The legislative recognition of the difference between these two clauses of the constitution is equally apparent. The constitution went into effect in July, 1865, and it became the duty of the legislature, at its next session, which commenced in November, to adapt the old laws to the new order of things. In this connection, it must be borne in mind that the provision for a registration of voters was first introduced into the policy of the state by this new constitution. The then existing law regulating the removal of county seats provided that "whenever three-fifths of the taxable inhabitants of any county, as ascertained by the tax list made and returned last preceding the application, shall petition the county court, praying a removal of the seat of justice thereof

to a designated place, the court shall appoint five commissioners," etc. R. S. Mo., 1855, p. 514, sec. 1. To meet the requirements of the new constitution on this subject, an election was provided for, and it was enacted that if it should appear by such election that two-thirds of "the legally registered voters" were in favor of the removal, commissioners should be appointed to perform the same duties prescribed in the old law. Gen. Stat. Mo., 1865, p. 223, secs. 20-22. Here it is evident the legislature had in mind both the provision for registration of voters and the somewhat unusual requirement that two-thirds of the qualified voters of the county should *vote* for the measure.

The old law respecting the subscription by the county courts to the capital stock of railroad corporations was as follows: "It shall not be lawful for the county court of any county to subscribe to the capital stock of any railroad company, unless the same has been voted for by a majority of the resident voters who shall vote at such election under the provisions of this act." Acts of 1860-61, p. 60, sec. 2. In adapting this to the new constitutional requirements, this is the language used: "It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock, etc., provided that two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription." Gen. Stat. Mo., 1865, p. 338, sec. 17. This, it will be seen, is the exact language of the constitution itself, and the intention evidently was to leave its meaning to be ascertained by judicial construction. By another statute passed at the same session of the legislature, the charter of the city of St. Joseph, which had before authorized subscriptions to the capital stock of railroad companies if a majority of the real estate owners in the city sanctioned the same, was amended so as to require that question to be submitted "to a vote of the qualified voters of said city, and in all such cases it shall require two-thirds of such qualified voters to sanction the same." Acts of 1865-66, p. 269, sec. 1. At the same session in amending the charter of the town of Clarksville, evidently to accomplish the same object, this is the language employed: "After first having obtained the consent of the inhabitants, as required by the constitution of the state." *Id.*, p. 254, sec. 1.

§ 1709. — *authorities reviewed.*

At the February term, 1866, of the supreme court of the state, that court was called on, in *Bassett v. Mayor of St. Joseph*, 37 Mo., 270, to give a construction to the act amending the charter of St. Joseph. Under that act an election was held on the 13th of January, 1866, to vote upon the question of an issue of bonds, and four hundred and four votes were polled, of which three hundred and thirty-six were in favor of and fifty-eight against the measure. The mayor refused to sign the bonds after the vote had been taken, and a *mandamus* was asked to require him to do so. The only reason he gave for declining to sign the bonds was, that "he was in doubt whether the matter was to be determined by two-thirds of the votes polled at the special election, or by two-thirds of all the voters resident in the city, absolutely, whether voting or not." In the argument in support of the application for the writ, the attention of the court was called to the fact that there was "no registry law by which the qualified voters in the city could be ascertained," and it was further said, "the votes cast at the last election for city officers and the votes cast at said subsequent election furnish the only correct criterion to ascertain the number of qualified voters in the city at the time said special election was held." In the opinion, mention is also made of the number of votes polled at

the next preceding election; but the court, after stating the exact question put by the mayor as indicating his own doubts, uses this direct and unmistakable language: "We think it was sufficient that two-thirds of the qualified voters who voted at the special election authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters on that question. There would appear to be no other practicable way in which this matter could be determined." It is true, the bonds voted at this election were not to be used in payment of subscriptions to the stock of railroad companies, but the law construed was the one in which provision was made for such subscriptions. Following this, at the October term, 1866, of the same court, was the case of *State v. Binder*, 38 Mo., 450, in which similar language in another statute was construed, and *Bassett v. Mayor of St. Joseph* cited as establishing the doctrine "that an election of this kind authorized for the very purpose of determining that question, on public notice duly given, was the mode contemplated by the legislature as well as by the law for ascertaining the sense of the legal voters upon the question submitted, and that there could not well be any other practicable way in which such a matter could be determined. And," continues the court, "certainly, in the absence of any evidence to the contrary, it may be presumed that the voters voting at an election so held were all the legal voters of the city; or, that all those who did not see fit to vote (if there were any) acquiesced in the action of those who did vote, and so are to be considered as equally bound and concluded by the result of the election. *Rex v. Foxcroft*, 2 Burr., 1017; *Wilcox on Corp.*, 546." Certainly, after these two decisions, made under the circumstances that attended them, and with the mind of the court directed by counsel in their argument to the registration laws, it might fairly be assumed by the legislature to have been judicially determined that the assent of two-thirds of the qualified voters voting at an election duly called and notified was the legal equivalent of the assent of two-thirds of the qualified voters of an election precinct. Hence it was that at the session of the legislature which began in January, 1868, and as soon, probably, as the effect of these decisions had become generally understood, to avoid all future doubts as to what was meant, the equivalent language, as construed by the courts, was used, instead of that of the constitution itself. And so we find not only in the township aid act, but in other acts depending for their authority on the same clause of the constitution, the requisite assent of those voting at an election was deemed by the legislature to be the assent of the qualified voters.

It was under this state of facts and the law that *State v. Linn County* (*supra*) was heard and decided. Other objections to its constitutional validity than those which had formerly been considered were raised, argued and decided in favor of the law. From that time forward, and until long after the issue of the bonds now in question, the law was treated by the courts and the people as valid and constitutional. No lawyer asked for a professional opinion on that subject could have hesitated to say that it had been settled. It would seem as though every question which could be raised had in some form, directly or indirectly, been presented and decided. While some of the decisions were rendered before the passage of the township act, it is so clear that the peculiar language of that act was the consequence of those decisions that we do not deem it unreasonable to give them all the effect they would have if made afterwards.

§ 1710. *Where municipal bonds have been put upon the market as commercial paper their legal status must be settled by the statutes of the state as expounded by the highest court of the state. (a)*

We are, then, to consider whether, under these circumstances, we must follow the later decisions to the extent of destroying rights which have become vested under those given before. As a rule, we treat the construction which the highest court of a state has given a statute of the state as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected. The language of Mr. Chief Justice Taney in *Rowan v. Runnels*, 5 How., 134, expresses the true rule on this subject. He said, p. 139: "Undoubtedly this court will always feel itself bound to respect the decisions of the state courts, and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states which, in the judgment of this court, were lawfully made." Afterwards, in *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How., 416, the same learned chief justice, after reiterating what he had before said in *Rowan v. Runnels*, uses this language: "It is true the language of the court in that case is confined to contracts with citizens of other states, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction." This distinction has many times been recognized and acted upon. *Supervisors v. United States*, 18 Wall., 71; *Fairfield v. County of Gallatin*, 100 U. S., 47 (§§ 869-871, *supra*). Indeed, if a contrary rule was adopted, and the comity due to state decisions pushed to the extent contended for, "it is evident," to use again the language of Mr. Chief Justice Taney, in *Rowan v. Runnels*, "that the provision of the constitution of the United States, which secures to the citizens of another state the right to sue in the courts of the United States, might become utterly useless and nugatory."

§ 1711. *The proper rule for the construction of a statute with reference to contract rights under it.*

The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment. So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully not only the right of a state court, but its duty, to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and

(a) Where bonds are valid by the laws of the state as expounded at the time they were issued, the federal courts will not follow later decisions holding them invalid. *Gelpeke v. City of Dubuque*, 1 Wall., 175 (§§ 1367-70, *supra*); *Thomson v. Lee County*, 8 Wall., 327 (§§ 1662-72, *supra*); *Mitchell v. Burlington*, 4 Wall., 270 (§§ 1151-53, *supra*); *Havemeyer v. Iowa Co.*, 3 Wall., 303; *Larned v. Burlington*, 4 Wall., 275; *The City v. Lamson*, 9 Wall., 477 (§§ 1730-34, *infra*); *Olcott v. The Supervisors*, 16 Wall., 678; *Chambers County v. Clews*, 21 Wall., 317; *New Buffalo v. Iron Co.*, 15 Otto, 73; *Marshall v. Elgin*, 3 McC., 35; *Burleigh v. Rochester*, 5 Fed. R., 667.

ordinarily we will follow them, except so far as they affect rights vested before the change was made. The rules which properly govern courts, in respect to their past adjudications, are well expressed in *Boyd v. Alabama*, 94 U. S., 645, where we spoke through Mr. Justice Field. If the township aid act had not been repealed by the new constitution of 1875 (art. 9, sec. 6), which took away from all municipalities the power of subscribing to the stock of railroads, the new decisions would be binding in respect to all issues of bonds after they were made; but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the constitution of the United States from doing. We always regret to find ourselves in conflict with the courts of the states in matters affecting local law, but when necessary we cannot refrain from acting on our own judgment without abrogating our constitutional jurisdiction.

For these reasons the judgment of the circuit court will be reversed, and the cause remanded with directions to overrule the demurrer to the petition, and take such further proceedings, not inconsistent with this opinion, as law and justice may require; and it is so ordered.

- § 1712. In general.—The federal courts are not bound by state decisions on questions of commercial law arising in suits on municipal bonds. *Mercer County v. Hackett*, 1 Wall., 83 (§§ 1409-12). Such questions are questions of commercial law, and belong to the domain of general jurisprudence. *Town of Venice v. Murdock*, 2 Otto, 494 (§§ 1447-48); *Township of Pine Grove v. Talcott*, 19 Wall., 666 (§§ 861-866); *Supervisors v. Schenck*, 5 Wall., 772 (§§ 1683-83); S. C.,* 1 Biss., 533.

§ 1713. Where municipal bonds have been held valid by the state court in the hands of innocent holders, and the ruling has been followed by the supreme court, if the state court subsequently changes its ruling the supreme court will decline to change its own rulings. *County of Ralls v. Douglass*,* 15 Otto, 728.

§ 1714. Where bonds are held valid by the laws of the state at the time of their issue, the federal courts will not follow later state decisions holding such bonds invalid, even though the purchaser purchases with notice of such later decisions. *Taylor v. Ypsilanti*,* 15 Otto, 60.

§ 1715. Whenever the state courts have declared the act under which bonds were issued constitutional, all persons into whose hands the bonds may come are authorized to consider the question as conclusively settled. *Smith v. Tallapoosa County*, 2 Woods, 574 (§§ 1778-81).

§ 1716. Where bonds have been issued before any decision adverse to their validity has been made by the state court, the federal courts will ascertain for themselves whether the bonds are valid under the constitution and laws of the state. *Foote v. Johnson County*,* 5 Dill., 281.

§ 1717. In suits on municipal bonds the decisions of state courts will be followed unless there are cogent reasons to the contrary. *Thomas v. County of Scotland*,* 3 Dill., 7. See §§ 1210-14.

§ 1718. A federal court will not hold municipal bonds void in the hands of *bona fide* holders simply on the ground that they have been held void by the state court. *McCall v. Town of Hancock*,* 10 Fed. R., 8.

§ 1719. The decision by the supreme court of Wisconsin, in *Whiting v. Fond du Lac County*, held not binding on the federal courts, as it declared certain bonds of that county invalid for want of constitutional power in the legislature to authorize the issue of bonds and the levy of taxes to pay them. The question was not one of interpretation or construction, but the right of taxation generally by any government. *Olcott v. The Supervisors*, 16 Wall., 678.

§ 1720. As to the validity of municipal bonds, as affected by irregularities in the election, etc., the supreme court will not follow the state courts regardless of its own convictions on the subject. *Roberts v. Bolles*, 11 Otto, 119 (§§ 1006-9).

§ 1721. The decision of the supreme court of the state, declaring an act of the legislature, authorizing a county to issue bonds, constitutional, will be followed by the federal courts. *McCoy v. Washington Co.*,* 3 Wall. Jr., 281; *First Nat. B'k v. Town of Bennington*,* 16 Blatch., 53; *County of Leavenworth v. Barnes*, 4 Otto, 70 (§§ 1024-26).

§ 1722. In the absence of any decision by the supreme court of the state upon the question, and considering the course of decision in the federal supreme court, a federal circuit court refused to hold unconstitutional legislation authorizing municipal indebtedness and taxation for stock in a railway company. *Gilchrist v. Little Rock*,* 1 Dill., 261.

XV. COUPONS.

SUMMARY—*Right of holder to sue*, § 1723.—*Limitations*, § 1724.—*Proof that purchase did not extinguish*, § 1725.—*Subrogation*, § 1726.—*Acquire no rights by being detached and transferred*, § 1727.—*Rights of pledgee of bonds*, § 1728.—*Presentment for payment*, § 1729.

§ 1723. The holder of matured coupons may sue on them although he is not the holder of the bonds. In such suit it is not necessary to produce the bonds, but it is proper in pleading to recite the bonds by way of inducement; such a mode of pleading will not make the suit a suit on the bonds. *The City v. Lamson*, §§ 1730-1734. See § 1776.

§ 1724. Coupons are not barred by limitation short of the time required to bar a remedy on the bonds. *Ibid.*

§ 1725. The purchaser of interest coupons of bonds of a railroad company is not estopped from claiming that he purchased, and did not pay and extinguish, the coupons, from the fact that he received the coupons of the financial agents of the company, and that he himself is the president of the company. *Ketchum v. Duncan*, §§ 1735-1742.

§ 1726. A purchaser of interest coupons acquires no rights by subrogation. *Ibid.*

§ 1727. The cutting of interest coupons from bonds, and transferring them, can give them no increased rights under the mortgage securing the payment of the bonds and interest. *Ibid.*

§ 1728. Where bonds with interest coupons attached are pledged as collateral security, the pledgee is a legal holder, and if the coupons are not paid when due he has the right to insist that the principal of the bonds has become due in accordance with their terms, although the debt to secure which the bonds were pledged is not yet due. *Warner v. The Rising Fawn Iron Co.*, §§ 1743-1745.

§ 1729. Where coupons do not provide for presentment for payment, the party issuing the bonds may be put in default without presentment, unless he aver and prove that funds were provided for the payment of the coupons as they became due. *Ibid.* See § 1776.

[NOTES.—See §§ 1746-1772.]

THE CITY v. LAMSON.

(9 Wallace, 477-486. 1869.)

ERROR to U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—This was an action by the holder of coupons detached from bonds. The declaration recited the bonds in general terms, alleged that they had been sold and transferred, etc., so that plaintiff could not produce them, and that plaintiff was the owner of the interest and coupons, the coupons being produced in court to be canceled. The defendant pleaded *nil debet*, and set up the statute of limitations of six years. The court refused to instruct (1) that the bonds ought to have been produced; (2) that the city of Kenosha had no authority to issue the bonds.

Opinion by NELSON, J.

We agree that if this were an action upon the bonds to recover instalments of interest that had accrued thereon, although such instalments had been duly assigned to the plaintiff, there would be great difficulty in maintaining it in his name, as well as without producing the bonds, as the proper evidence that interest was due. The plaintiff, under such circumstances, doubtless, would have a remedy for withholding the interest; but it is not necessary or material to stop and point it out in the present case; for we do not regard the action as founded upon the bonds, but upon the coupons. The bonds are recited in very general terms, it is true, in the declaration, but it is by way of explaining and bringing into view the relation which the coupons originally held to the bonds, and which, in an important sense, they still hold, though distinct as it respects ownership, as they represent the interest that had become due upon

them. The relation we refer to is, that these coupons are not received or intended to have the effect of extinguishing the interest due on the bonds, as this collateral security, or rather this evidence of the interest, upon well-settled principles, cannot have that effect without an express agreement between the parties. Besides, the coupons are given simply as a convenient mode of obtaining payment of the interest as it becomes due upon the bonds. There is no extinguishment till payment.

§ 1730. *Pleading a contract by way of inducement.*

The recital is by way of inducement, as is familiar to special pleaders at common law, which Mr. Chitty says is in the nature of a preamble, stating the circumstances under which the contract was made, or to which the consideration has reference. 1 Chitty on Plead., 290. The office of an inducement is explanatory, and does not, in general, require exact certainty. Thus, says Mr. Chitty, when an agreement with a third person is stated only as an inducement to the defendant's promise, which is the principal cause of action, it is considered, in general, sufficient to state such agreement without certainty of name, place or person (1 Chitty on Plead., 291), and where the matter is unnecessarily stated by way of inducement, and might be struck out as surplusage, and, as we shall show hereafter, may be said of that in the present case, the failure to make proof of the statement is not material.

§ 1731. *A suit upon coupons is barred by the statute of limitations only where a suit upon the bond would be barred.*

The action, then, being founded upon the coupons, the material question arising on this branch of the case is whether or not the plea of the statute of limitations constitutes a good defense. It is admitted that more than six years have elapsed since the interest accrued on the coupons, and, if barred by this lapse of time, the defense is complete and the court below erred in sustaining the demurrer. As we have seen, the coupons were made contemporaneously by the city with the bonds for the accruing interest thereon. This appears on their face. The city of Kenosha, on the 1st September, etc., will pay \$25 at the People's Bank, etc., on presentation of this coupon, being the interest due that day on the bond of said city, numbered one, dated 1st September, 1857, which bond itself contains a covenant for the same interest. The coupon is not an independent instrument, like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond and partakes of its nature; and the bond being of a higher security than a simple contract debt, is not barred by lapse of time short of twenty years; and, as we have seen, this contemporaneous coupon does not operate as an extinguishment of the interest, unless there has been an express agreement to that effect. These coupons are, substantially, but copies from the body of the bond in respect to the interest, and, as is well known, are given to the holder of the bond for the purpose, first, of enabling him to collect the interest at the time and place mentioned without the trouble of presenting the bond every time it becomes due; and second, to enable the holder to realize the interest due, or to become due, by negotiating the coupons to the bearer in business transactions, on whom the duty of collecting them devolves. This device affords great convenience to all persons dealing in these securities, especially to the holders in foreign countries, who otherwise would be obliged to forward the bond to the place of payment of the interest each time it became due or trust them to the hands of their correspondents in the country where the payment is made.

This convenience in the collection by the use of coupons, as is apparent, very much facilitates the negotiation of these securities abroad, and enhances their value in the foreign market. And any decision that would have the effect to lessen or impair the higher security for the interest as found in the bond, by the use of these coupons, would necessarily, to that extent, defeat the purpose for which they were designed. As we have seen, there is nothing in the contract between the parties that would lead to the conclusion the nature or character of the security by the bond for the interest was to be changed or lessened by the issue of the coupons, but the contrary; for if any such change had been intended, it should have been in some way indicated in the body of them. There was but one contract, and that evidenced by the bond, which covenanted to pay the bearer \$500 in twenty years, with semi-annual interest at the rate of ten per cent. per annum. The bearer has the same security for the interest that he has for the principal. The coupon is simply a mode agreed on between the parties for the convenience of the holder in collecting the interest as it becomes due. Their great convenience and use in the interests of business and commerce should commend them to the most favorable view of the court; but even without this consideration, looking at their terms, and in connection with the bond, of which they are a part, and which is referred to on their face, in our judgment it would be a departure from the purpose for which they were issued, and from the intent of the parties, to hold, when they are cut off from the bond for collection, that the nature and character of the security changes, and becomes a simple contract debt, instead of partaking of the nature of the higher security of the bond, which exists for the same indebtedness. Our conclusion is, that the cause of action is not barred by lapse of time short of twenty years.

§ 1732. *Pleading in actions upon coupons.*

Recurring again to the declaration, we have said that the preamble or inducement was unnecessary, and might well be rejected as surplusage. As we have seen, it recites, in very general terms, the bonds to which the several coupons in suit were annexed. Now, each coupon itself contains substantially, on its face, all this information. It is issued for interest due at a certain day and place on a bond, giving its number and date. Another form adds the amount, but this is unimportant, as the bond is sufficiently identified without it. The production of the coupon, therefore, at the trial, will show the relation it bears to the bond, and if our opinion is sound, that in this connection it cannot be legally severed from it till the interest is paid, a count upon the coupon is all that can be material.

§ 1733. *Where a debt is contracted by a city under an act which is unconstitutional, the debt may be validated by a subsequent statute.*

The only remaining question in the case is as to the authority of the city of Kenosha to issue bonds to which the coupons were annexed. The act of 1857 of the legislature, which amends and consolidates the several acts relating to the charter of the city, confers full authority upon the common council to borrow on the corporate credit of the city any sum of money for any term of time, at any rate of interest, and payable at any place deemed expedient, issuing bonds or scrip therefor. It is admitted this authority would be sufficient, but it is insisted that the statute exceeds the authority of the legislature under the third section of the eleventh article of the state constitution, which, it is asserted, requires the legislature to limit or restrict the amount of money to be raised by the city. Without inquiry into this question, it is sufficient to say

that, after the city had passed the ordinance lending its credit to the railroad company to the amount of \$100,000, the legislature ratified it. This was equivalent to an original limit of this amount.

§ 1734. *Where municipal bonds were held valid by the state court when issued, this court will not follow a subsequent decision of the same court holding them invalid.*

It is urged also that the supreme court of Wisconsin has held that the act of the legislature conferring authority upon the city to lend its credit, and issue the bonds in question, was in violation of the provision of the constitution above referred to. But, at the time this loan was made, and these bonds were issued, the decisions of the court of the state favored the validity of the law. The last decision cannot, therefore, be followed. *Gelpcke v. Dubuque*, 1 Wall., 175 (§§ 1367-70, *supra*).

Judgment affirmed.

MR. JUSTICE MILLER dissented.

KETCHUM v. DUNCAN — HAYS v. KETCHUM.

(6 Otto, 659-675. 1877.)

APPEAL from U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The principal question attempted to be raised by the appellants is, whether the deed of trust or mortgage of the railroad company, executed in 1853, is a valid security, not merely for the bonds therein described, but for the interest coupons that fell due in May and November, 1874, and which are now held by Alexander Duncan. Assuming that the question is properly before us, we proceed directly to consider it. On the part of the appellants, it is claimed that the coupons were paid when they became due, or, secondly, if not, that Duncan, Sherman & Co., and their assignee, Alexander Duncan, are estopped by fraud and breach of trust from setting them up as first mortgage liens, that is, as entitled to the benefit of the lien of the mortgage of 1853; and thirdly, that the coupons, if not paid when they fell due, have since been paid to Duncan, Sherman & Co., under a special appropriation of the net earnings of the railroad, which the firm diverted to other uses. This, it is said, appears from a proper marshaling of the assets of the railroad company. On the other hand, Alexander Duncan, who obtained those coupons from Duncan, Sherman & Co., denies that they were paid when they fell due, or have ever been paid. He denies that there is any estoppel, arising from fraud or breach of trust, against claiming the coupons to be entitled to the lien of the first mortgage. And he denies that there has been any misappropriation of the net earnings of the railroad company, which, under any proper marshaling of the assets, shows that the coupons were paid to the firm from which he obtained them. He insists that the coupons, instead of having been paid, became the property of Duncan, Sherman & Co., either by purchase or transfer from the former owners, at or about the times when they fell due, and that he has succeeded to the rights of those purchasers. It is to the support of one or the other of these opposite averments of the parties that most of the evidence in this voluminous record has been directed.

If the coupons have not been paid in fact, or equitably by funds which Duncan, Sherman & Co. should have appropriated to paying them, and if there be no estoppel against asserting them, it is not claimed that they are not protected

by the mortgage as fully as the bonds from which they were taken. What, then, is the evidence of actual payment? The coupons were produced uncanceled, and they were proved before the master appointed by the circuit court. If there were nothing else in the case, Alexander Duncan's possession of them would raise the presumption that he became the holder in the usual course of business, for value, at their date, and before they became payable. The appellees claim the benefit of this presumption; but it is completely rebutted by proof that neither Duncan, Sherman & Co., nor Alexander Duncan, acquired any ownership of them before they fell due. We are then confined to a consideration of what occurred at that time and thereafter. There are some things so clearly established by the evidence that they must be considered beyond doubt. They are these: 1. Neither the coupons due in May, 1874, nor those due in November, 1874, were paid by the railroad company. 2. They were not paid with money or funds furnished by the railroad company. 3. They were not paid by any one in pursuance of an agreement with the railroad company to pay them for or on behalf of the debtors, or in extinguishment of the debt. Thus far the evidence is full and uncontradicted. 4. Duncan, Sherman & Co., who furnished the money which the former owners received for the coupons, did not intend to pay them in any such sense as to relieve the railroad company from its obligation. By advancing the money, and directing its payment to the holders of the coupons, they intended to take the place of those holders, and to become the owners of the evidences of the company's debt; or, in other words, they intended to obtain for themselves the rights of purchasers. They did not advance the money either to or for the company. Certainly they did not intend to extinguish the coupons. Of this the evidence is very full. The firm had made advances to the company to pay the coupons due in November, 1873, as well as interest due in January and March, 1874, amounting to a very large sum. These advances had not been repaid when the May coupons fell due. Those coupons the company was then utterly unable to take up. In near prospect of this inability, William B. Duncan, the head of the firm, on the 28th of April, 1874, telegraphed from New York to the company at Mobile, that his firm would purchase for their own account sterling coupons, payable in London. The firm also telegraphed to the Bank of Mobile and to the Union Bank of London to purchase the coupons there presented for them, charging their account with the cost, and transmitting the coupons uncanceled. The railroad company acceded to the proposition made them, and the Bank of Mobile and the Union Bank did also. Similar arrangements were made respecting the November coupons, except that Duncan, Sherman & Co. arranged with the *Crédit Foncier* to make the purchase in London. Both these banks were agents of the firm in the transactions. They were not agents of the railroad company. They had no funds of the company in hand. In taking up the coupons, they acted for Duncan, Sherman & Co., charged the cost to their account, transmitted to them the coupons taken up without cancellation, and were repaid by them. In view of these facts, it is manifest that, whatever may have been the nature of the transaction by which the coupons passed from the hands of the former holders into the possession of Duncan, Sherman & Co., it was not intended by the firm to be a payment or extinguishment of the company's liability. Neither they, nor the company, nor the Bank of Mobile, nor the Union Bank, nor the *Crédit Foncier*, so intended or understood it. Was it, then, a payment? It is as difficult to see how there can be a payment and extinguishment thereby of a

debt without any intention to pay it as it is to see how there can be a sale without an intention to sell.

§ 1735. *The consent of parties to a sale may be inferred from the circumstances of the transaction.*

But that the coupons were either paid, or transferred to Duncan, Sherman & Co. unpaid, is plain enough. The transaction, whatever it was, must have been a payment, or a transfer by gift or purchase. Was it, then, a purchase? It is undoubtedly true that it is essential to a sale that both parties should consent to it. We may admit, also, that "where, as in this case, a sale, compared with payment, is prejudicial to the holder's interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal debt, the intent to sell should be clearly proved." But the intent to sell, or the assent of the former owner to a sale, need not have been expressly given. It may be inferred from the circumstances of the transaction. It often is. In the present case, the nature of the subject cannot be overlooked. Interest coupons are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not warranted to believe that such a person intended to extinguish the coupons when he hands over the sum called for by them and takes them into his possession. It is not in accordance with common experience for one man to pay the debt of another, without receiving any benefit from his act. We cannot close our eyes to things that are of daily occurrence. It is within common knowledge that interest coupons, alike those that are not due and those that are due, are passed from hand to hand; the receiver paying the amount they call for, without any intention on his part to extinguish them, and without any belief in the other party that they are extinguished by the transaction. In such a case, the holder intends to transfer his title, not to extinguish the debt. In multitudes of cases, coupons are transferred by persons who are not the owners of the bonds from which they have been detached. To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to show an assent of the person parting with the possession that they should remain alive, and be available in the hands of the person to whom they were delivered, would, we think, be inconsistent with the common understanding of business men.

In the present case, there was much in the circumstances attending the transfer of the possession of the coupons from the original holders to Duncan, Sherman & Co., or their agents, tending to show that those holders could not have believed the payment made to them extinguished the securities, so that they could not thereafter be set up by the transferees against the railroad company. Those circumstances, certainly, should have awakened their attention and led them to inquiry. The coupons were not paid in the usual manner, or at the usual place, or by the persons accustomed to pay them. Before May, 1874, the coupons paid at Mobile had always been paid at the office of the company by its officers, and had been left there. They had been paid, it is true, by checks drawn on the Bank of Mobile; but the holders had received those checks only on the delivery of the coupons to the company. In regard to the May and November coupons of 1874, this usage was changed. The coupons were not left at the company's office. They were taken there for verification, and then

returned to the holders, with directions to take them to the bank, where they would be paid; but no checks drawn upon the bank were given to the holders. Some of them knew the company was not paying those coupons. Others inquired, and were told the bank would purchase. Others did not know the company would not pay, and they made no inquiry. At the bank the holders received the amounts due on the coupons, and left them in the possession of the bank; but, as they brought no checks, they must have known that the bank had no vouchers for its payments, unless the coupons continued in force in the hands of the new possessors; and hence it is a fair presumption, that, when they delivered the possession, they assented to a transfer of ownership. They must have expected that the bank would hold the coupons as claims against the railroad company; and with that expectation they transferred them to the bank. What was that but tacit consent to a sale? Similar remarks might be made respecting the coupons presented in London. On the 28th of April, 1874, Duncan, Sherman & Co. sent a telegram to the Union Bank, requesting it to pay the May coupons for their account and forward them uncanceled. These instructions the bank followed. Parties who presented the coupons there received the amount, and handed over the security, so far as it appears, without a word. Here, too, it is a reasonable presumption, that both parties supposed and expected that the coupons remaining uncanceled would be preserved, and held as claims against the railroad company.

The coupon holders who presented their coupons in New York were informed that Duncan, Sherman & Co. were purchasing them. The manner in which the November coupons passed from the holders was not essentially different. There were, however, notices that the Bank of Mobile was purchasing them posted in the bank, and in the office of the railroad company. In London they were taken by the Crédit Foncier, with which Duncan, Sherman & Co. had arranged to purchase them; and notice of an intention to purchase was publicly given by the London house. If, now, in addition to this, it be considered that none of the original holders of these coupons, with perhaps one exception (and he not an appellant), have hitherto denied the sale and purchase, and that not one has reclaimed the coupons and thus disaffirmed any sale, it seems to us a just conclusion, that they must be held to have assented to the purchase which was certainly intended by those who gave them the money and thereby acquired the possession.

§ 1736. *The mere fact that the purchaser of railroad coupons was the financial agent of the company will not create an estoppel against his assignee.*

It is argued, however, by the appellants, that Duncan, Sherman & Co., and, consequently, Alexander Duncan, their assignee, are estopped from claiming that the May and November coupons are unpaid. Precisely wherein this alleged estoppel consists we are unable to discover. It is said that setting up the coupons now as an existing claim, entitled to the protection of the mortgage of the railroad company, is a fraud upon the bondholders secured by it. This we cannot see. If the original holders of the May and November coupons had sold them to some one else than Duncan, Sherman & Co., it could not be doubted those vendees would have an unimpeachable right, equal at least to the right of the bondholders. Such a sale would have worked no injury to the bondholders of which they could complain. They are in no worse condition now than they would have been in the case supposed. If there be any difference between that case and the present, it must be found in the relation William B. Duncan, and the firm of which he was a member, held to the railroad

company and to its creditors. The firm had been financial agents of the company, and Duncan had been a director several years. In April, 1874, he was elected its president. It was his duty, therefore, to have regard for the interests of the company, its stockholders, and, measurably, of its creditors. He was bound to entire good faith. This may be conceded. But was it unfaithfulness to the company or to the bondholders of the company to purchase either the bonds or the coupons falling due, which the company was unable to pay as they fell due? Was it unfaithfulness thus to save the company from going into immediate bankruptcy? This cannot be maintained. Subsequent events may show that it would have been better for the bondholders had the May and November coupons been suffered to go to protest, or had the company acknowledged publicly its inability to pay them when they fell due, though it is not proved that it would have been better. But the duty of Duncan was to do what in his judgment at the time was the best thing for all persons for whom he was a trustee. It surely was not his duty to permit the coupons to go into default. Still less, as it appears to us, was it a breach of trust in him to purchase the coupons and hold them in order that the company might have time to provide for their payment. The company was informed of his intention to make the purchase, and its consent was given. It can, therefore, make no claim that Duncan, Sherman & Co. are estopped from asserting that they acquired possession of the coupons by purchase; and the company makes no such assertion. The bondholders under the first mortgage, or rather a very small number of them, however, do. They say, had the coupons not been purchased, had the company been known to have defaulted upon them, the trustees in the mortgage might have taken possession of the railroad for the benefit of the bondholders. Hence they say they were injured by the purchase if there was one. But, as we have said, they would have been equally injured if the purchase had been made by a stranger. There would have been no estoppel against a stranger. And William B. Duncan can be in no worse position, unless it be shown that he was guilty of bad faith in making the purchase through his firm.

§ 1737. *In whose favor an estoppel in pais operates.*

Moreover, it is necessary to notice who sets up this plea of estoppel. An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up. If, therefore, there be any estoppel in this case, it must be in favor of some bondholder (if any there was) who was led to believe, by the action of William B. Duncan; that the railroad company was, in May and November, 1874, paying the coupons of the first mortgage, then falling due, and paying them in order to extinguishment; but no such bondholder asserts such an estoppel. So far as it appears, no one of the appellants was so misled. No one of them can claim an estoppel which is personal, and of which only the person misled to his hurt can avail himself. Indeed, it does not appear that any one of the witnesses (very few in number) who supposed the coupons were being paid when they received their money from the Bank of Mobile, was at the time, or is now, the holder of a single first mortgage bond. Nor is there a single coupon holder who now claims that he was misled or deceived by any of Duncan, Sherman & Co.'s agents, by the Bank of Mobile, or the Union Bank of London, or by the Crédit Foncier. It is impossible, therefore, to see how there can be any estoppel, or wherein can be found any fraud in purchasing the coupons.

§ 1738. *A purchaser of coupons does not succeed by subrogation to the rights of the person from whom he purchases.*

The appellants have expended much argument to show that Duncan, Sherman & Co. and Alexander Duncan, their assignee, are not entitled by subrogation to any rights of the persons who transferred to them the possession of the coupons. This may be admitted; but the argument is inapplicable to the case. Subrogation is an equitable right. The right claimed here is a legal one, obtained by transfer of the coupons, as distinguished from payment. Numerous authorities have been adduced to maintain that there is no right of subrogation. They are all wide of the mark. The case of *Union Trust Co. of New York v. Monticello & Port Jervis R. Co.*, 63 N. Y., 311, is the one principally relied upon. There it appeared that one Smith had made an agreement with the railroad company to advance the money to pay coupons on the company's bonds when they should become due, holding the coupons for security. In pursuance of this agreement, he went to the plaintiff, where the coupons were payable, and left with it the money to pay the coupons when presented; it agreeing with him to take and deliver them to him uncanceled, that he might hold them as security for the money advanced. It was held that Smith was not entitled to share ratably in the proceeds of the mortgage to secure the bonds and coupons with other bond and coupon holders; but in that case the money was substantially advanced to the company, and the coupons were paid by it through its agent at the place where they were payable. The coupons were paid with money advanced to the company, and under an agreement to make such an advance to pay. These coupon holders had a right to conclude that the money was paid by their debtors. We gather the facts from the opinion of the court. The case, therefore, bears very slight resemblance to the present. It was not a case of subrogation; nor was it a case of purchase or transfer; it was a case of agency for the debtor.

It is next contended by the appellants that, even if Duncan, Sherman & Co. did become the owners of the coupons, by purchase or transfer, the firm received from the railroad company sums of money sufficient to pay what had been paid for the coupons, and which it ought to have applied to their extinction. This raises a question of appropriation. The facts exhibited by the evidence are these: When, in April, 1874, William B. Duncan became the president of the railroad company, his firm was a large creditor of the company for money lent and for advances made to pay the interest of the first mortgage bonds due in 1873. And there was then a floating debt, amounting, at the beginning of 1874, to about \$1,500,000. Of this floating debt, nearly \$200,000 were due to his firm, more than three-quarters of which consisted of a temporary loan made to the company to enable it to pay its interest and meet its current liabilities. At the same time the May interest on the first mortgage bonds was about coming due, and the company had no means to meet it. In these circumstances the board of directors of the company, on the 28th of April, 1874, in the absence of Duncan, passed the following resolution: "*Resolved*, that the net earnings of the company, after payment of the current expenses, be pledged for repayment of advances obtained by the president, for the purpose of meeting the May interest; and that the floating debt, in the shape of bills payable, be extended, so far as practicable, to next winter; and that credits so extending shall be secured by pledge of consolidated bonds in the hands of Bank of Mobile, or at such other bank or place as may be determined by the vice-president, in trust, at the rates of seventy-five cents."

This, it is contended by the appellants, was a specific appropriation of the net earnings of the road to the payment of the May interest, which the president was bound thus to appropriate in preference to paying the floating debt, or anything except current expenses. Whether it was or not we will presently consider. The net earnings of the road during the year 1874 (assuming that they all went into the hands of Duncan, Sherman & Co.), together with the proceeds of sales of company bonds, amounted to about \$800,000. The annual interest of the company's bonds was considerably more than that sum. But it was necessary to keep the floating debt afloat; and that could be done only by partial payments and renewals, and by pledging collaterals. Had that debt not been kept afloat, the company must at once have suspended operations and ceased making earnings. Accordingly it was reduced and extended. It was reduced over \$280,000 during the year; and included in the reduction was a payment of \$150,000 to Duncan, Sherman & Co., to reimburse their temporary loan, and some \$24,000 more on their general account; leaving still some \$17,000 due to them beyond what was due on the May and November coupons they had purchased. The remainder of the net earnings was used to pay overdue coupons of the previous year, interest on the floating debt, interest on the company's convertible and other bonds, claims in judgment, and other pressing liabilities. All the resources of the company were thus disposed of. It is obvious, therefore, that in the latter part of April, 1874, unless the company could be relieved from immediate demand for payment of the May coupons, it would be in the power of its mortgage creditors to take possession of the road and force a foreclosure. And unless the floating debt could be taken care of, for which reliance must be placed mainly on the future net earnings, equal disaster might be expected from that direction. It was when the company was in this condition the resolution of April 28, 1874, was passed. It contemplated the possibility of obtaining advances to the company in order to meet the imminent claims for payment of the coupons, and it offered a pledge of net earnings as a security for such advances or loans to the company. But no such advances or loans were made by anybody. They had been made the year before; but none were made or agreed to be made to enable the company to pay the May interest. There never came into existence, therefore, any debt for which the earnings were pledged by the resolution. And, even if the purchase of the coupons by Duncan, Sherman & Co. could be considered advances to the company to enable it to pay the coupons, the pledge made by the directors' resolution was not a pledge to the coupon holders. It was a pledge for the benefit of the firm, which it was competent for the firm to forego without losing its claim as transferees of the coupons upon the railroad company.

§ 1739. *A railroad president held, under circumstances, not bound to apply the net earnings of the company to the payment of coupons held by him.*

There was, then, no misappropriation of the company's funds by William B. Duncan,—no payment by him of which either the company or the bondholders have any reason to complain. And there is no foundation for the claim now made, that the payments out of the net earnings, applied to the payment of coupons of former years, to the reduction of the floating debt, and to the satisfaction of interest upon it, should have been made in discharge of the May and November coupons.

The exact net earnings of the year 1874, as it appears from the report of the directors for that year, was \$707,865.04. These were disposed of as follows:

COUPONS.

§ 1740.

1. Paid interest coupons matured in 1872 and 1873.....	\$139,296 35
2. Interest coupons matured in 1874, none of them those of May and November.....	197,970 70
3. Interest paid to secure renewal of floating debt and to prevent proceedings against the company on the part of the holders.....	118,346 97
4. Paid on account of floating debt to prevent sacrifice of securities belonging to the company.....	281,948 85
Total.....	\$787,563 87

In view of this, it cannot be maintained, either that the coupons of May and November, transferred to Duncan, Sherman & Co., were paid, or that, in obedience to any rule of law or equity, the net earnings of the road should have been applied in payment of them. They are, therefore, existing liabilities of the railroad company, and protected by the first mortgage. But we think they have no equity superior to that of the bonds from which they were taken, or the subsequently maturing coupons. The mortgage was given as a security for the principal of the bonds as well as the interest, with no priority to either. The coupons are mere representatives of the claim for interest. The obligation of the debtor evidenced by them cannot be higher, nor entitled to greater privileges, than it would be had the bonds, in their body, undertaken the payment of interest. Cutting them from the several bonds of which they were a part, and transferring them to other holders, can give them no increased equities, so far as we can perceive. Had they been assigned with a guaranty of payment, it may well be they would be entitled to payment before the assignors could claim the fund. Then they might have an equity to prior payment growing out of the guaranty. But there was no such undertaking of the assignors in this case. A mere transfer or assignment does not import a guaranty. At most it warrants title, not solvency, of the debtor, or collectibility of the chose assigned. A transfer or assignment of a claim, or part of a claim, secured by a mortgage given to protect that claim, in common with other claims contemporaneously originating, would seem to refer the transferee to the common security, and measure his rights and equities by that. It is in vain to urge that, as between the person transferring and the transferee, there is an equity, or even moral obligation, if it was the intention of the parties to participate, "*pari passu*," in the proceeds of the property pledged as a security. And such an intention may well be inferred from an assignment or transfer without guaranty. The meaning of such a transfer without more is that the transferee takes precisely the rights of the person from whom he obtains his title, and no more. But certainly such a transfer cannot have the effect of giving to the transferee greater rights than those created by the mortgage. *Dunham v. Cincinnati, Peru, etc., R'y Co.*, 1 Wall., 254; *Gordillo v. Wiquetin*, L. R., 5 Ch., 287.

§ 1740. *The coupons of May and November, 1874, of the railroad company are existing liabilities, but have no equity superior to later coupons or the bonds themselves.*

The mortgage in this case secures no priority to the coupons past due, nor to those first due. It places all bondholders and coupon holders on the same level. It requires the trustees, in case of a sale, to apply the residue of the proceeds, after deducting costs, charges, etc., "to pay the principal and interest which may be due on the bonds issued," as recited, rendering the balance, if any, to the company, plainly meaning that the bonds and interest due (that is, owing or contracted to be paid) are to share in the application. By the terms of the mortgage, the holders of the coupons of May and November, 1874, are

therefore to have no preference over the bondholders and other coupon holders. We concur, therefore, in the decree of the circuit court, so far as it determined the priorities of the parties.

§ 1741. *Bondholders have no equity requiring a strict foreclosure of a railroad mortgage rather than a decree of sale.*

It remains only to consider the terms of the sale ordered. That a sale was properly directed, rather than a strict foreclosure, is quite evident. It was the object of all the consolidated bills to procure a sale; and, if there was not assent by all parties, there was at least no objection to it. A strict foreclosure would not have converted the property into money. It would in fact have required the creditors to advance more funds to pay the costs and expenses. This no bondholder could justly require from his associates. Besides, a strict foreclosure would not be a winding up of the matter. It would leave an undivided beneficial interest in an unmanageable property in the hands of a large number of persons, who are very likely to disagree in regard to its use. The same observations might be made respecting a purchase by a trustee for the benefit of all the lien creditors. Such a purchase would convert them all into tenants in common, and probably give rise to endless discussion. Assuming that it was competent for the court, on bills praying for a sale and payment thereby of debts due, to compel creditors to take, in lieu of their personal rights, undivided interests in realty, which may be doubted, what could the trustee do after he had become the purchaser? Could he operate the railroad, at his discretion, through four states and in as many jurisdictions? Or would the court have placed the property again in the hands of a receiver? If so, what progress would have been made in securing payment of the creditors' bonds? What advance from the position in which the creditors now are, since the road is now in the hands of a receiver? It is too plain for any further comment that neither a strict foreclosure, nor a purchase by a trustee to buy, would have been for the interest of any bondholder.

§ 1742. *It is no objection to a decree of sale under a railroad mortgage that bonds are receivable from purchasers.*

The main objection to the terms prescribed by the circuit court for conducting the sale ordered appears to be that they give superior advantages to some of the bond and coupon holders. The masters appointed to make the sale were, by the decree, required to exact from any bidder, before making an adjudication to him, a deposit of \$50,000 in money, to pay costs and expenses, and a further deposit of \$100,000 in money, or of the bonds or coupons described in the deed of trust and master's report, as a part of the debt secured by the deed. The decree further ordered that the masters might receive, in payment from the highest and last bidder, bonds and coupons which form a part of the first mortgage debt ascertained to be due or owing by the master in his report, and sustained by the opinion of the court; "provided, however, that a sum sufficient to pay the costs, charges and expenses of the trust as above mentioned, whether exceeding the said cash deposit or not, and also to provide for the payment of the *pro rata* dividend which shall be due or owing to the owners of other bonds and coupons secured under the deed of trust, must be paid in money; and provided, also, that, if the said mortgage property shall be bid off, directly or indirectly, by, for or in behalf of the bondholders and creditors who have or shall have entered into and subscribed the agreement for the readjustment of the securities of said company, dated October 1, 1876, commonly called the agreement of reorganization, then and in that case all and every bondholder

and creditor of said company not having already entered into and subscribed said agreement, who shall, on or before the 1st day of September next, enter into and subscribe the same, and deposit their securities with the Farmers' Loan and Trust Company, in the city of New York, or with the Bank of Mobile, in the city of Mobile, as provided by said agreement, shall be and they are hereby allowed to participate in said bid and purchase, on the same terms, and on an equal footing in all respects, according to the character of their claims respectively, with the said bondholders and creditors who have heretofore entered into and signed said agreement."

It is said this enables those who have subscribed to that agreement, and who are a large majority of the bondholders, to purchase on paying a much less sum in money than would be required of other bondholders who have not signed the agreement. This is true; but we do not perceive that it is inequitable. After all, it makes no distinction against the minority which they have not themselves made by failing to secure a majority of the bonds. They are as much entitled to use their bonds in payment as any other bondholders are. It is their misfortune if they have not as many bonds as others have. They have no equity to cast their misfortune upon those who own more bonds than they do. Permission to bondholders who are mortgagees to purchase at a sale of the mortgaged property and to pay by their bonds is not only usual, but it is highly advantageous to all persons who have an interest. It tends to enhance the price which may be obtained, and thus benefits other creditors as well as the mortgagor. That large bondholders have an advantage over small ones, in that they are required to pay less in money, may be true; but it is an advantage they purchased when they obtained their bonds, of which it would be inequitable to deprive them. Such an advantage is everywhere recognized and protected,—notably in partition suits, and in sales of the assets of a partnership, as well as in many sheriffs' sales. Had there been but two creditors of the railroad company,—one holding \$10,000,000 of the company's mortgage bonds, and the other \$100,000,—it would be strange indeed if the former, buying at a foreclosure sale, might not pay with his bonds that proportion of his bid which would come to him, paying the rest in money, because the latter would be obliged to pay more in money if he had become the purchaser. The minority holder has no such equity to control the sale. The case supposed is in principle the one we have before us; for it is not to be doubted that creditors of a common debtor may combine to purchase the debtor's property at a judicial sale, though they may not combine to prevent others from purchasing. The decree now complained of puts no obstacle in the way of a purchase by the appellants; nor does the agreement of October 1, 1876. It follows from what we have said that neither of the appeals can be sustained.

It is ordered that the appellants in the first case pay all costs of their appeal, except the costs of the *certiorari* and return, including the printing thereof and the clerk's fees for copying, which the appellees are ordered to pay. It is further ordered that Henry Jump, one of the appellants, shall not be charged with any costs that may have accrued since April 1, 1878, when he moved to withdraw his appeal. And it is further ordered that the costs of the appeal in the second case be paid by the appellants.

Decree affirmed.

JUSTICES CLIFFORD, SWAYNE, MILLER and HARLAN dissented, the former, in a brief opinion, holding that the coupons which were declared by the decree to be a lien on the road were extinguished by payment.

WARNER v. RISING FAWN IRON COMPANY.

(Circuit Court for Georgia; 3 Woods, 514-527. 1878.)

STATEMENT OF FACTS.—The Rising Fawn Iron Company, a manufacturing company, being authorized so to do by an act of the Georgia legislature, issued a number of bonds to the amount of \$125,000, and mortgaged its property, real and personal, to secure their payment. The bonds by their terms were to become due on the 1st day of March, 1881, but stipulated that if the interest coupons remained unpaid for six months, then the bonds themselves should become due, although the time of their stipulated maturity had not arrived; and that the trustee might under that condition enforce the trust, and that it should be his duty to do so if required by the holders of the bonds or any of them. In 1876 all the personal property of the company was sold at sheriff's sale to Hale, and afterwards all the real and personal property was sold on execution to Cureton, who took possession of all of it. In March, 1877, a convention of the creditors of the corporation, who were not holders of bonds, leased the property to Peters, who, however, soon yielded possession to Cureton. Some of the bonds were pledged to complainants as collateral to secure certain notes owing by the company to complainants; the notes were not due when the bonds were hypothecated, and it was stipulated that they should not be sold until after the maturity of the notes. This bill was filed by the holders of \$88,000 of the bonds to foreclose the mortgage, and at their instance a receiver was appointed. The cause was heard on a motion to continue the receiver.

Opinion by Woods, J.

The question to be determined is whether, on the facts shown by the pleadings and evidence, the court ought to discontinue the injunction and to discharge the receiver and restore the possession of the trust property to Cureton, the alleged purchaser at sheriff's sale. No objection is made to the receiver appointed by the court or to his management of the property, which his reports show to be reasonably successful and profitable.

§ 1743. *Where a trustee authorized under certain conditions to take possession of mortgaged property refuses to do so, the court will, under these conditions, appoint a receiver.*

In my judgment, the facts abundantly justified the appointment of a receiver in the first instance, as the case was then presented to the district judge. If there was a default in the payment of interest coupons for the period of six months after they fell due, the trustees named in the deed of trust were authorized, upon the request of the holder or holders of any of the bonds, to enter upon and take actual possession of the trust property, and to advertise and sell the same. And, by the express stipulation of the trust deed, the Rising Fawn Iron Company reserved the right to the possession and management of the trust property only so long as no default should be made in the payment of either interest or principal of the bonds. Cureton, by his purchase at sheriff's sale on a subsequent incumbrance, could not place himself in a stronger position than the company itself. Suppose there had been no sheriff's sale and the company had remained in possession of the trust property, could it have lawfully resisted the right of the trustees to demand and take possession of the trust property after six months' default in the payment of the principal or interest of the bonds? The right to the possession after such default is as clearly conferred by the trust deed as the right to payment of the principal and interest on the bonds. If the company could not resist the demand of the trustees

to take possession of the trust property after default, neither could it claim that this court could not rightfully take possession on a bill filed by the bondholders to enforce their rights under the trust deed. If the contingency existed when it was the right and duty of the trustees, in the execution of their trust, to take possession of the trust property, it was incumbent on the court, upon failure of the trustees to discharge that duty, to compel them to act or to appoint some one to act in their stead.

§ 1744. *Pledgees of bonds hypothecated to secure a debt are legal holders, and may collect interest coupons.*

Independent, therefore, of any jeopardy to the trust property, the company lost, and the trustee acquired, the right to the possession of the trust property, after six months' default in the payment of the interest coupons. But the evidence is satisfactory to the point that there had been, at the time of the filing of the bill, serious loss and depreciation of the trust property. The question on which the motion turns is, has there been any default on the part of the Rising Fawn Iron Company in payment of the interest coupons attached to the first mortgage bonds held by complainants? The complainants assert that there has, and the defendants, the Rising Fawn Iron Company and Cureton, assert that there has not. There is no dispute that the interest coupons due July 1, 1876, on the eight bonds heretofore specified, held by the complainants, were not paid on that day, and have not since been paid. The reply of the defendants to this fact is: *First*, that there was nothing payable on the coupons falling due July 1, 1876, because the bonds to which they were attached were deposited before July 1, 1876, as collateral security for debts which did not mature until after that date. This ground appears to me to be clearly untenable. By depositing the bonds as collateral security with all the coupons attached, the company made the pledgee the legal holder, subject only to the rights of the company, on payment of the debt for which they were held as security. If the pledgee had transferred the bonds to an innocent purchaser, such transfer would have carried with it the legal title. In Georgia, by express enactment, the holder of a note as collateral security for a debt stands upon the same footing as a purchaser. Code of Georgia, sec. 2788. See, also, *Goodman v. Simonds*, 20 How., 343 (BILLS AND NOTES, §§ 420-425); 1 Daniel, *Neg. Inst.*, secs. 820, 821, 822, 824, 825.

When, therefore, the bonds were pledged as collateral security, the pledgee became the legal holder, and he became the holder of all the coupons attached and not due, as well as of the bond itself. The bonds and the coupons were all pledged for the payment of the debt which was secured by the deposit of the bonds and coupons. The fact that the debt secured was not due did not relieve the coupons, any more than the bond itself, from the effect of this hypothecation. To hold otherwise would be to hold that if the bonds themselves fell due before the debt secured by the pledge of the bonds, their hypothecation was without any effect whatever. 1 Daniel on Negotiable Instruments, secs. 825, 826. This is true, where the pledge is made to secure a pre-existing debt. In this case it does not appear that the bonds were transferred to secure a debt already existing. The presumption is, that the creation of the debt and the giving of the security were contemporaneous. It is clear to my mind that the pledgees of the bonds deposited as collateral security, before July 1, 1876, were legal holders, and had the right to demand and receive the interest due July 1, 1876. This right was a part of their security. Upon the failure to pay the coupons, the pledgee had all the rights of any other legal holder or purchaser

of the bonds. And a default, for six months, in the payment of such interest, gave the pledgee the same right as any other purchaser to insist that the principal of the bond had become due in accordance with its terms and the terms of the trust deed. In short, the collateral holder took the bonds and coupons with all their terms and stipulations, unaffected by the fact that they were held as security for another debt, and that that debt was not due. He had the right to collect the interest on the bond as it fell due, to enforce payment of the principal in accordance with the terms of the bond. He only differed from an absolute owner in this, that he was bound to account for any surplus received from the bonds and coupons, over and above what was necessary to the payment of his debt.

When the pledgee transferred the bonds to the complainants, they acquired all his rights. The fact, therefore, that the complainants knew before they purchased the bonds, that they were in pledge, has no effect, for the complainants are claiming no rights which the parties from whom they purchased the bonds did not have. It is insisted that because the pledgee did not know that he was entitled to collect the interest coupons which fell due before the maturity of the debt secured by the pledge of the bonds, therefore he had no such right. But men's rights are not lost by the fact that they are ignorant of them; much less can such ignorance destroy the rights of the subsequent holder of the bonds. In my judgment, the collateral holder of the bonds, on July 1, 1876, had the right to demand payment of the coupons due on that day, and on a default of payment continuing six months, had the right to demand as due, by reason of such default, both the principal and interest on his bond, and that when he transferred his bonds and coupons, for value, to a purchaser, the transfer carried with it all the rights of the original collateral holder.

§ 1745. *Suit may be brought on coupons or bonds without a demand at the place of payment named therein.*

But it is claimed, second, by defendants, that there was no default in the failure to pay the coupons due July 1, 1876, because there was no presentation of the coupons for payment. Generally, a suit may be brought on any commercial paper, payable at a particular place, without demand at that place. *Wallace v. McConnell*, 13 Pet., 136 (BILLS AND NOTES, §§ 1539-43); *Montgomery v. Elliott*, 6 Ala., 701. The peculiar form of the bond, in this case, it is insisted, takes it out of this general rule. The bond promises to pay the principal and "interest at the rate of ten per cent. per annum, payable semi-annually on the first days of January and July in each year, on presentation of the respective coupons hereto attached, both principal and interest being payable at the financial office of said company, in the city of New York." Neither the act authorizing the company to issue bonds, nor the mortgage nor the coupons themselves, say anything about the presentation of the coupons as a condition of payment. Does the form of the bond require presentation of the coupon and demand of payment before the company can be put in default? It seems to me that it does not. If a cause of action accrues on a coupon in which the words "on presentation" do not occur, as soon as it falls due and is unpaid, without any demand, I do not think the insertion in the trust deed, of the words "on presentation of this coupon," changes the rule. The evident purpose is to indicate that the interest is to be paid on the coupon, without the production of the bond. The words do not change the legal effect of the coupon, for the company is not bound to pay unless the coupon is not only presented but delivered up. *Wolcott v. Van Santvoord*, 17 Johns., 248; 2 Daniel, Neg. Inst.,

sec. 1508. But it is said that if this construction is correct any coupon holder could, by failure to present his coupon for payment when due, cause both the principal and interest on all the bonds to become payable long before the date named for their maturity. No such result would follow if the company could truly aver that it had funds at the place designated for the payment sufficient to pay the coupons if they had been presented. This would be a conclusive answer to the claim that the principal of the bonds had become due, by reason of default in the payment of interest.

It is averred in the bill that no funds were provided for the payment of these coupons on the eight specified bonds which fell due July 1, 1876. This is not denied in any answer or affidavit filed in this case, though it was clearly within the power of the company to prove the fact that it had provided for the payment of these coupons at maturity, if such had been the case, for it is not pretended or claimed that funds were ready for the payment of these coupons, if they had been presented. The defense relied on is the failure to present the coupons for payment at a place where there was no money provided to pay them. The coupons attached to the eight bonds were due July 1, 1876. They were not paid on that day, nor was any money provided for their payment. No payment was made, nor offered to be made, within six months after the maturity of the coupons. By the terms of the bond and trust deed, both the principal and interest of the bonds became due. No offer has been made to pay the principal and interest. The company itself has never provided any funds to pay interest, and the interest due January 1 and July 1, 1878, has never been paid by any one. The evidence is overwhelming that in a commercial sense the company is insolvent. It appears to me, from the facts of the case, that its property, if brought to sale, would not pay the first mortgage bonds and interest. There appears, therefore, no reason why the order of the district judge, in vacation, appointing a receiver should be revoked. On the contrary, if the case were presented here for the first time, we should feel bound to accede to the prayer of the bill, and allow the injunction and appoint a receiver, as has already been done.

It was suggested in the argument that the sale of the bonds of the company, which had been pledged as collateral security for the company's own debt, at a price below par, amounted to usury, and the bonds and coupons were, therefore, void. As this is nowhere set up in any of the answers filed in the case, it is not necessary or proper now to discuss or decide it.

It was also claimed, in argument, that some of the judgments on which the Rising Fawn Iron Company's property was sold were founded on mechanics' liens, and that they were superior to the lien of the first mortgage bonds, under the constitution of Georgia. This, also, is matter of defense not set up in any of the answers. On the contrary, the answers of the company admit that the first mortgage bonds were the first and highest lien on the property covered by the trust deed. It is, therefore, unnecessary at this time to discuss this question. The motion to continue the receiver and injunction must prevail.

§ 1746. *Negotiable.*—Coupons, when payable to bearer, are promissory notes negotiable by the law merchant, and possess all the attributes of promissory notes. It does not deprive them of their negotiable character that it may be necessary to resort to the bonds to prove their execution. *Cooper v. Town of Thompson*,* 13 Blatch., 434. And they retain their negotiability after being detached from bonds not yet due. *Thompson v. Perrine*,* 16 Otto, 589.

§ 1747. Interest coupons payable to bearer are negotiable promissory notes, and a national bank having power to discount and negotiate promissory notes, may handle these coupons in

the same manner. If the bank had no such power, the question could not be raised by a party sued on the coupons by the bank. *Lyons v. Lyons National Bank*,* 19 Blatch., 279.

§ 1748. Coupon bonds possess all the qualities of commercial paper, and, unless utterly void in their inception, pass to an innocent holder free from equities existing between the original parties. *Durant v. Iowa County*,* Woolw., 69.

§ 1749. Holder may sue.—Bonds with coupons attached, payable to bearer, are negotiable; and the holder of a coupon may recover upon it without being the owner of the bond. *Thomson v. Lee County*, 3 Wall., 327 (§§ 1669-72); *Commissioners of Knox County v. Aspinwall*, 21 How., 539 (§§ 1413-18); *Brine v. Ins. Co.*, 6 Otto, 627.

§ 1750. In a suit on coupons the petition need not set forth the bonds to which the coupons were attached, nor allege the election or other preliminary steps required of the officers before they are authorized to issue and deliver the bonds. *Railroad Co. v. Otoe County*,* 1 Dill., 888.

§ 1751. Interest coupons constitute the proper evidence of the interest due. The holder need not sue on the bonds to recover the interest. *McCoy v. Washington Co.*,* 3 Wall. Jr., 381.

§ 1752. Interest coupons are *prima facie* evidence that the holder is also the holder of the bonds to which they were attached. The obligation to pay interest is in the bond, not in the coupon. They are not negotiable by the law merchant, but they pass by delivery, by the contract of the parties in the bond, and the holder is entitled to recover thereon without proof that he is the holder of the bonds to which they belong. *Ibid.*

§ 1753. Where an act provides that city bonds shall only be transferred upon the books of the city, the holder of the interest coupons on such bonds cannot recover thereon unless he shows that the bond has been transferred to him on the books of the city. *Oelrich v. Pittsburgh*,* 1 Pittsb. R., 530.

§ 1754. Interest coupons in form as follows: "W. county bonds—warrant for thirty dollars interest on bond No. 108, payable in N., on the 15th day of May, 1857. For the commissioners, S., Clerk," attached to municipal bonds payable to bearer and transferable by delivery, are the appointed evidence by the agreement of the parties to show who is entitled, as the holder of the bond, to receive the interest due at a particular date. They are attached to the bond for the convenience of the officers of the municipality and to add to the commercial value of the bonds by facilitating their negotiability. The obligation to pay interest is found in the bond and not in the coupon. They are not in words an instrument in writing of a commercial nature and having their negotiability by virtue of the law merchant. In terms they are not made payable to any particular person or his order, or even to bearer. They partake of the nature of the peculiar instrument to which they are attached. They are intended by the parties to be evidence of debt in the hands of the holder, and proof of payment when in the hands of the debtor. They pass by delivery, and by the contract of the parties and the usage of the country are sufficient evidence of a debt to the holder as against the obligors in the bond. They are of modern invention, and should have the effect intended by the parties, and be governed by the usage of the country, and not by the sharp rules of law applicable to instruments of a different nature. The possession of them is, therefore, *prima facie* evidence that the holder of them is the holder of the bond, or was so at least when they were cut off, and as such entitled to the interest. *McCoy v. Washington County*,* 7 Am. L. Reg., 196.

§ 1755. Demand of payment.—Interest coupons made payable at a certain place need not be presented at that place for payment before suit thereon. Nor is it any objection that they are detached from the bonds, and the latter not accounted for. When detached they pass by delivery. The coupons bear interest from the day they are payable, although they were not presented for payment on that day, unless the town can show that it had funds ready to pay them on the day they fell due. *Walnut v. Wade*,* 13 Otto, 683.

§ 1756. Not signed.—The bond itself being duly signed and sealed by the proper officers of the county, and the coupons being part of the bond, it is no defense to the coupons that they are not signed by the chairman of the board as well as by the clerk. *Thayer v. Montgomery County*,* 3 Dill., 389.

§ 1757. Interest.—Coupons bear interest from maturity. *Rich v. Seneca Falls*, 19 Blatch., 558; *Aurora City v. West*, 7 Wall., 105; *Brine v. Insurance Co.*, 6 Otto, 627; *Town of Genoa v. Woodruff*,* 2 Otto, 502. See § 1755.

§ 1758. Where there is a right of interest upon interest coupons from their maturity till paid, such a right cannot be impaired by an act passed after the issue of the bonds, construing past legislation. *Koshkonong v. Burton*, 14 Otto, 668.

§ 1759. Under an act providing that in all actions founded on contracts, whenever, in the prosecution thereof, any amount of money shall be liquidated or ascertained in favor of either party, it shall be lawful to receive and allow interest until payment thereof, interest

may be recovered on interest coupons of bonds from the day on which they were due. *Hollingsworth v. Detroit*, 3 McL., 473.

§ 1760. Limitations.—The cause of action accrues upon an interest coupon at the date of its maturity, whether it is detached from the bond or not, and the statute of limitations begins to run at that date. *Koshkonong v. Burton*, 14 Otto, 668.

§ 1761. The statute of limitations of Wisconsin of 1858, barring actions on sealed instruments after twenty years, is held to include interest coupons to municipal bonds. *Ibid.*

§ 1762. It is within the constitutional power of the legislature to require, as to bonds and coupons already issued and due, that suits for their enforcement shall be barred unless brought within a period less than that prescribed at the time the bonds were issued. *Ibid.*

§ 1763. The statute of limitations in Iowa being ten years on all written contracts, sealed or unsealed, the holder of interest coupons, belonging to bonds issued by a city in that state, who brings suit thereon more than fourteen years after they were separated from the bonds and became due, and after the bonds to which they were originally attached were paid and canceled, is held to be barred by the statute, although the statute would not yet have barred the bonds had they remained unpaid. (CLIFFORD, J., dissented.) *Clark v. Iowa City*, 20 Wall., 588.

§ 1764. Municipal bonds do not fall within the statute of limitations barring actions on *simple contracts*. Actions on interest coupons are not barred by the statute of limitations unless the lapse of time is sufficient to bar a suit upon the bonds to which they belong. *Lexington v. Butler*, 14 Wall., 282 (§§ 1377-81).

§ 1765. Miscellaneous.—A contract to pay coupons in gold will be enforced. *Pollard v. Pleasant Hill*, * 3 Dill., 195.

§ 1766. An act, under which municipal bonds are issued, which provides that they shall bear interest at a certain rate, payable semi-annually, and bear interest warrants corresponding in number and amounts with the several payments of interest to become due thereon, is merely directory with respect to the dates on which the coupons are to become due, and it is no objection that the first coupon was made payable more than six months from the date of the bonds. *Lyons v. Lyons National Bank*, * 19 Blatch., 270.

§ 1767. Authority to a county to issue bonds is authority to issue them with interest coupons attached; and it is no objection that the coupons are for a less amount than one hundred dollars, the minimum of securities allowed to be issued. Nor is it an objection that the coupons are not signed by the commissioners of the county who were authorized to issue the bonds. *McCoy v. Washington Co.*, * 8 Wall. Jr., 381.

§ 1768. The provision in an act, authorizing a county to issue bonds in payment of its subscription to the stock of a railroad, that the railroad should guaranty the payment of principal and interest and should pay it till the road was completed, does not prevent a recovery on the interest coupons against the county before the road is completed. And parol evidence is not admissible to prove an agreement, between the county and the railroad company, that the latter should pay the interest until the completion of the road. *Ibid.*

§ 1769. The holders of certain bonds issued by the Chesapeake & Ohio Canal Company were secured by a preferred lien on the net revenue and tolls of the canal. The deed of trust secured the payment of the bonds and interest semi-annually. Coupons were annexed for the interest, which were to be paid on presentation and delivery. The state of Maryland having a prior lien on the property and revenue of the canal, when these bonds were issued, released it in favor of the lien of the bondholders for their principal and half-yearly interest. On a bill by the bondholders to enforce the lien, it was decided that they could not claim interest on the coupons from the date of their maturity, inasmuch as they had no lien if there was no net revenue in the treasury, there being none when the coupons fell due, and as the coupons were never presented for payment, and the company offered to pay them after they were due, but payment was refused because interest was not also tendered. The state was also held entitled to a strict compliance with her agreement, and she only released her lien in favor of the principal and half-yearly interest. (WYLIE, J., dissented.) *Corcoran v. Chesapeake & Ohio Canal Co.*, * 1 MacArth., 858.

§ 1770. The test to determine whether coupons for interest on railroad bonds were purchased or paid is, Did the original holder intend to sell, or did he have notice that the person to whom he surrendered them intended to retain the same as security for his reimbursement by the company? If these questions are answered in the affirmative the transaction amounts to a sale. *Duncan v. Mobile, etc., R. Co.*, 3 Woods, 567.

§ 1771. Interest coupons on railroad bonds which have matured are not entitled to priority over the principal or over coupons subsequently falling due. *Ibid.*

§ 1772. Where coupons, containing a promise to pay, are not under seal, *assumpsit* is a proper remedy, though not the only one; debt would lie. *First Nat. Bank v. Town of Bennington*, * 16 Blatch., 53.

XVI. SALE WITHOUT WARRANTY.

SUMMARY—*Express and implied warranties*, § 1778.

§ 1778. Where bonds of a city became the property of a bank, and it sold them, and in a suit upon them they were declared void, *held*, that as the bank sold without warranty, and there was no fraud, it was not liable to the purchaser. The seller of such securities is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him and that they are not forgeries; but in the absence of express stipulation there is no liability beyond this. *Otis v. Cullum*, § 1774.

[NOTES.— See § 1775.]

OTIS v. CULLUM.

(2 Otto, 447-449; 13 Alb. L. J., 202. 1875.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— This case presents but a single point for consideration. In the court below, the defendant demurred to the plaintiffs' petition. The court sustained the demurrer. The plaintiffs elected to stand by it. The court thereupon gave judgment for the defendant. It is not alleged that there was any fraud on the part of the bank or its agent in selling the bonds in question; on the contrary, their good faith is expressly admitted. The plaintiffs' declaration, or petition as it is called, is not framed upon the theory of bad faith, and a recovery is not sought upon that ground. The representations made by the agent of the bank to the plaintiffs when they bought the bonds are largely set out; but while it is alleged they were made in good faith, and believed by both parties to be true, it is not averred that they were intended to be, or were understood by either party to be, a warranty. The points of fraud and warranty may, therefore, be laid out of view. They are in no sense elements in the case. This simplifies the character of the controversy. With these considerations eliminated, what is left of the case may be stated in a few words.

The legislature of Kansas passed two acts, under which the city of Topeka was authorized to issue bonds for certain specified purposes, the amount in each case to be within the limit prescribed. A hundred coupon bonds of \$1,000 each, payable to a party named or bearer, were executed and delivered to that party. They became the property of the First National Bank of Topeka. That bank put them upon the market and disposed of them. Eighteen of them were sold to the plaintiffs in error for the sum of \$12,852, and the residue to another party. There was default in the payment of interest. The other party brought suit. This court held that the legislature had no power to pass the acts, and that the bonds were, therefore, void. *Loan Association v. Topeka*, 20 Wall., 655 (§§ 1162-68, *supra*). This suit was brought by the plaintiffs in error to recover from the receiver the amount paid to the bank for the eighteen bonds, with interest upon that sum. The ground relied upon is failure of consideration. The question presented for our determination is whether, upon this state of facts, they have a valid cause of action.

§ 1774. *There is no implied warranty by the seller of bonds that they are valid.*

In *Lambert v. Heath*, 15 Mees. & W., 486, the defendant bought for the plaintiff certain "certificates of Kentish-coast railway scrip," and received from him the money for them. Subsequently the directors repudiated the scrip-

upon the ground that it had been issued by the secretary without authority. The enterprise to which it related was abandoned. The action, which was for money had and received, was thereupon brought to recover back what had been paid for the scrip. The court put it to the jury to say whether the scrip bought was "real Kentish railway scrip." A verdict was found for the plaintiff upon this issue. A new trial was moved for, the defendant insisting that the court had misdirected the jury. After hearing the argument, the court said, "The question is simply this: Was what the parties bought in the market Kentish-coast railway scrip? It appears that it was signed by the secretary of the company; and if this was the only Kentish-coast railway scrip in the market, as appears to have been the case, and one person chooses to sell, and another to buy, that then the latter has got all that he contracted to buy. That was the question for the jury; but it was not so left to them. The rule must, therefore, be absolute for a new trial." The judges were unanimous.

Here also the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation there is no liability beyond this. If the buyer desires special protection he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage-ground upon which it would have placed him. It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable according to the principles which the plaintiffs in error insist shall be applied in this case.

Judgment affirmed.

§ 1775. Contract of sale; warranty.— Upon a sale of railroad bonds there is, in the absence of any agreement as to the matter, an implied condition or warranty on the part of the vendor that the bonds are genuine. Thus, a Leavenworth bank telegraphed to a St. Louis bank May 24, 1871: "Get rates for \$15,000 California Central Pacific Railroad bonds delivered tomorrow," and the defendants offered 100½, which was accepted by telegraph. On May 25th the cashier of St. Louis bank received from Leavenworth bank the bonds with a letter stating, "the party selling these bonds is waiting here to get the money for them. He is an entire stranger to us." "We desire them sold without any recourse on us." Which letter same day was shown to defendants. They refused to receive them without recourse, but offered to take them, and pay for them when ascertained to be good; otherwise to return them. This was agreed to. May 24th defendants telegraphed to plaintiffs in New York, "Make best bid for fifteen Central Pacifics, quick;" plaintiffs answered, May 25th, that they would buy at 102½. Defendants answered same day, "we accept your offer." The bonds were delivered by St. Louis bank to defendants May 25th, and together with a draft on plaintiffs for the price sent to New York by express. On the same day defendants wrote to plaintiffs, "In accordance with your offer for fifteen Central Pacific 1st mort. bonds, 102½, we replied, we accept your offer, and have forwarded them by express to Bank North America, with draft attached for \$15,375. We would further add that we have purchased the bonds from a party strange to us; and, not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and, upon being found correct, telegraph immediately (Central all O. K.). We do not doubt the bonds, but, coming to us through strange parties, we use this as a precaution, and not willing to take any risk." This letter reached plaintiffs a short time before bonds and draft were presented. The bonds were upon arrival immediately sold, etc. Afterwards it was ascertained that they were counter-

feit. *Held*, that the dispatches between the parties on the 25th of May constituted a complete contract of sale upon the condition or with an implied warranty that the bonds were genuine; that the contract was not afterwards changed so that plaintiffs waived this condition or warranty, and that the plaintiffs were entitled to a recovery of the sum paid the defendants for the bonds. *Utiley v. Donaldson*, 4 Otto, 29.

XVII. ACTIONS.

SUMMARY—*Presentment not necessary*, § 1776.—*Pleading*, § 1777.

§ 1776. An action may be maintained upon coupons without presentment for payment. *Smith v. Tallapoosa County*, §§ 1778-1781. See § 1729.

§ 1777. In an action on bonds or coupons it is not necessary to aver or prove the authority of the county to issue them. The courts take notice of the laws under which they were issued. *Ibid.* See § 1788.

[NOTES.—See §§ 1782-1810.]

SMITH v. TALLAPOOSA COUNTY.

(Circuit Court for Alabama: 2 Woods, 574-578. 1874.)

Opinion by Woods, J.

STATEMENT OF FACTS.—The action is brought to recover \$3,000, the amount due upon two hundred and twenty-two coupons, of which the plaintiffs aver themselves to be the holders, which were attached to that number of bonds issued by the defendant county. A copy of one of the bonds is set out in full in the declaration, and it is averred that the others are similar, save in number and amount. The bonds purport on their face to be issued by the defendant in pursuance of authority granted by an act of the Alabama legislature, approved December 31, 1868, entitled "An act to authorize the several counties, towns and cities of Alabama to subscribe to the capital stock of such railroads throughout the state as they may consider most conducive to their interests." A copy of one of the coupons is set out in the declaration, and the others are averred to be similar, save in amount and date of payment. The coupons are made payable at the agency of the Savannah & Memphis Railroad Company in the city of Montgomery. It is averred that the plaintiffs are *bona fide* holders of the coupons and of the bonds to which they were attached, and that the bonds and coupons were purchased by the plaintiffs for a valuable consideration, before the bonds or coupons on any of them fell due; that when the coupons sued on became due the defendant had no funds at the agency of the Savannah & Memphis Railroad Company in the city of Montgomery to pay the same, and that in fact at that time the railroad company had no agency in the city of Montgomery, and did not have, up to the time of bringing the suit.

The demurrer is based on three grounds: 1. That there is no averment that the coupons were presented for payment before suit brought. 2. There is no averment of the authority of the county to issue the bonds. 3. Because the act of the general assembly authorizing the issue of the bonds is contrary to the provisions of the state constitution.

§ 1778. *Presentation for payment at the place where payable is not a condition precedent to bringing an action against the maker of negotiable paper.*

On the first ground of demurrer it is sufficient to say that it is now the well settled doctrine of the courts of this country that when a note is payable at a particular place, presentation for payment at that place is not a condition prece-

dent to a suit against the maker. *Wallace v. McConnell*, 13 Pet., 148 (BILLS AND NOTES, §§ 1539-43); *Irvine v. Withers*, 1 Stew., 234; *Montgomery v. Elliott*, 6 Ala., 701. This is the settled law, even where there is no excuse for the non-presentation of the note. But the declaration avers a fact which abundantly excuses the want of presentation, even if presentation were necessary, namely, that the Savannah & Memphis Railroad Company had no agency in the city of Montgomery, where, according to the tenor of the bonds, the coupons were to be presented for payment. The law does not require any one to do a vain or impossible thing.

§ 1779. *It is not necessary to aver in a declaration the authority under which a negotiable instrument is issued by a corporation if authorized by a public act.*

The next objection to the declaration is that the authority of the county of Tallapoosa to issue the bonds is not averred. The authority of the county to issue bonds was conferred by a general and public act of the legislature of the state. An authority given by a general statute need not be pleaded. *Tappen v. Railroad Co.*, 4 West. Law Mo., 67. The courts of the United States take judicial notice of the public acts of the states. And what the court judicially knows need not be averred or proven. It did not, therefore, require a special averment that the county of Tallapoosa was authorized to issue the bonds. The court judicially knows that on certain conditions the county of Tallapoosa, and every other county in the state of Alabama, was authorized to issue bonds in aid of the construction of railroads. The declaration avers that certain bonds were issued, which show upon their face that they were issued in pursuance of the authority conferred by a certain act of the legislature. We think that the facts of which the court takes judicial notice, taken in connection with the facts averred, sufficiently show the authority of the defendant county to issue the bonds in suit.

§ 1780. *When a county is bound to pay its bonds.*

Where a county issues its bonds payable to bearer, and pledges for their payment the faith, credit and property of the county, under the authority of an act of assembly referred to on the face of the bonds by date, and those bonds pass *bona fide* into the hands of holders for value, the county is bound to pay them. *Mercer County v. Hackett*, 1 Wall., 83 (§§ 1409-12, *supra*); *Gelpcke v. Dubuque*, id., 175 (§§ 1367-70, *supra*); *Meyer v. Muscatine*, id., 384 (§§ 921-25, *supra*); *Van Hostrup v. Madison City*, id., 291 (§§ 1196-97, *supra*). It seems clear that the averments of the declaration bring the case within the rule thus laid down, and make, so far as the objection under consideration goes, a *prima facie* case for recovery. I am of opinion, therefore, that the second ground of demurrer is not well taken.

§ 1781. *When the supreme court of a state has declared a law authorizing the issue of bonds to be constitutional, all holders of such bonds may regard the question as settled.*

But it is assigned, lastly, as an objection to the declaration, that the act of the general assembly authorizing the issue of bonds by counties is unconstitutional. It is settled by authority, if, indeed, it requires authority to settle so plain a proposition, that a county or other municipal corporation has no inherent right of legislation, and cannot subscribe for stock in a railroad and issue bonds to pay for it, unless authorized to do so by the legislature. *Thomson v. Lee County*, 3 Wall., 327 (§§ 1669-72, *supra*). But the legislature of a state, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improve-

ment, to borrow money to pay for it, and to levy a tax to repay the loan. *Thomson v. Lee County, supra*. The question is therefore presented, Does the constitution of Alabama prohibit the general assembly from authorizing cities and counties to subscribe stock in railroads, and to borrow money and issue bonds to pay for it? This question has been decided by the supreme court of Alabama in *Ex parte Selma & Gulf R. Co.*, 45 Ala., 696. The court in that case has passed upon the constitutionality of the identical act under authority of which the defendant county issued the bonds in this case, and sustained its constitutionality. And it is stated at the bar that this decision has been approved by a later one of the same court. *Lockhart v. City of Troy*, not yet reported. [48 Ala., 579.] The bonds of the county of Tallapoosa, issued under authority of the act referred to, are protected by the decision, even though issued before it was made. These bonds are payable to bearer, and circulate by delivery as negotiable paper. They are the property of one holder to-day, and of another to-morrow. As soon, then, as a decision of the highest court of the state is made affirming the constitutionality of the act under which the bonds were issued, all persons to whose hands the bonds may come are authorized to consider that question as conclusively settled. It cannot be opened to their damage. Even should the decision be reversed, the reversal cannot affect bonds already issued. *Gelpcke v. Dubuque*, 1 Wall., 175 (§§ 1367-70, *supra*).

I have read with interest the argument submitted to prove the unconstitutionality of the act of the legislature under which the defendant county issued its bonds. But even if I were disposed to agree with its conclusions, it could not avail in this case. For the purposes of this suit, and so far as these bonds are concerned, the act under which they are issued must be considered as constitutional and valid, and the question of the power of the county to issue them foreclosed. Demurrer overruled.

§ 1782. *Suit by assignee in federal courts.*—The holder of a bond or coupon payable to bearer is not an assignee, and he may sue in the federal courts without reference to the citizenship of antecedent holders. *Cooper v. Town of Thompson*,* 13 Blatch., 434; *Pettit v. Town of Hope*,* 18 Blatch., 180; *McCoy v. Washington Co.*,* 3 Wall. Jr., 381; *Rich v. Seneca Falls*, 19 Blatch., 558. And it is not material that the coupon is detached from a bond not yet due; it retains its quality of negotiability. *Thompson v. Perrine*,* 16 Otto, 589. And the holder may sue without reference to the intent with which he acquired the coupon. *McCall v. Town of Hancock*,* 10 Fed. R., 8; *Foote v. Hancock*,* 15 Blatch., 343.

§ 1783. The assignee of a bond of a municipal corporation of a state, payable to a citizen of that state or bearer, or to bearer, is not prohibited by the act of March 3, 1875, c. 137, from suing in the federal courts. *Chickaming v. Carpenter*,* 16 Otto, 663.

§ 1784. Municipal bonds made payable to a railroad company, within the same state with the city issuing the bonds, or bearer, and assigned by the company by a writing on the back making them payable to bearer, are not within the provisions of the judiciary act, that the federal courts shall not have cognizance of suits on notes or other choses in action in favor of an assignee unless such suit could have been brought there if no assignment had been made. *Lexington v. Butler*, 14 Wall., 282 (§§ 1377-81).

§ 1785. A municipal bond in the form of an acknowledgment of indebtedness, without a condition, made payable to a railroad company or its assignees, is so far treated as a promissory note, although it has a seal and is not payable to bearer or order, that the holder may sue thereon in the federal courts, although the railroad company could not have sued there if the bond had never been assigned. Such a bond does not fall within the act of March 3, 1875, defining the jurisdiction of the circuit courts. *Porter v. Janesville*, 3 Fed. R., 617.

§ 1786. It is held that interest coupons cannot be sued upon in a federal court, where the municipal bonds to which they are attached are under the seal of the corporation, are made payable to a railroad company in the same state, and the coupons contain no obligation in themselves, but refer to the bonds for their vitality, the plaintiff being an assignee of the

railroad company and his assignor being unable, on account of its citizenship, to sue in a federal court. *Clarke v. Janesville*, *1 Biss., 98.

§ 1787. The instruments issued by the town of Rochester, being in the form of negotiable promissory notes and having no seal, although called "Town of Rochester bonds," are held to be the promissory notes of the town, and do not come within the provisions of the act of 1875 with respect to the jurisdiction of the federal courts in cases where choses in action have been assigned. *Burleigh v. Town of Rochester*, 5 Fed. R., 667.

§ 1788. Pleading.—There can be no objection to the admission in evidence of bonds and coupons in a suit thereon, when the execution of the bonds is not in issue, this fact being in substance alleged on the part of the plaintiff, and not denied on oath by the defendant in his plea as required by local law. *Chambers County v. Clews*, 21 Wall., 317. See § 1777.

§ 1789. In an action on township bonds, an omission in the declaration to state the holding of the election, and the occurrence of other preliminary facts which the law required to precede the issuing of the bonds, does not render the declaration bad, since irregularities or defects in these preliminary matters, if relied on as a defense, must be pleaded by the defendant. A negotiable bond is a *prima facie* obligation of the obligor, if he has capacity to make it; and is binding according to its face until the contrary is shown. Such an omission, if it rendered the declaration bad on demurrer, could not be regarded as error after verdict; since the plaintiff, in that case, would have had to prove these omitted facts in order to obtain a verdict. *Lincoln v. Iron Co.*, *13 Otto, 412.

§ 1790. In an action on interest coupons which had been attached to negotiable bonds issued by a town, a declaration which does not allege either the tenor or effect of the bonds, or the authority for their issue, and with which no copy of a bond is filed and none set out therein, is demurrable. The plaintiff must allege the general authority to issue the bonds and show that the bonds sued on were issued for purposes authorized, since a municipal corporation has no power to issue bonds except it is given by the legislature, and then for only such purposes as the legislature authorizes. *Hopper v. Town of Covington*, *8 Fed. R., 777.

§ 1791. In an action on interest coupons which were originally attached to county bonds, the declaration should aver the authority of the county to issue the bonds. This may be done by a distinct averment of the special act conferring the authority, or by stating the recital of the bond in that respect. But a declaration which does not show the authority is demurrable. *Kennard v. Cass County*, 3 Dill., 147.

§ 1792. A plea to an action on coupons to county bonds, averring that the plaintiff was not the "owner, etc., of the bonds and coupons as mentioned in the declaration," was held good on general demurrer though faulty in form. The like ruling was made as to a plea in such action averring that the coupons sued on were the property of a third person and not the property of the plaintiff. *Pendleton Co. v. Amy*, *13 Wall., 297.

§ 1793. A plea to an action on coupons of county bonds that the "county did not sign, seal or deliver the bonds as in the declaration alleged nor authorize any one to do so, and so the defendant says the alleged acts and coupons are not its acts and deeds," was held good on general demurrer. *Ibid.*

§ 1794. The declaration stated the issuance of county bonds under authority of statute, and that the county received stock in a railroad for them, and that the railroad sold the bonds and the plaintiff became the owner. The plea averred that the conditions of the statute, authorizing the issue of the bonds, touching the submission of the question of issuance to the voters of the county, had not been complied with. It appeared that the county still held the railroad stock for which the bonds were issued. *Held*, the plea was bad on general demurrer. *Ibid.*

§ 1795. Estoppel by judgment.—Where the holder of interest coupons belonging to county bonds has applied to the supreme court of a state for a *mandamus* to compel county officers to appropriate a tax already collected to the payment of his coupons, and his petition has been dismissed on the ground that the issue of the bonds and coupons was unauthorized for want of a sufficient vote, and the coupons constituted no lawful debt against the county, such judgment constitutes a bar to an action on the same coupons in a federal court. (CLIFFORD, J., dissented.) But this judgment works no estoppel as to other holders of interest coupons, of the same series of bonds. *Block v. Commissioners*, 9 Otto, 686 (§§ 1037-38).

§ 1796. A judgment on municipal bonds is conclusive as to their validity. *United States v. New Orleans*, 8 Otto, 381 (§§ 1603-9); *Muscatine v. Railroad Co.*, 1 Dill., 536 (§§ 1624-28).

§ 1797. Where a suit is brought to test the validity of bonds and to restrain their issue, the record of such suit is conclusive in a subsequent suit between the same parties as to all defenses touching the legality of such bonds which might have been set up in the first suit. *Preble v. Board of Supervisors*, *8 Biss., 358.

§ 1798. Where the holder of a series of municipal bonds obtains judgment on a portion of them, and a suit is afterwards brought by the town to enjoin the holder from proceeding in

suits at law instituted upon others of the series, the former judgment is conclusive of the validity of the bonds and the liability of the town on them, since the parties to the two suits are the same, the title involved is the same, and the objections taken in the injunction proceeding might have been taken in the former suit at law, and the court had full jurisdiction of the parties and the subject matter. *Beloit v. Morgan*,* 7 Wall., 619.

§ 1799. **Liability of precincts.**—Where the laws of a state authorize the qualified voters of an election precinct to vote for the issuing of bonds for a specified purpose, and when properly voted they are to be issued by the county commissioners of the county in which the precinct may be situated, and a precinct under the laws of that state has no corporate existence, but is formed for convenience merely, and has no officers to defend a suit against it, a suit on the bonds is correctly brought in the federal court against the county, and especially where the supreme court of the state has decided that such a suit may be maintained against the county. *Osborne v. County Commissioners*, 7 Fed. R., 441; S. C., 2 McC., 97; *Blair v. West Point Precinct*,* 2 McC., 459.

§ 1800. **On a bill in equity**, filed by the holders of municipal bonds, to charge the city as trustee, and to reach property on which the city has a deed of trust to secure payment of the bonds, a mere money judgment against the city rendered by the court cannot be sustained, as that judgment could have been reached by each bondholder by remedy at law. *Parkersburg v. Brown*,* 16 Otto, 487.

§ 1801. **Demand of payment.**—The law of Alabama required all claims against a county to be presented to the court of county commissioners to be audited and allowed, and to be presented within a certain time, or they would be barred. *Held*, that suit might be maintained on bonds of the county without presenting them for allowance. *County of Greene v. Daniel*,* 12 Otto, 187.

§ 1802. **Remedy.**—By providing a special remedy on bonds the usual remedy by suit is not taken away. *Bonham v. Board of Education*,* 4 Dill., 156.

§ 1803. **Limitations.**—Municipal bonds and coupons were undoubtedly regarded by the legislature of Wisconsin at the time of the enactment of the Revised Statutes of 1849 and 1858 as sealed instruments, though they might not actually be sealed, and therefore the statute of limitations of twenty years applies to them. *Koshkonong v. Burton*, 14 Otto, 673.

§ 1804. **Privity.**—Where one corporation passes a resolution to assume, upon certain conditions, the payment of bonds issued by another corporation, there is no such privity between the former corporation and a holder of such bonds as to warrant him in bringing a suit in his own name to enforce payment of the bonds by such corporation. *National Bank v. Grand Lodge*, 8 Otto, 123.

§ 1805. **Stamp.**—Under the act of July 13, 1866, municipal bonds issued in 1870 and 1871 were admissible in evidence without being stamped. *County of Ralls v. Douglass*,* 15 Otto, 728.

§ 1806. **Interest; exchange.**—On a recovery on negotiable bonds and coupons the party is entitled to interest and exchange. *Gelpcke v. City of Dubuque*, 1 Wall., 175 (§§ 1367-70).

§ 1807. **Mortgage.**—It is no objection to a decree of sale under a railroad mortgage, securing the payment of bonds, that, by allowing bonds to be received in payment, it enables the larger bondholders to purchase on better terms than the smaller ones. *Ketchum v. Duncan*, 6 Otto, 659 (§§ 1735-42).

§ 1808. **Defenses.**—In a suit against a county to foreclose a mortgage executed by it to secure its negotiable bonds, only such defenses are available against the mortgage as would be available in a court of law in an action on the bonds. *Kenicott v. The Supervisors*, 16 Wall., 452 (§§ 1453-64).

§ 1809. In an action on municipal bonds, the power of the legislature to create the municipality, and whether, therefore, it had a legal existence, cannot be inquired into. *Judson v. City of Plattsburg*,* 8 Dill., 181.

§ 1810. **Guaranty.**—A railroad company which receives the bonds of a county in payment for stock subscribed has power to indorse thereon that it "guaranties to the bearer of the bond the punctual payment of interest thereon, as it may fall due, at the time and place specified." The bonds being payable to bearer, and the county having failed to pay the interest at the time and place, the holder may sue the company on its guaranty, without previous demand and notice. *Evans v. C. & P. Railroad Co.*,* 2 Pittsb. R., 483.

XVIII. MISCELLANEOUS.

SUMMARY—Three subscriptions voted at the same time; curative act, § 1811.—Subscription canceled; rights of creditors, § 1812.—Waiver of fraud as against a bona fide holder, § 1813.—Subscription without a vote; constitutional law, § 1814.—Bona fide holder; lien on road; fraud; ratification, § 1815.—Liability as guarantor; interest; *lex loci*, § 1816.—Canada law violating the obligation of a contract; law of the place of performance, § 1817.—State cannot be sued; lien of state, §§ 1818, 1819.

§ 1811. The court refused to declare the subscription by a county to the stock of a railroad company and the issue of bonds in payment thereof invalid, on the ground that a single vote authorized the subscription in question and two others to separate companies, where there had been three suits in the state courts involving this subscription and this objection had never been raised, and a subsequent statute had declared the vote to have been legally taken. *County of Morgan v. Allen*, §§ 1820-1824.

§ 1812. A county issued its bonds to a railroad company, and received the stock of the company instead. The road was completed through the county by a company succeeding to all the rights of the first. This latter company became insolvent, and the county, by various proceedings, received back its bonds on payment of a sum less than the amount of interest due on them. The creditors of the insolvent company, having foreclosed a mortgage on all the property of that company, brought a bill to subject to the decree of foreclosure the amount due by the county on its subscription to the stock of the old company, the bonds for which had been surrendered and canceled. They were held entitled to a decree, on the principle that the unpaid subscription, and the bonds given for such subscription, were a trust fund for the payment of the debts of the insolvent company. The subscription being unconditional, it is immaterial that the bonds were delivered on the assurance made by the president of the company that they would be used only in payment for work done in the county. The creditors are not concluded by judgment in the state court, that, on foreclosure of the mortgage on the first company, the trustees in the mortgage were not entitled to these bonds to be turned over to the new company, as these trustees represented the new company, and not these creditors. (*MILLER, FIELD and BRADLEY, JJ., dissented.*) *Ibid.*

§ 1813. A county, under due authority of law, issued its bonds to a railroad company in exchange for stock, for the purpose of aiding in the construction of the road. Before the road was completed, and the county having provided no means of meeting the bonds and coupons, the president of the road appeared before the county court, stating that his road would be consolidated with another road, provided the county would, in consideration of an extension of time on the bonds, collect each year, and promptly pay over the amount falling due each year during the whole period of the extension. This was assented to by the court, the consolidation was consummated, the new company received all the property of the old company, and the county had its subscription of stock in the new company, which completed the road. The county was held, by this action, to have waived all defenses of fraud in procuring the issue of the bonds, after they had come into the hands of a bona fide holder. *County of Tipton v. Locomotive Works*, §§ 1825-1829.

§ 1814. The acts of Tennessee of February 25, 1867, and February 12, 1869, together with the act of November 5, 1867, authorizing certain counties to issue bonds in aid of a certain railroad company, without the sanction of a popular vote, passed while there was a general act in force requiring a popular vote in all cases, are not inconsistent with the constitution of that state of 1834, which provides that "no freeman shall be taken, or imprisoned, or dis seized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life or property, except by the judgment of his peers, or the law of the land;" also that "the legislature shall have no power to suspend any general law for the benefit of any particular individual; nor pass any law for the benefit of any individuals, inconsistent with the general law of the land; nor pass any law granting to any individual or individuals rights, privileges, immunities or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provision of that law; provided always, the legislature shall have power to grant such charters of any incorporation as may be deemed expedient for public good." *Ibid.*

§ 1815. The state of Florida exchanged its bonds for the bonds of railroad company A., under an agreement by which the state secured a first lien on the road of that company for the payment of the railroad bonds held by the state, and in case of the failure to pay these bonds on the part of the company the road was to be sold and the proceeds paid into the state treasury to be applied in payment of the state bonds delivered to the company and indorsed by it for the construction of its road. The president of company A., being a director in com-

pany B., fraudulently procured the issue of a large amount of bonds by B., reciting that they were issued under authority of the act providing for the exchange of bonds with A., and given in exchange for state bonds to aid in the construction of the road of A. He exchanged these fraudulent bonds for state bonds and put the latter on the market. These bonds of the state, together with those issued to A., went into the hands of *bona fide* holders. It is held that the bonds of the state delivered to A., though unconstitutional, yet being in the hands of *bona fide* holders and having been indorsed by A., the holders thereof are entitled to have the lien of the state on the road of A. enforced in their favor. It is also held that the *bona fide* holders of the bonds of the state exchanged for the fraudulent bonds of company B. are entitled to a lien on the road of that company for the payment of their bonds, since the company ratified the acts of its directors in issuing bonds and exchanging them for bonds of the state. The company is estopped from setting up the unconstitutionality of the bonds or their fraudulent issue, and the recovery is not limited to the amount actually paid for the bonds. *Railroad Companies v. Schutte*, §§ 1830-1837.

§ 1816. The trustees of a railroad company placed the following indorsement on notes issued by itself and another company, under authority of a decree of court and a special act of the legislature: "For value received, the Vermont & Canada Railroad Company hereby guaranty the payment of the within note, principal and interest, according to its tenor, and order the contents thereof paid to the bearer." *Held*, that this indorsement was within the corporate powers of the company, as measured by the statutes of Vermont; also, that the proper steps having been taken to charge the company as indorser, it was liable on the notes as indorser. It was further held that the laws of Vermont, the notes having been issued under authority of a Vermont statute, regulated the amount of interest allowable, although the notes were made payable in Massachusetts. *Codman v. Vermont & Canada Railroad Co.*, §§ 1838-1840.

§ 1817. Plaintiff sues as the holder of bonds issued in Canada, by a Canadian corporation, made payable in New York. It is held that a subsequent act passed by the parliament of Canada, providing for the substitution in place of these bonds of bonds bearing a lower rate of interest, is no defense, since this act is contrary to our constitution; and in such a case the laws of the place of performance of the contract will govern. *Gebhard v. Canada Southern Railway Co.*, §§ 1841, 1842.

§ 1818. A state takes possession of the property of a railroad company, under a statutory mortgage securing it against loss on its indorsement on the bonds of the company. It is held that the holders of these bonds cannot maintain their bill for an injunction to restrain a sale of the road under the mortgage and for the appointment of a receiver, in order to avail themselves of the security held by the state; since this could not be done without making the state a party, and the state cannot be sued in a United States court. *Branch v. Macon & Brunswick Railroad Co.*, §§ 1843-1845.

§ 1819. The state of Tennessee, by the act of 1832, loaned its bonds to several railroad companies, under a contract by which the state was to have a lien on the property of the companies for the payment of the bonds. The interest, as it became due, was to be paid to the state's agent, or proof furnished of prior payment. The principal was to be paid by the companies by means of a sinking fund paid into the state treasury. The bonds were transferable by delivery and were passed to the companies without indorsement of guaranty by the state. The holders of these bonds brought their bill to have a lien declared and enforced in their favor against these companies, on the ground that the lien given to the state was a lien for the payment to them of their bonds. *Held*, that the state remained the principal debtor to the holders, and did not become a surety on the bonds by its transaction with the railroads, and that the roads of these companies were not subject to any lien in favor of these holders. *Stephens v. Louisville & Nashville Railroad Co.*, §§ 1846-1848.

[NOTES.—See §§ 1849-1880.]

COUNTY OF MORGAN v. ALLEN.

(13 Otto, 498-515. 1880.)

APPEAL from U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—The county of Morgan, Illinois, in 1856, subscribed unconditionally to the capital stock of the Illinois River Railroad Company the amount of \$50,000, and issued its bonds therefor. Thomas, the president of the railroad company, promised that the bonds of the county should be applied to the building of the railroad through the county, but it does not appear con-

clusively that there was any contract to that effect obligatory upon the company. The railroad in point of fact was built through the county by the successor of the first company, which latter had become insolvent. By a number of legal proceedings of a rather intricate character the county obtained possession of most of its bonds, paying for them less than the amount of the overdue coupons on them, and canceled the bonds. This suit was brought by Allen and others, who claim under the successor company, that company having at a foreclosure sale bought all the property of the original company. The object of the suit is to hold the county responsible for the amount of the bonds, on the ground that the transactions by which it acquired possession of them from creditors of the original company were collusive and fraudulent as to the general creditors of the insolvent company, and especially as to the successor company, which held an unpaid debt on its predecessor of over a million of dollars. There was a decree in the court below against the county for \$72,539.56. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE HARLAN.

The right of the creditors of the Illinois River Railroad Company to subject to the satisfaction of their claims the bonds issued by Morgan county for its subscription to the capital stock of the company has for many years been the subject of litigation in Illinois. The preceding statement mentions the cases in her supreme court where the history of that litigation will be found, and summarizes the essential facts which gave rise to it. (a) They are numerous and complicated, and our labor in ascertaining them with accuracy has been greatly increased by the confused condition of the transcript. We will notice such of the questions of law, suggested by the assignments of error, as we deem necessary to consider or determine.

§ 1820. *The capital stock and unpaid subscriptions of an insolvent corporation constitute a trust fund for its creditors, and no part of it can be alienated except in fair dealing and for a valuable consideration.*

1. In *Sawyer v. Hoag*, 17 Wall., 610, we had occasion to consider the question whether the creditors of an insolvent corporation were at liberty to assail a transaction between it and its debtor, whereby his subscription of stock was withdrawn, so far as general creditors were concerned, from the assets of the corporation. In that case we declared the doctrine to be well established, that the capital stock of a corporation, especially its unpaid subscriptions, constitutes a trust fund for the benefit of its general creditors, and that its governing officers cannot, by agreement or other transaction with the stockholder, release him from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing, and for a valuable consideration. In the subsequent case of *Sanger v. Upton*, 91 U. S., 56, we had occasion to consider the same question, and there said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation

(a) The following are the cases referred to by the court: *Thomas v. County of Morgan*, 39 Ill., 496; 59 Id., 479; *Morgan Co. v. Thomas*, 70 Id., 120.

for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation." The same doctrines are held in *Upton v. Tribilcock*, 91 U. S., 45; *Webster v. Upton*, id., 65; *Hatch v. Dana*, 101 id., 205. In no court have they been more distinctly approved than in the supreme court of Illinois, when considering the liability of the county of Morgan to creditors of the Illinois River Railroad Company arising out of these identical bonds. *Morgan County v. Thomas*, 76 Ill., 120.

These principles condemn the arrangements with certain creditors of the company, through which the county, to the prejudice of other creditors, attempted to discharge its liability to the common debtor by paying less than the entire sum due from it. The suits in the state court, under cover of which these arrangements were consummated, were all commenced after the decree of foreclosure, and after the company had suspended operations and was notoriously insolvent. The county recognized the dangers which beset the original enterprise, in furtherance of which its people had voted a subscription of stock payable in bonds. Its officers believed that it would inevitably fail, and that the ends expected to be accomplished by the aid voted would not be attained. It was for these reasons that they sought, or acceded to, an arrangement looking to the protection of the county against liability. But it is clear that other creditors besides those with whom it combined had an interest in the disposition of the assets of the company, and that the plan as conceived and consummated was wholly inconsistent with the established doctrines of equity. Upon recognized principles of public policy and good faith, the debt which the county owed, by reason of its subscription and the bonds given therefor, constituted, with other property of the company, a trust fund, to which all its creditors could rightfully look for satisfaction of their claims. The county was liable for the whole of that debt, and by no device or combination, to which particular creditors were parties, could it withdraw its bonds from that fund, and thereby avoid liability to the general creditors of the company.

§ 1821. *County bonds given for subscription to a railroad company, if held by that company, constitute a part of its assets for the benefit of its creditors.*

Had the county's liability to the company rested upon its original subscription, the present case, it must be conceded, would come within the very letter of our decisions in the cases just cited. That the subscription was paid or merged in bonds can certainly make no difference in the application of the principle upon which those cases were determined. The bonds were the evidence of the debt created by the original subscription. The company had become, as all its creditors knew, wholly unable to meet its engagements, and had practically ceased to exist. The bonds in question were part of its assets, in which all the creditors had an interest. The county, by an arrangement with some of those creditors, attempted to lessen its obligation to pay what it had stipulated to pay, and thereby defeat the rights of other creditors, who had as much claim upon the assets of the company as those with whom the county contracted. What it did is utterly indefensible under any known rules of equity.

§ 1822. *This court follows the decrees of a state court in holding the bonds issued by a county of that state to be valid.*

2. But it is contended that the subscription was without authority of law, and that, consequently, the county is not liable thereon, or upon the bonds. The specific ground upon which this contention rests is that the vote of the people in 1856 conferred no legal authority to make the subscription, such vote having been taken under an order of the county court submitting, as a single proposition, the question of subscribing \$50,000 to the capital stock of three separate railroad companies, one of which was the Illinois River Railroad Company; that a vote upon such a proposition, submitted in that form, was not one upon which a municipal subscription could rest. There are two sufficient answers to this suggestion. One is, that in no one of the three cases in the supreme court of Illinois involving this subscription was any such question distinctly raised by the county. All of them proceeded manifestly upon the undisputed ground that the county court had ample power by statute to make the subscription. We are not now disposed to inquire whether the particular mode in which the people were invited to pass upon the proposed subscription affected the substance or validity of the subscription when made, or whether the subscription was not a waiver of any irregularity in that respect. Until this suit was brought, more than fifteen years after the subscription had been made, the county never disputed, in any direct form, the legality of the order submitting the question of subscription. Another answer to this objection is suggested by the act of January 29, 1857, declaring the vote to have been legally taken and requiring a subscription and the issuing of bonds in accordance with the vote of the people. That act, it is argued, was beyond the power of the legislature to pass, in that, in violation of section 9 of article 5 of the constitution of 1848, as construed by the supreme court of Illinois, it imposed upon the people of the county a debt which they had never legally voted to incur; that the vote in 1856 upon the proposition to subscribe stock in three distinct railroad corporations was an absolute nullity, which could not be constitutionally remedied by any act of assembly, or otherwise than a direct vote of the electors upon a new proposition submitted in legal form. In support of these views we are referred to numerous decisions of the state court, which we had occasion heretofore to examine in other cases. We deem it unnecessary to consider the general doctrine, with all its limitations and qualifications, of the power of the legislature by retrospective enactments to cure defects or omissions which occurred in elections relating to municipal subscriptions. It is often difficult to determine, as matter of local constitutional law, whether the defect or omission in a particular case involves a mere irregularity in the execution of a statutory power, or is vital and jurisdictional. It is quite sufficient on this point to say that the supreme court of the state, in *Thomas v. County of Morgan*, 39 Ill., 496, as well as in *Morgan County v. Thomas*, 76 id., 120, recognized the act of the 29th of January, 1857, as having legalized the vote of the county. Those cases, in connection with *Thomas v. County of Morgan*, 59 id., 479, are adjudications under which certain creditors of the Illinois River Railroad Company have received payments of their claims out of the amount due from the county upon the bonds issued in payment of its subscription. The decrees in those cases could not have been rendered except upon the ground that the subscription was not invalid by reason of the particular mode in which the question of county aid was submitted to the electors.

§ 1823. *Where a party receives property in discharge of precedent liability, the debtor having no right to prescribe its future use, the fact that he intends a particular use to be made of it does not make such use a condition precedent to the vesting of the title.*

3. It is further contended that the bonds were deposited with Elliott & Brown, to be delivered upon the condition, to which the railroad company assented, that they should be used only for the payment of work done in Morgan county; and, since no such work was done by that company, neither the latter nor its creditors can enforce liability upon the county. Undoubtedly the county authorities, at the outset, expected that the bonds would be applied only upon such work, and there is no reason to suppose that the president of the company intended any application of them inconsistent with the paper which he executed and delivered to the county prior to their issue. The county court relied upon the assurances given by that officer, and made an order, at its September term, 1857, that the bonds be delivered to the company. In conformity with that order the bonds were deposited with Elliott & Brown, the bankers of the company, and were held by them subject to its order. They, in return, received for the county, and by its direction, the certificate of stock. Subsequently, and after the bonds were issued and delivered to Elliott & Brown, the county voted as a stockholder in the election of directors, and for two years paid the interest on its bonds. During all that time who owned the bonds? We have already seen that the supreme court of the state adjudged, and, as we think, rightly, that the subscription was absolute and unconditional, and, when made, the company became entitled to the bonds, and the county to the stock. When the absolute subscription was made the claim for its payment became, as was held by that court, a part of the assets of the company, upon which creditors could rely for the payment of their debts. While, as held by the state court, Thomas might bind himself to treat the subscription as conditional, he had no authority, simply as president of the company, "to consent that it should become conditional." The present appellees, by their purchase of its mortgage bonds (about \$900,000 of them purchased in April or May, 1862, and the remainder in 1868), became creditors of the company, and nothing is disclosed by the evidence which estops them from claiming, as against the county, that the bonds given for the county's unconditional subscription constituted, from, at least, the time of their issue and delivery to Elliott & Brown, a part of the assets of the company, to which the latter's creditors could look. Upon this very point the supreme court of the state expressed similar views, and said that "where a party receives property from another in discharge of precedent liability, and the party delivering the property has no legal right to prescribe its future disposition or use, as in the present instance, the mere fact that when he delivers it he expects and intends that it shall be applied to a particular disposition or use, does not make such an application of it a condition precedent to the vesting of title."

§ 1824. *One who is not a party or a privy to a suit is not concluded by its decision.*

4. The objection that the appellees are concluded by the decree in the state court, under which the county obtained possession of its bonds, is not well taken. They were not parties to any of those suits, but it is contended that they are nevertheless bound by the adjudication upon the claim asserted therein by Studwell, Hopkins and Cobb, in their capacity as trustees in the mortgage

deed, that they were entitled to the possession of the bonds, for delivery to the new company in completion of the original contract with the county. The supreme court of the state was of opinion that the mortgage deed did not, by its terms, include these bonds; that the Peoria, Pekin & Jacksonville Railroad Company was not a reorganization of the Illinois River Railroad Company, but a new and totally independent organization; and, therefore, the new company acquired no claim to the bonds at the sale under the deed of trust. 76 Ill. But if the trustees, after obtaining the decree of foreclosure and a sale of the mortgage property for the benefit of the bondholders, were under a duty, or by virtue of their position were authorized to enforce, for the benefit of those creditors, the collection of the decree against the company for the balance of the mortgage debt, it is manifest that they did not assume, in the suit in the state court, to which they and the county were parties, to represent the bondholders. In the suit commenced by Elliott & Brown, and reported in 39 Ill., they claimed the right to hold the bonds for the benefit of the new company, and not for the bondholders, whose claims, after crediting the proceeds of the foreclosure sale, were unsatisfied to the extent of \$1,061,292.56. Besides, the state court did not, in that case, decide that Morgan county was discharged altogether, and as to everybody, from responsibility upon the bonds, because of the failure of the old company to construct the road in that county. In the original decree it directed the bonds to remain in the custody of Ayres & Co. And in the case in 59 Ill. the court held that the construction of the road by the new company was a substantial compliance with the contract between the old company and the county. There was no adjudication in the state court against the claims of the present appellees. On the contrary, the grounds upon which the claims of Vail, Ladd, Thomas, Blair and other creditors were adjudged by the supreme court of the state to be payable out of these bonds are the precise grounds upon which we sustain the claims of appellees as creditors of the old company.

5. In reference to the suit which, it is suggested, was instituted by Studwell, Hopkins and Cobb in the circuit court of the United States for the southern district of Illinois, it is sufficient to say that the present transcript contains nothing upon that subject. We are not advised, in any proper form, of the nature and object of that suit, nor who were parties to it. We cannot, therefore, say that the final decree in that case, if any was rendered, would affect the rights of parties in this litigation. There are many other questions which counsel have discussed, but we do not regard them as material in determining the essential rights of the parties. We, therefore, refrain from any discussion of them. The decree below is in line with the adjudications of the supreme court of the state, and, in our judgment, is right.

While upon the bench MR. JUSTICE SWAYNE and MR. JUSTICE STRONG participated in the decision of this case. They concur in this opinion; and it is ordered that the judgment be entered as of the date when this cause was submitted to this court.

Decree affirmed.

JUSTICES MILLER, FIELD and BRADLEY dissented.

COUNTY OF TIPTON *v.* LOCOMOTIVE WORKS.

(18 Otto, 523-540. 1890.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.— This is a writ of error from a judgment in favor of the Rogers Locomotive and Machine Works against the county of Tipton, in the state of Tennessee, for the principal and interest of fifty bonds of \$500 each, dated January 1, 1869, and payable on the 1st day of January, 1873, to the Mississippi River Railroad Company or bearer, with interest from date at the rate of six per cent. per annum. Each bond, signed by the chairman of the Tipton county court, and countersigned by its clerk, recites that it is “issued under and by virtue of section 6 of an act of the legislature of the state of Tennessee, passed February 25, 1867, amended on the 12th day of February, 1869;” also, that “a special tax is levied, by authority of law, upon all the taxable property in the county of Tipton, to meet the principal and interest of these bonds, collectible in equal instalments, running through five years, as the bonds themselves mature;” and further, that “this is one of four hundred bonds, all of the same denomination and rate of interest, issued by Tipton county in payment of a subscription of \$200,000 to the Mississippi River Railroad Company, made by the county court of said county, under the authority of the acts above recited,— these bonds, transferable by delivery and redeemable in five years at the rate of \$40,000 a year, commencing January 1, 1870.”

When the foregoing acts were passed there was in force a general statute, under the provisions of which counties, incorporated cities and towns could subscribe stock in railroads, upon certain terms and conditions, one of which was the previous approval of the legal voters of such county, city or town, at an election called and held for the ascertainment of their will. These special acts, in connection with the act of November 5, 1867, for the benefit of the Mississippi River Railroad Company, authorized the county courts of counties *on the line of that company's road* (among which was the county of Tipton) to subscribe to its capital stock, without requiring a submission of the question of subscription to a popular vote,— the majority of the justices in commission being present, and a majority of those present concurring. The validity of those acts is questioned here, as it was in the court below, upon the ground that they are unconstitutional, and therefore gave no authority to make the subscription or issue bonds in payment thereof.

The provisions of the constitution of Tennessee (that of 1834) to which, it is supposed, they are repugnant, are section 8 of article 1, and section 7 of article 11; the first of which declares that “no freeman shall be taken, or imprisoned, or dis seized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life or property, except by the judgment of his peers or the law of the land;” and the last of which provides that “the legislature shall have no power to suspend any general law for the benefit of any particular individual; nor to pass any law for the benefit of individuals, inconsistent with the general law of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law. *Provided, always,* the legislature shall have power to

grant such charters of incorporation as may be deemed expedient for the public good."

It is contended that these special acts are in violation of section 7, article 11, of the state constitution, in that they authorized a limited number of counties to subscribe to the capital stock of a particular railroad corporation, and also because they dispensed with the previous sanction of a popular vote, as required by the general statute regulating railroad subscriptions by counties, incorporated cities and towns; and further, that being partial and special laws, inconsistent with the general law upon the subject of municipal subscriptions, they do not constitute "the law of the land," within the meaning of section 8, article 1, of that constitution. The argument in behalf of the plaintiff in error is that the power, reserved to the legislature in the proviso to section 7 of article 11, "to grant such charters of incorporation as may be deemed expedient for the public good," is limited, in its exercise, by the prohibitions contained in the body of the same section; and that a charter conferring upon a particular railroad company, or upon particular municipal corporations, special privileges and immunities, not given by the general law, was inconsistent with those prohibitions, and, besides, was not a "law of the land" within the meaning of section 8 of article 1.

These propositions have received at our hands that consideration which their importance confessedly demands; and, if we err in the conclusions reached, it will not be the fault of able counsel, who, both in oral and printed arguments, have pressed upon our attention every suggestion which seems to have any bearing upon the question presented for determination. The earnestness with which they have asserted their positions to be sustained by adjudications of the supreme court of the state has made it necessary for us to examine, with great care, a very large number of the reported decisions of that learned tribunal. If, when the acts in question were passed, the general assembly was without power, under the constitution, as interpreted by the highest court of Tennessee, to enact a special law authorizing a designated number of counties, without a previous vote of the people, to make subscriptions of stock to a particular railroad running through such counties, our duty is to accept that construction of the fundamental law of the state. But if there was no such contemporaneous or fixed construction, this court, as was the court of original jurisdiction, is under a duty imposed by the constitution of the United States, from the performance of which it is not at liberty to shrink, to determine, for itself, what were the legal rights of parties at the time the bonds in suit were issued. It would extend this opinion to an improper length should we extract from the numerous decisions of the state court, cited by counsel, so much of their language as seems pertinent to the questions before us. We must, therefore, content ourselves with stating only the general doctrines to be deduced from the adjudged cases, some of which are cited in a note to this opinion.

§ 1825. *Principles established by the supreme court of Tennessee, controlling questions of general or special laws, the creation of corporations, and the granting of special franchises.*

Prior to the case of *Wallace v. Tipton County* (to which we will hereafter refer more particularly), the following rules or principles seem to have been established by repeated adjudications in the supreme court of the state, viz.: That a law, which did not alike embrace and equally affect all persons in general, or all persons who exist, or may come into the like state and circumstances, was a partial and special law, and, therefore, not "the law of the land," within the

meaning of the constitution of 1796, from which was taken section 8 of article 1 of the constitution of 1834; that section 7 of article 11, prohibiting the suspension of a general law for the benefit of any particular individual, or the passage of any law for the benefit of individuals, inconsistent with the general laws of the land, or the passage of any law granting to any individual or individuals, rights, privileges, immunities or exceptions other than such as may by the same law be extended to any member of the community who may be able to bring himself within the provisions of such law, is a statement, in condensed form, of the construction which the supreme court of the state had in several decisions placed upon the phrase, "the law of the land," as used in both the constitutions of 1796 and of 1834; that, nevertheless, the authority of the legislature to create corporations with special rights and privileges existed as an incident of sovereignty; that a law creating a corporation and granting a franchise was more in the nature of a contract than a "law of the land," in the sense of the constitution; and, upon that ground, the right given to a bank by its charter, granted in 1832, to take a greater rate of interest than was allowed by a general statute to individual citizens, was held not to be obnoxious to the constitution upon the ground that it was not a general law, or "the law of the land;" that the proviso in section 7 of article 11 of the constitution of 1834 was inserted "for the purpose of enabling the legislature thereby to grant exclusive privileges, which, but for the proviso, would be prohibited by the body of the section;" that the power to create corporations was not curtailed or restricted by the general prohibitions in that section, but only by the positive provisions to be found in other parts of the constitution; that prior to the adoption of the constitution of 1834 the supreme court of the state suggested doubts as to whether the taxing power, being legislative in its nature, could be constitutionally conferred upon the subordinate municipal corporations or civil divisions of the state; and that, for the purpose of removing those doubts, the convention which framed that constitution incorporated into it section 29 of article 2, which declares that "the general assembly shall have power to authorize the *several* counties and incorporated towns in the state to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation;" that the construction of a railroad to or through a county or incorporated town is, in the one case, a county, and in the other a corporate, purpose, for which the legislature may invest such county or town respectively with the power to impose taxes; that under section 29 of article 2 the legislature could, by special act, confer upon the mayor and aldermen of an incorporated town, directly and exclusively (and, consequently, upon the county court of a county), the power to subscribe railroad stock, without first, or at all, submitting the question of subscription to a vote of the inhabitants of such town.

§ 1826. — *authorities reviewed.*

Such were, beyond question, as we think, the established principles of the constitution as announced by the highest judicial tribunal of the state, up to the decision in *Wallace v. Tipton County*, to which reference has already been made. These doctrines, it must be conceded, would sustain the statutes of 1867 and 1869 against the objections urged. But it is contended that the decision in that case is a direct authority against the constitutionality of those acts, and should control our judgment. That case deserves special examination. It was a suit commenced in 1873, in an inferior state court of Tennessee, by certain

tax-payers of Tipton county against the county court of that county, the Paducah & Memphis Railroad Company (a corporation lawfully created by the consolidation, in 1872, of the Mississippi River Railroad Company, with the Paducah & Gulf Railroad Company, a Kentucky corporation), and the local collectors of Tipton county engaged in the collection of taxes which had been levied to meet the bonds constituting the issue of \$200,000 to the Mississippi River Railroad Company, under the aforesaid acts of 1867 and 1869. The object of that suit was to enjoin the collection of such taxes, upon the ground that those acts were unconstitutional and void. In May, 1874, certain citizens of other states, holders of a portion of the Tipton county bonds, were, upon their own application, made parties defendant in that suit. They thereupon filed a petition for its removal to the circuit court of the United States, and, as to them, the opinion of the court states, the suit was removed. The railroad company, by an amended answer, disclaimed all interest in the suit, and informed the court that it neither held nor owned any of the bonds, but that they were held and owned by others who had paid value therefor. Thenceforward it was a suit, practically if not exclusively, between parties who had no interest in enforcing the collection of the county's bonds. It was finally determined without the presence of any of the holders of the bonds. Waiving any question as to whether, under the act of congress, the whole suit was not removed to the federal court, it is sufficient to say that, in accordance with the prayer of the tax-payers, a decree was entered, which was, by the supreme court of the state, in all respects, affirmed. Although the case was determined in the supreme court, at its September term, 1875, it has not, that we can ascertain, been published in its reported decisions, and we are not, therefore, advised of the precise grounds upon which the acts of 1867 and 1869 were assailed in argument, as being in conflict with the constitution. But the opinion of the court discloses the fact that those acts were held to be repugnant to section 8 of article 1, and section 7 of article 11, of the state constitution, upon the ground that, while the general law of 1852, regulating railroad subscriptions by counties, towns and cities, required a popular vote as a condition precedent to any authority to make subscriptions, the special acts of 1867 and 1869 permitted a few counties, upon the line of the Mississippi River Railroad, by their respective county courts, and without a submission of the question to the people, to subscribe to that company's stock. No comment whatever is made in the original opinion, and very little in the opinion on the rehearing, upon the scope or effect of the proviso in section 7 of article 11, giving or reserving to the legislature the power to grant such charters of incorporation as it deemed expedient for the public good. But it is to be assumed that the court did not regard that proviso as materially affecting the conclusion reached. If there had been no decision of the state court, subsequent to that of *Wallace v. Tipton County*, on the subject of municipal subscriptions, under special statutes, we should feel greatly embarrassed by the circumstance that the judgment of the circuit court could not, upon this branch of the case, be sustained, except by disregarding that decision.

§ 1827. *Section 7 of article 11 of the Tennessee constitution of 1834 does not impose upon the legislature, as to charters of corporations, the prohibitions in that section expressed.*

But all difficulty, we think, is removed by the decision of the state court in the more recent case of the *Knoxville & Ohio R. Co. v. Hicks*, determined in 1877. Unless we mistake, altogether, the import of that decision, it is incon-

sistent with the doctrines of *Wallace v. Tipton County*, and, upon the point now before us, practically overrules the latter case. In *Knoxville & Ohio R. Co. v. Hicks*, it was a question whether an act passed in 1852, exempting the capital stock, dividends, roads and fixtures of the Knoxville & Kentucky Railroad Company from taxation, until the stock paid a dividend equal to the legal rate of interest, was in conflict with the constitution of 1834. That constitution declared (sec. 28, art. 2) "that all lands, liable to taxation, held by deed, grant or entry, town lots, bank stock, etc., and such other property as the legislature may from time to time deem expedient, shall be taxable." In view of that constitutional injunction, the case was a very strong one for the application of the prohibitions, against special and partial laws, contained in section 7 of article 11, if such prohibitions had any application whatever to charters of incorporation granted by the legislature. But the court, after stating that the convention of 1834 comprised among its delegates some of the ablest lawyers the state ever had, who were familiar with the principles of the Dartmouth college case, and knew that the legislature, under the previous constitution, had, without question, exercised the power of granting charters, with total or partial exemptions, said: "With these facts prominently before the convention, if it was their purpose to restrict the power of the legislature, one should expect to find such restriction expressed in unequivocal language. But the only direct provision in regard to the power of the legislature in respect to charters of incorporation is in the proviso to section 7 of article 11, to the effect that the restriction upon the power of the legislature to grant special privileges, immunities and exemptions was not to be construed to affect the power of the legislature to grant such charters of incorporation as they might deem expedient for the public good, thereby leaving the power as it previously existed. See *Hope v. Deaderick*, 8 Humph., 1. If it had been the purpose of the convention to restrict the power of the legislature in this particular, this would certainly have been the appropriate place to insert the restriction; but, so far from doing so, we find only the proviso above referred to, which was intended to exclude the idea that the first clause of the section against the granting of special privileges, immunities or exemptions was intended to limit the power of the legislature in regard to granting charters of incorporation. From this the conclusion seems necessarily to follow that the legislature was still left the power to pass laws creating bodies corporate, with all the rights, privileges, immunities and exemptions which it was usual to vest in such fictitious persons under the general principles previously recognized; and, as we have seen, the power in question was previously recognized by the general law and the authorities of the state. We do not say rights, privileges or immunities might be granted inconsistent with other positive restrictions of the constitution." The court then proceeds to consider the language of section 28 of article 2, already cited, in reference to taxation, and says: "On the other hand, this section may well be construed as having no reference to the property of corporations to be created, and as leaving the power of the legislature, in this regard, as it stood before. This is the more natural construction when we take this section in connection with the clause before referred to, and find that no express restriction is placed upon the power conceded to have previously existed in the legislature, in respect to corporations, in that clause which refers directly to the power to grant such charters."

The chief significance of the decision in the last case lies in the explicit declaration by the court that the power expressly granted to the legislature in

the proviso to the seventh section of article 11 to create corporations with such charters as, in its judgment, were expedient for the public good was not limited or restrained in its operation by the prohibitions in the same section against special rights, privileges, immunities or exemptions; in other words, that the legislature, as to corporations, could grant special rights and privileges which, but for the proviso, might be deemed obnoxious to the prohibitory clauses of that section. And in that view we concur.

The case of *McKinney v. Overton Hotel Co.*, 12 Heisk. (Tenn.), 104, cited by counsel for plaintiff in error, is not adverse to this conclusion. The main question there was as to the constitutionality of an act passed in 1860, authorizing the hotel company to issue mortgage bonds bearing a greater rate of interest than was allowed by the general law of the state. It was held that section 7 of article 11, giving power to grant such charters of incorporation as the legislature deemed expedient for the public good, must be construed in connection with section 6 of the same article, which imposed upon the legislature the duty of fixing the rate of interest, and declared that the "rate so established shall be equal and uniform throughout the state." The decision was that the legislature, in creating corporations under section 7, could not grant to them "powers or rights expressly forbidden by any other clause of the constitution." Consequently, the rate of interest fixed by the legislature was applicable to corporations as well as to individuals. The language of the court, in connection with prior decisions, upon the general subject of corporations, justifies the conclusion that the act of 1860 would not have been declared void had not the constitution of 1834 expressly required the rate of interest to be equal and uniform throughout the state.

§ 1828. *The Tennessee acts of 1867 and 1869 are not unconstitutional in that they confer on certain counties the right to make, and on a particular corporation the right to receive, subscriptions of stock.*

Looking, then, as well at the language of the constitution as at the course of decision in the supreme court of Tennessee up to the time the acts of 1867 and 1869 were passed, and giving full effect to its latest utterance, to which our attention has been called, and remembering, also, that the power given to a municipal corporation to subscribe to the stock of a railroad company may be, also, a right and privilege of that company (*County of Scotland v. Thomas*, 94 U. S., 682; §§ 1210-14, *supra*; *Wilson v. Salamanca*, 99 id., 499; *Empire v. Darlington*, 101 id., 87, 91; §§ 1218-20, *supra*), our conclusion is, that those acts were not repugnant to the constitutions of the state, by reason of the authority they confer on a limited number of counties to make, and on a particular railroad corporation to receive, a subscription of stock, nor because they dispensed with the previous assent of the people of such counties expressed at a popular election.

STATEMENT OF FACTS.—It remains to inquire whether, in view of the evidence, the circuit court committed any error of law, either in giving or refusing instructions to the jury. Certain facts should be stated as explanatory of the instructions which were given to the jury. Upon the trial evidence was introduced in behalf of the county tending to establish "fraud, moral coercion, intimidation and bribery in the procurement and issuance of the bonds in suit in this case upon the part of the Mississippi River Railway Company," and that such corrupt practices were not known to the county court until February, 1875. On the 30th of September, 1871, at a meeting of the board of directors of the railroad company, a resolution was offered by one who, at the time, was

a justice of the peace of Tipton county, which, after reciting the failure of the county to provide means for the payment of its bonds and coupons, designated E. Norton, as agent of the company, to make the following proposition to the county, namely: "That this company will grant an extension of time for the payment of said bonds and interest, so that the said payments shall be extended to the period of ten years from the date of the bonds, in ten annual instalments, instead of the time they now have to run; this extension to apply to all bonds which this company owns or controls. But this proposition should be made on condition that the county court of Tipton county shall immediately levy a tax, and proceed to its collection, for the amount now due under this offer, and that they shall each year levy, collect and promptly pay over the amount to fall due each year, as the same falls due, during the whole period of this proposed extension; and, in case of a failure to levy, collect or promptly pay over said annual amount, then the remaining bonds to become due, according to their original terms."

This proposition was presented to the county court by Norton at its October term, 1871. Several of the justices were then present who had attended the July meeting of 1870, on which latter occasion the court, by resolutions, entered upon its records, declared that the bonds had been issued without lawful authority, and were not binding upon the county. Across the record of those resolutions was, however, subsequently written the word "*void*," but by whom, or when, so written, does not appear. In addition to this evidence, the substantial facts upon which the case went to the jury are indicated in the following charge given by the court at the request of the plaintiffs: "That if you credit the testimony, and from it believe that Mr. Norton, as president of the Paducah & Gulf Railroad Company, in October, 1871, appeared before a duly organized county court of Tipton county, and in open court fully explained to it that a consolidation was contemplated between his company and the Mississippi River Railroad Company, and that such consolidation depended upon the fact whether the bonds in controversy were to be paid by the county, and whether it would proceed to levy a tax for the same, and then and there presented the proposition of the said Mississippi company recited in the resolution of that date, passed by the said county court, and that said Paducah company was then solvent, and owned and operated a railroad from the town of Paducah, in Kentucky, to Troy, in Tennessee, and that no portion of the railroad in Tipton county was then completed, and that but a few thousand dollars had been expended in work thereon, and that the purpose of said consolidation was to complete said road in Tipton county, and to connect it with the line of said Paducah & Gulf road, and that said road has since been completed from the town of Covington, in said county, to the city of Memphis, being a distance of thirty-seven miles, twenty-one whereof are in said Tipton county, and that said Norton communicated to his company the action of said county court at its said October session of 1871, and that in consequence thereof, and in reliance thereupon, said consolidation took place, whereby said Paducah & Memphis Railroad was created, and that said latter company thereafter completed the road from Covington to Memphis, and has regularly run and operated the same from the 25th of June, 1873, to this date, and that the plaintiffs in this action, in the ordinary course of trade, and without any notice of ill faith in the procurement of said bonds, gave full value therefor to the said Paducah & Memphis Railroad Company, by furnishing engines to be employed on said road, and that said Paducah & Memphis Railroad Company received said bonds without any no-

tice whatsoever of any fraud in their issuance,— then the fact that one or more of the justices of said county court, who originally voted for said subscription of stock were induced so to do by corrupt means, and all other proofs or matters of fraud, constitute no defense to this action.” To the giving of that charge the county, by its attorney, excepted.

At the request of the county the court charged the jury that “if the railway procured the issuance of the bonds by bribery, fraud and corruption, that they would be void in the hands of the railway company, just as if they had not been issued; that all persons taking them from the company with notice, or under circumstances to put the vendor on inquiry, would stand in no better plight than the railway company would;” and that “if it appears that there was actual fraud in procuring the bonds, then the plaintiffs would be bound to show that they were *bona fide* holders.”

The defendant requested the court to further charge the jury as follows: “That if the plaintiff took them (the bonds) after due, they would stand like the railway company’s;” which request was granted, with the modification that, “unless the jury believed as stated in the charge given at the request of the plaintiffs.” “That a party may waive the fraud by subsequent acts, but in order to make this doctrine apply, it must appear that the party waiving was fully apprised of the fraud which he waives. He must know of the fraud, and, knowing, waive it;” which was given with this modification: “Although this is generally true, it has no application to this case if the jury believe as in the charge stated in favor of the plaintiffs. If one citizen about to buy a demand against another applies to him in good faith to ascertain whether the demand will be paid, and is informed that it will be, and buys in reliance upon such information, the party admitting his obligation will not be permitted to defend, although the admission was made in ignorance of a valid defense.” “That if before a contract which was void, which is no contract, had become a subsisting and valid contract, a constitutional provision intervenes, which took away all power from one of the contracting parties to enter into the contract, then there could be no contract by ratification, because the party would be under disability of contracting either expressly or by ratification. Therefore, if the contract was void in its making, for fraud, and the facts of the fraud were not known, and known waived, before May, 1870, when the new constitution was adopted, then there could be no contract by ratification or otherwise, as all power to make such a contract as this was then, by the mandate of the constitution, taken away from the county court.” That instruction was also granted, with this modification: “That although the general reasoning of this request is correct in legal principle, still, if the jury believe as stated in the charge for the plaintiffs, the defendant will be estopped to set up fraud as a defense, after having induced their purchase by answering to an inquiry of whether they would be paid, that they would be. And if the jury believe that such were the facts in this case, then fraud will not constitute a defense.” “That if the influences which procured the contract were afterwards successfully exerted in concealing the fraud and defeating its discovery and efforts to resist the contract, then there can be no such thing as a waiver; that communities may waive fraud, but more indulgence is extended to them than to individuals; that accepting the road and using it, and paying a part of the consideration in ignorance of the fraud by which a vote was produced, will not be a waiver.” This request was given, with the same modifications, however, as made in reference to the last two preceding requests by the defendant.

§ 1829. *In Tennessee every county is a corporation, and the justices in county court assembled are its representatives and authorized to act for it.*

We are unable to perceive that any error of law was committed to the prejudice of the county. The case went to the jury under circumstances quite as favorable to it as the evidence justified. If the facts disclosed in the instructions were believed by the jury to be established by the testimony, its duty was to return a verdict for the plaintiffs. The charge of fraud, bribery, moral coercion and intimidation applied, it must be observed, to the Mississippi Railroad Company and to the justices composing the county court at the time the original subscription was made, and the bonds issued and delivered. When the court, subsequently, received the written proposition from the railroad company, for an extension of time upon certain conditions, it was distinctly informed that its action would affect and control large business operations in which others were concerned who had no connection with the original subscription, or with the issue of the bonds. The extension of time was accepted upon the terms and conditions set out in the proposition of the company, and without, so far as the record discloses, any dissent among the twenty-two justices present; and as evidence of its purpose to adhere to the new agreement and provide for the payment of the bonds and coupons, the county court ordered the levy of a tax upon all of the taxable property of the county. We have already seen that at the meeting of the county court held in July, 1870, resolutions were entered of record declaring that the bonds had been issued without lawful authority, and directing such steps to be taken as were necessary to protect the people against the proposed burden. With this record before the justices who composed the court in October, 1871, the proposition for an extension of time was accepted, and an assurance of record was thereby given, that the county would meet the bonds according to the new terms. The force of this action of the court was increased in view of section 402 of the Code of Tennessee, adopted in 1858, declaring that "every county is a corporation, and the justices in the court assembled are the representatives of the county and authorized to act for it."

Whether upon the faith of these proceedings in the county court the Paducah & Gulf Railroad Company consolidated with the Mississippi River Railroad Company was fairly submitted for the determination of the jury. The new company having become in virtue of that consolidation the owner of the assets of the constituent companies, including the bonds in suit, proceeded with the work of construction. There was evidence tending to show that at the time of the consolidation only a few thousand dollars had been expended in building the Mississippi River railroad in Tipton county; that after the consolidation about half a million of dollars had been expended in Tipton county by the Paducah & Memphis Railroad Company; that the road from Memphis to Covington, the county seat of Tipton, a distance of thirty-seven miles (of which twenty-one miles were in Tipton county), had been built and equipped, and trains running thereon regularly ever since June 25, 1873; that the road had been graded, bridged and made ready for the cross-ties and rails from Covington to one and a quarter miles north of Ripley, in Lauderdale county; that since the consolidation the road had been completed and equipped from Troy to Trumber, a distance of fifteen miles, and trains run regularly between those places; that the road had been graded, bridged and cross-tied for the rails from Trumber to Dyersburg, and the right of way secured on about twenty-one miles of the road between Dyersburg and Ripley. This is not all. The stock which Tipton county originally received in payment of its subscription was voted by its official

representative in favor of the consolidation, and the county received in place of its stock in the Mississippi River Railroad Company, stock for like amount in the new company. Besides, the county voted the new stock in favor of the execution of a mortgage for \$1,951,000, which was placed upon the property of the company which was formed by the consolidation.

The acceptance by the county court of the terms and conditions set forth in the proposition of September 30, 1871, and its participation, under the circumstances adverted to by its authorized representatives in the proceedings which resulted in the consolidation, whereby the situation of the Paducah & Gulf Railroad Company became materially altered, was, in effect, a representation to those interested in that company that the county would not withhold payment of its bonds or coupons, but would meet them according to the terms of the new agreement. By its conduct it induced those interested in the Paducah & Gulf Railroad Company — then solvent, out of debt, and owning and operating a complete railroad from Paducah, Ky., to Troy, Tenn., worth \$1,000,000 — to believe that the bonds would constitute a part of the available assets of the new company. The defendants in error received a portion of these bonds as early as March 15, 1873. The integrity of the business transaction by which they acquired them is not questioned by any evidence recited in the record. Nor does it appear that any evidence was offered that impugned in any degree the good faith, in respect of these matters, of those who controlled the Paducah & Gulf Railroad Company, or of those who controlled the Paducah & Memphis Railroad Company subsequent to the consolidation of 1872. The defendants in error obtained the bonds in suit from the Paducah & Memphis Railroad Company, paying value therefor, and, so far as the record discloses, without any reason to suspect their payment would be resisted by the county. In view, then, of the conduct throughout all these proceedings of those who represented the county of Tipton, it is estopped, by every consideration of law, justice and fair dealing, from disputing its liability to defendants in error upon the bonds in suit. The discovery by the county, in February, 1875, of fraud and corrupt practices upon the part of the Mississippi River Railroad Company, in procuring the issue of the bonds in 1869, cannot be permitted to affect the rights of those who had in good faith acquired the bonds in reliance upon the explicit assurance which the county, in effect, gave in October, 1871, that it would provide for the payment of the bonds and their coupons. The defendants in error having obtained the bonds under the circumstances which have been detailed, may rightfully invoke in support of their claims any facts which would have estopped the county from disputing the claim of the Paducah & Memphis Railroad Company, had the latter company never parted with the bonds. There are other grounds arising upon the evidence upon which the judgment below might, perhaps, be sustained, and there are other questions suggested in argument upon which we deem it unnecessary to comment.

MR. JUSTICE SWAYNE and MR. JUSTICE STRONG participated in the decision of this case in conference before their retirement, and we are authorized to say that they concur in this opinion and judgment.

Judgment affirmed.

RAILROAD COMPANIES v. SCHUTTE.

(13 Otto, 118-145. 1880.)

APPEALS from U. S. Circuit Court, Northern District of Florida.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—These cases, although separate in form, are so connected in their facts that they may properly be considered and decided together. The facts are these:

The Florida, Atlantic & Gulf Central Railroad Company, incorporated by the general assembly of Florida in 1853, built a railroad from Jacksonville to Lake City. The Pensacola & Georgia Railroad Company, also incorporated during the same year, built a road from Lake City through Tallahassee to Quincy in the direction of Mobile, with a branch to Monticello; and the Tallahassee Railroad Company, incorporated at a somewhat earlier date, built another road from Tallahassee to St. Marks. Each of these companies became indebted to the state of Florida under the provisions of the internal improvement law, and, as a consequence, the road of the Florida, Atlantic & Gulf Central Company was sold on the 4th of March, 1868, by the trustees of the internal improvement fund, under the authority of law, to William E. Jackson and his associates, that of the Pensacola & Georgia Company, on the 6th of February, 1869, to F. Dibble and his associates, and that of the Tallahassee Company on the same day and to the same parties.

The road from Jacksonville to Lake City was paid for in full, and a conveyance in due form executed to the purchasers, who, on the 29th of July, 1868, were, under the name of the Florida Central Railroad Company, incorporated by the general assembly of the state, with all the powers and franchises of the Florida, Atlantic & Gulf Central Company. They were also authorized to fix the amount of the capital stock of the company, and the number of shares into which it should be divided. In this way the capital was put at \$550,000, with five thousand five hundred shares. Of these shares George W. Swepson afterwards became the purchaser of four thousand three hundred and seventy, which he paid for with money in his hands belonging to the Western Division of the Western North Carolina Railroad Company, a North Carolina corporation, which he fraudulently diverted from the use to which it had been appropriated by that company.

Swepson also purchased, with the funds of the same North Carolina corporation, bonds of the Pensacola & Georgia and the Tallahassee companies to the amount of \$960,000, or thereabouts, and on the 24th of April, 1869, he entered into a contract with the purchasers of the roads of those companies by which he was to deliver them these bonds to use in making their payments of purchase money; and they, as soon as they could get the necessary authority from the legislature, were to raise money by a mortgage on the property and pay him what he had advanced to buy the bonds, with certain commissions and attorney's fees, and \$100,000 in addition. The contract contemplated an incorporation of the purchasers after the manner of the Florida Central Company, with a distribution of one-third of the stock to Swepson. As security for the payment of the sum agreed to be paid, the bonds issued under the contemplated mortgage were to be disposed of in a particular way, and Swepson was to be given certain privileges in the election of directors. Under this arrangement Swepson handed over \$960,300 of Pensacola & Georgia and Tallahassee bonds to the purchasers; but after these bonds had been applied in the

way contemplated there still remained a balance of the purchase-money, amounting to \$472,065, to be paid. Deeds conveying the property to Dibble for himself and his associates were executed in due form, but their delivery was withheld on account of this default in payment. Dibble and his associates being unable to raise the money, Swepson, by putting off on the trustees of the improvement fund a worthless check that was never paid for the amount that was due, got possession of the deeds and had them duly recorded April 22, 1869. On the same day Dibble, for himself and his associates, party of the first part, executed a paper which on its face purported to convey the roads to Swepson, "said party of the second part, in trust for the express purpose of enabling said party of the second part — which he hereby agrees and binds himself to do — to convey the same to that incorporation, consisting or to consist as incorporators of said F. Dibble and his associates, as soon as said Dibble and his associates shall have granted to them such a similar relief as the legislature of the said state of Florida granted to William E. Jackson and his associates by act for relief of William E. Jackson and his associates, approved July 29, 1868, and also for the further purpose of securing said party of the second part in all advances made as specified and agreed upon in the said agreement between these parties, executed and dated March 26, 1869, and the advancement, as aforesaid, of said sum of \$472,065, until such time as said relief shall have been granted and said party of the second part shall have conveyed said property to said incorporation, as hereinbefore prescribed." This instrument was never acknowledged or recorded.

On the 24th of June, 1869, the proposed act of incorporation was obtained, by which Dibble and his associates, as purchasers of the roads, were made a body corporate under the name of the Tallahassee Railroad Company, to hold, operate and enjoy the property purchased, with all the powers, privileges and franchises of the Pensacola & Georgia and the original Tallahassee companies, and with power to issue bonds secured by mortgage: "*Provided*, that any deed of trust, mortgage, or conveyance, bond or bonds, or security which may have been executed, made, created or contracted for, as a lien on said railroad or otherwise, by said Franklin Dibble, in behalf of himself and his associates, prior to the passage of this act, shall be valid and effectual to all intents, either at law or in equity, as a lien or a mortgage, or security on said railroad, as if the same had been made by virtue of this act, and shall in nowise be affected by any provisions thereof." Sec. 6.

The new Tallahassee company was duly organized under this charter, and took possession of and operated the roads. Afterwards, to remove all doubts as to the title of the corporation to the property of the old companies, Dibble, for himself and his associates, at some time during the year 1870, executed a paper which purported to be a conveyance, in due form, for that purpose, by which he professed to relinquish and quitclaim to the corporation all his rights. This paper was not acknowledged, and was not in fact a legal conveyance of the property. No conveyance in form was ever executed by Swepson, neither has he at any time, so far as appears, attempted to exercise any rights under the conveyance or transfer which was made to him.

On the 24th of June, 1869, an act was passed by the general assembly of Florida to "perfect the public works of the state." By this act, "in order to secure the speedy completion, equipment and maintenance of a connection by railroad between Jacksonville, on the Atlantic coast, and Pensacola, on the gulf coast, and Mobile, in Alabama," George W. Swepson, Milton S. Littlefield,

J. P. Sanderson, J. L. Re Qua, William H. Hunt, their associates, successors and assigns, were constituted a body politic and corporate under the name of the Jacksonville, Pensacola & Mobile Railroad Company. This company was authorized to build a road from Quincy to the Alabama state line, and there connect with any road running to Mobile, and to consolidate with the several companies owning roads from Quincy to Jacksonville, from Tallahassee to St. Marks, and the branch to Monticello. The original charter was somewhat amended on the 28th of January, 1870, after which sections 9, 10 and 11 of the original charter, and section 4 of the amended charter, were as follows:

"SEC. 9. In order to aid the said Jacksonville, Pensacola & Mobile Railroad Company to complete, equip and maintain its road, and to aid in perfecting one of the public works embraced in the internal improvements of the state, the governor of the state is hereby directed to deliver to the president of the said company coupon bonds of the state to an amount equal to \$16,000 per mile for the whole line of road and length of railroad owned by or belonging to said Jacksonville, Pensacola & Mobile Railroad Company, in exchange for first mortgage bonds of said railroad company, of the denomination of \$1,000, when the president thereof shall certify upon his oath that the road or parts of road for which he asks for an exchange of bonds is completed, and is in good running order. The said bonds shall be of the denomination of \$1,000, signed by the governor, countersigned by the treasurer, sealed with the great seal of the state; shall bear eight per cent. interest, payable semi-annually, and shall be payable to bearer. They shall be dated on the 1st day of January, A. D. 1870, and shall be due thirty years thereafter, and principal and interest shall be payable at such place in the city of New York as the governor shall designate. The coupons for interest shall be payable to bearer, and shall be authenticated by the written or engraved signature of the treasurer. *Provided, however,* that when the Jacksonville, Pensacola & Mobile Railroad Company shall or may determine to pay the interest in gold for or upon their bonds or the bonds designated in the tenth section of an act entitled 'An act to perfect the public works of the state,' approved June 24, 1869, upon giving notice to the governor of such intention, then the state bonds aforesaid and the coupons for interest on said bonds shall be payable in gold, notice of which shall be given by the governor in some paper published in the city of New York, and at the capital of this state, to be designated by the governor.

"SEC. 10. In exchange for the bonds of the state above described the president of the company shall deliver to the governor of the state coupon bonds of the company, bearing a like rate of interest, payable to the state of Florida, signed by the president, sealed with the corporate seal; coupons payable to state of Florida, authenticated by the written or engraved signature of the president. The bonds shall be of such denominations, not less than \$1,000, as the said company may choose, and principal and interest shall be payable at the same time and place as the aforesaid state bonds.

"SEC. 11. To secure the principal and interest of the said company bonds, the state of Florida shall, by this act, have a statutory lien, which shall be valid to all intents and purposes as a first mortgage duly registered, on the part of the road for which the state bonds were delivered, and on all the property of the company, real and personal, appertaining to that part of the line which it may now have or may hereafter acquire, together with all the rights, franchises and powers thereto belonging, and in case of a failure of the company to pay either principal or interest of its bonds, or any part thereof, for

twelve months after the same shall become due, it shall be lawful for the governor to enter upon and take possession of said property and franchises, and sell the same at public auction, after having first given ninety days' notice by public advertisement in at least one newspaper published in each of the following places: The city of New York, in the state of New York; the city of Savannah, in the state of Georgia, and the city of Tallahassee, in the state of Florida, for lawful money of the United States, and for nothing else, except that the state, for its own protection, may become the purchaser at said sale, and may pay on said purchase any evidences of indebtedness the state may hold against said roads, which purchase money or said evidences of indebtedness shall be paid on the day of sale into the treasury of this state, or within ten days thereafter; and all moneys arising from said sale and paid into the treasury of this state, as heretofore prescribed, shall be promptly and exclusively applied to the payment and satisfaction of the bonds issued by the state of Florida, under this act; and in case the holders of said bonds do not present them for redemption within ninety days after said sale, the treasurer shall invest the same, or any part thereof which may be remaining in his hands, in the securities of the United States, to be held by the state of Florida, as trustee for the bondholders, until said bondholders shall demand the same, upon which demand the treasurer shall immediately turn over or pay said securities to the bondholders. The purchaser or purchasers of said road shall be by said sale possessed of all the rights, privileges and franchises of said defaulting company, together with the franchise of use and being a body politic, and the governor shall, upon the payment of said purchase money into the treasury of this state, as above provided, immediately cause the purchaser or purchasers of said road at said sale to be placed in the actual possession, use and enjoyment thereof, and cause all the books, papers and real and personal property of said company, of every description, together with its franchise of use and being a body politic and corporate, to be turned over to said purchaser or purchasers, and the purchaser or purchasers of said road shall be by said sale possessed of all the rights, privileges and franchises of said defaulting company, together with the franchise of use and being a body politic and corporate, and may use any new corporate name they see fit, and make and use a new seal upon signifying their action in writing to the governor, and thereafter may exercise all the rights of a body corporate and privileges thereof, and of said defaulting company, under said new name, for the term of thirty-five years, to date from the time of purchase as aforesaid. That any such sale shall be ratified by the legislature before the same shall become effective."

"SEC. 4. That the governor shall, for the purpose of further aiding said Jacksonville, Pensacola & Mobile Railroad Company in the speedy construction of its road, deliver to the president of said company coupon bonds of this state, of the same character as those above described in this act, to the amount of \$16,000 per mile, upon receiving for and from the president of said company first mortgage bonds of like amount on any part or portion of the road between Quincy and Jacksonville: *Provided, however,* the state bonds under this section shall not be exchanged for first mortgage bonds for a greater length than one hundred miles of any part of railroad between Quincy and Jacksonville: *Provided,* the said railroad company or companies shall not issue first mortgage bonds to a greater amount than \$16,000 per mile."

Under the authority of this act the new Tallahassee Company was consolidated with the Jacksonville, Pensacola & Mobile Company, May 25, 1870, by

the name and having the corporate powers of the Jacksonville, Pensacola & Mobile Railroad Company, with a capital of \$6,000,000, divided into sixty thousand shares. Previous to this time M. S. Littlefield had succeeded to all the rights of Swepson in these several transactions, and in the distribution of stock in the consolidated company he was given thirty-eight thousand four hundred and thirty-three shares of the agreed capital. He represented nine thousand nine hundred and thirty out of the ten thousand shares at the meeting of the stockholders of the Jacksonville, Pensacola & Mobile Company which voted for the consolidation, and seventeen thousand nine hundred and ninety-eight of the thirty thousand shares of the Tallahassee Company voting to the same effect. The Florida Central Company never entered into the consolidation, and the consolidated company, therefore, only became the owner of the roads west of Lake City. After the consolidation was perfected the Jacksonville, Pensacola & Mobile Company executed its bonds, payable to the state, for \$3,000,000, as allowed by section 10 of its charter, and received in exchange bonds of the state for the same amount, such as were provided for in section 9, and in the following form:

“UNITED STATES OF AMERICA.

“No. —.]

State of Florida.

[No. —.

“It is hereby certified that the state of Florida justly owes to ———, or bearer, one thousand dollars, redeemable in gold coin of the United States, at the Florida state agency, in the city of New York, on the 1st day of January, 1900, with interest thereon at the rate of eight per centum per annum, payable half-yearly at the said Florida state agency, in gold, on the 1st days of July and January in each year, from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed.

“Tallahassee, January 1, 1870.

HARRISON REED, Governor.

“[FLORIDA GREAT SEAL.]

S. B. CONNER, Treasurer.

“Issued in accordance with act of the legislature of Florida, approved January 28, 1870.”

Form of Coupon.

“The state of Florida will pay to bearer forty dollars in gold, at the state agency, in the city of New York, for interest due ———, on bond for \$1,000.

“No. —.

S. B. CONNER, Treasurer.”

Indorsement.

“STATE OF FLORIDA.

“No. —.]

THIRTY-YEAR EIGHT PER CENT. BOND.

[\$1,000.

“Payable January 1, 1900. Interest payable 1st July and January, in gold, at Florida state agency, in the city of New York.

“This bond is one of a series issued in aid of the Jacksonville, Pensacola & Mobile Railroad Company, to the extent of \$16,000 per mile upon completed road. The state of Florida holding the first mortgage bonds of said railroad company for a like amount, as further security to the holder hereof.

“HARRISON REED, Governor of Florida.”

These bonds of the state, thus indorsed, were put in the hands of Littlefield, the president of the company, to be disposed of, and he, under an arrangement previously made with S. W. Hopkins & Co., of New York and London, handed the bonds over to them for sale. Some time in the spring of 1870 Littlefield, who was at the time president of the Jacksonville, Pensacola & Mobile Com-

pany, and a director in the Florida Central, caused a million of dollars of the bonds of the last-named company to be printed in New York, and signed there by one H. H. Thompson as treasurer of the company. These bonds were made payable to the state, and purported to be executed under the authority of the act of January 28, 1870, to amend the act of June 24, 1869, "to perfect the public works of the state," and given in exchange for bonds of the state to aid the Jacksonville, Pensacola & Mobile Company. After having been signed by Thompson, they were taken by Littlefield to Washington, where they were signed by Swepson as president of the company. Afterwards the seal of the company was put to them, but undoubtedly in an irregular and surreptitious way. It is apparent, also, from the evidence, that when Thompson signed the bonds as treasurer he had not been formally elected to that office by the directors, but at a meeting of the directors, on the 25th of May, Littlefield stated that Swepson, the late president, had appointed Thompson as secretary and treasurer of the company for the past year, and on his motion this action of the president was approved.

On the 30th of May, 1870, an agreement was entered into between Littlefield and one Edward Houstoun, both stockholders of the Florida Central Company, by which this million of dollars of bonds was put in the hands of Houstoun, as collateral security for a debt from Littlefield to him, and on the 2d of June, at a meeting of the stockholders of the company, the following resolutions were unanimously adopted:

"*Resolved*, that bonds to the extent of \$16,000 per mile be issued by this company, which bonds shall be a first lien or mortgage on the Florida Central Railroad, its equipments, franchise, road-bed, workshops and depots, excepting, however, the town lots in the city of Jacksonville not used for depot purposes.

"And whereas the late president, George W. Swepson, caused to be prepared bonds to be issued by this company preparatory to an order of the board of directors to that effect, and which bonds were signed by said Swepson as president of this company and countersigned by H. H. Thompson, treasurer:

"*Be it therefore resolved*, that the said bonds so signed by said Swepson and countersigned by said Thompson, to the extent of \$16,000 a mile, be and they are hereby adopted as the bonds to be issued under the foregoing resolution, and that such bonds when so issued shall be a first lien or mortgage on the said Florida Central Railroad, its equipment, franchise, road-bed, work-shops and depots (excepting the lots in Jacksonville not used for depot purposes).

"*Be it further resolved*, that said bonds shall be placed in the hands of Edward Houstoun for the purposes agreed upon by an arrangement between himself and Milton S. Littlefield, who is the owner of nearly all the stock in this company, which bonds or their proceeds are to be held and applied according to the terms of said arrangement, except the proportion thereof applicable or apportionable to the stock owned by other parties and upon the satisfaction otherwise of the terms of said arrangement with said Houstoun, the said bonds are to be by him transferred to Milton S. Littlefield, or according to his direction, to the extent of the stock owned by him at the time.

"*Resolved, further*, that the directors be directed to carry the foregoing resolutions into effect."

On the 7th of June, after these resolutions were passed, the original agreement between Littlefield and Houstoun was modified so as to provide for a substitution and exchange of the bonds of the state for the bonds of the company, and a sale of the bonds of the state by Hopkins & Co., they to pay from the pro-

ceeds certain sums to different parties, and the remainder, if any, to Littlefield. So far as appears nothing was to go to the Jacksonville, Pensacola & Mobile Company.

Afterwards, on the 21st of November, 1870, at a meeting of the directors of the company, a report was received from a committee appointed to take into consideration the past issue of bonds, as follows:

"The committee finding that the bonds signed by G. W. Swepson, president, and countersigned by H. H. Thompson, treasurer, are in such form as that they cannot be used to carry out the intention of their issue when they were adopted, report the following resolution in respect thereto:

"*Resolved*, that the resolution adopting the bonds to be issued by the company, signed by George W. Swepson, president, and H. H. Thompson, treasurer, at a meeting of the board of directors, held on the 2d of June, A. D. 1870, be and the same is hereby rescinded, and that said bonds be destroyed."

The resolution as reported was unanimously adopted, but the bonds were never destroyed, and Houstoun, on the 11th of January, 1871, delivered them upon certain trusts to Coddington, who exchanged them for state bonds, which he took to New York, and afterwards, on the 18th of April, placed in the hands of Hopkins & Co. in New York for sale. On the 13th of April, 1871, at a meeting of the stockholders of the company, the following resolution was passed:

"*Resolved*, that Edward Houstoun is authorized to place the bonds referred to in the preamble and resolutions of the stockholders, adopted June 2, 1870, in the hands of S. W. Hopkins & Co., for the purposes mentioned in said resolutions, subject to the same exceptions therein expressed with respect to the proportion thereof applicable to the stock owned by other parties, and according to the same terms therein mentioned."

These state bonds were in the same form as those exchanged with the Jacksonville, Pensacola & Mobile Company, and they had upon them similar indorsements.

On the 24th of March, 1870, J. L. Henry, N. W. Woodfin, W. P. Welch, W. G. Candler and W. W. Rollins were appointed by the general assembly of North Carolina a commission "to examine and fully investigate the condition and affairs of the Western Division North Carolina Railroad Company, as far as it concerns the administration of G. W. Swepson, late president thereof, and to make a full and final settlement of all accounts and liabilities of said president, G. W. Swepson, in connection with said company," and this commission, on the 16th of April, 1870, entered into the following agreement:

"Memorandum of agreement and settlement between the Florida Central Railroad Company, George W. Swepson, president, and the Jacksonville, Pensacola & Mobile Railroad Company, Milton S. Littlefield, president, and Milton S. Littlefield, majority owner of the stock of said companies, and also of the stock of the Tallahassee Railroad Company, of the first part, and the Western Division of the Western North Carolina Railroad Company, represented by N. W. Woodfin, W. G. Candler, W. Pink Welch and W. W. Rollins, commissioners appointed by an act of the legislature of North Carolina, approved by the stockholders of said corporation, of the second part, witnesseth:

"That whereas, George W. Swepson, late president of the Western Division of the Western North Carolina Railroad Company, made certain investments of the funds of said company in securities of and interests in the said Florida Central Railroad, Jacksonville, Pensacola & Mobile Railroad, and the Talla-

hassee Railroad, of the said state of Florida, as per report made by the said George W. Swepson to the said commissioners, amounting in the aggregate to the sum of \$1,287,436.03, to bear interest from the 1st day of November, 1869, at the rate of eight per cent. per annum; and whereas the said George W. Swepson heretofore conveyed to the said Milton S. Littlefield, subject to the payment of the above recited claim, his interest in the above recited railroads; and whereas the said Littlefield has received authority from the legislature of the state of Florida and the several railroad companies to receive bonds to be issued by and for account of the several railroad companies, which bonds are to be exchanged for the bonds of the state of Florida to be issued for the purpose of aiding the finances of the said several railroad companies, all of which bonds are now in a state of preparation; and whereas the said Milton S. Littlefield has made a contract with S. W. Hopkins & Co., No. 71 Broadway, for the disposition of said bonds as the same may be issued, the proceeds of the issue of the bonds of the Florida Central Railroad Company of the said state of Florida, amounting to \$960,000, are to be applied to the payment of the existing liabilities of the said several railroad companies, including the sum of \$150,000 to be paid to the commissioners aforesaid, for the purpose of paying existing liabilities of the said Western Division of the Western North Carolina Railroad Company.

"It is understood and agreed by the parties of the first and second part that the proceeds of the sale of the said bonds, so to be issued by the said Florida railroad companies and the said state of Florida, are to be equally divided, dollar for dollar, between the Western Division of the Western North Carolina Railroad Company and the said Florida railroads; and as the commissioners aforesaid receive by this first sale of bonds only the sum of \$150,000, it is further understood and agreed that out of the proceeds of the sale of the issue of the bonds of the Jacksonville, Pensacola & Mobile Railroad there is first to be received, by the commissioners aforesaid, a sum sufficient to be equal to the amount received by and on account of the said Florida railroads, and then an equal amount is to be received by the said commissioners and the said Florida railroads, dollar for dollar, until the entire amount of \$1,287,036.03, with interest at eight per cent., as aforesaid, being the sum reported by the parties of the first part as due to the Western Division of the Western North Carolina Railroad, is fully paid.

"It is further understood and agreed by the parties of the first and second parts that all the interest owned or claimed by the said parties of the first part, George W. Swepson and Milton S. Littlefield, or which they as individuals have a right to control, in the said Florida railroads, are hereby pledged for the faithful fulfilment of this contract without the right on the part of any party to interfere with our management or control of the affairs of the road.

(Signed)

"GEORGE W. SWEPSON,

"Pres. Fla. Cent. R. R. Co.

"M. S. LITTLEFIELD,

"M. S. LITTLEFIELD,

"Pres. J. P. & M. R. R. Co.

"N. W. WOODFIN,

"W. W. ROLLINS,

"W. G. CANDLER,

"W. P. WELCH,

"Commissioners.

"Witnesses: M. W. RANSON,
"R. R. SWEPSON."

§ 1830. *Holders of bonds, issued by the state of Florida, and fraudulently obtained, who purchased for value in open market, declared to be bona fide holders.*

While these different proceedings were going on, and for a very considerable time afterwards, strenuous efforts were made by some parties interested to prevent a sale of the bonds of the state which had thus been put out. Notices of the fraud were extensively published both in this country and in Europe. Letters were written to those engaged in putting the bonds on the market, and suits were begun; but notwithstanding all this, we are entirely satisfied, from the evidence, that twenty-eight hundred, or thereabouts, of bonds given in exchange for those of the Jacksonville, Pensacola & Mobile Company, and two hundred and six given for those of the Florida Central Company, were actually sold, and are now owned by *bona fide* purchasers, most or all of whom are citizens of Holland. We have reached this conclusion without the aid of the depositions taken in Amsterdam, which were excluded in the court below. There cannot be a doubt that the governor of Florida was active in promoting the sale, as was also, to some extent, the chairman of the commission appointed by the general assembly of North Carolina. The bonds were taken at once to London, and from there put on the market in Holland, where most or all of the sales appear to have been made. The bonds were undoubtedly steeped in fraud at their inception, but they were nevertheless apparently state bonds on the market in a foreign country, among a people largely unacquainted with the English language, and offering tempting inducements by reason of their liberal interest to those who were seeking investments. To promote their sale those interested in the scheme kept a part of the proceeds to meet the interest for a time as it matured. Under these circumstances it is easy to see how, in the course of two or three years, with the help of skilful managers, the amount now out would be found in the hands of persons who believed they were holding a good and safe investment. At any rate, upon the facts as they are presented to us, we must hold that in this suit the present owners of the bonds occupy the position of purchasers for value and in good faith and are entitled to relief accordingly.

In March, 1872, the trustees of the internal improvement fund of Florida commenced a suit in Duval circuit court, Florida, against the Jacksonville, Pensacola & Mobile Company, to recover the balance that was due upon the purchase of the Pensacola and Georgia and Tallahassee roads, for which the fraudulent check was given by Swepson, and to enforce an equitable lien they claimed to have on the property as security for the payment. After this suit was begun Daniel P. Holland recovered a judgment against the company and levied upon and sold its railroad under execution, he himself becoming the purchaser and getting into possession. He thereupon was made a party to the suit of the trustees, and in his answer claimed to be the owner of the road, free of all liens in favor of the trustees or of the state on account of the bonds exchanged for the company's bonds under the amended charter. At its January term, 1876, the supreme court of the state decided in that case that the title which Holland took by his purchase was subject to the prior liens on the property, and that the bonds of the state were unconstitutional and void, but that the *bona fide* holders of the state bonds were entitled to the benefit of the statutory lien to secure the company bonds which were given in exchange for the state bonds. *Holland v. State of Florida*, 15 Fla., 455.

In March, 1872, the state of Florida instituted another suit in the Duval

circuit court against the Florida Central Railroad Company and others, alleging a default in the payment of the interest due on the bonds of that company given in exchange for the bonds of the state, and seeking to enforce the statutory lien by sale and an application of the proceeds to the holders of the bonds of the state. To this suit the company answered, setting up to some extent the frauds that are complained of in the present case, and further averring that the bonds of the state were unconstitutional and void and that the railroad bonds were not a lien. This suit also went to the supreme court of the state on appeal, and it was there decided, at the January term, 1876: 1, that the state bonds were unconstitutional; 2, that the Florida Central Company was authorized by the act of January 28, 1870, to issue the bonds held by the state, and that thereby a first lien was created on the road of the company in favor of the *bona fide* holders of the state bonds; 3, that there were no such circumstances connected with the issue, delivery and exchange of the bonds as would excuse the company from their payment to *bona fide* holders; but 4, that there was no proof in that case showing that any of the state bonds were actually so held. *State of Florida v. Florida Central R. Co.*, id., 690.

Afterwards, at the January term, 1878, in the case of *The Trustees of Improvement Fund v. Jacksonville, P. & M. R. Co.*, 16 id., 708, the same court repeated its decision that the state bonds were unconstitutional and that the statutory lien was good in favor of *bona fide* holders. The court also in that case declared the lien of the trustees on the roads of that company to be prior in right to all others, as security for the payment of the balance due on the sales under which the present company got title to its roads. The amount due, as found by the court below in its decree, is \$661,845.55, as of April 2, 1874. After some of these decisions, and on the 30th of December, 1876, the holders of the state bonds represented in the present suits, and having two thousand seven hundred and fifty-one of the Jacksonville, Pensacola & Mobile issue, and one hundred and ninety-seven of the Florida Central, united, and, through a committee, applied to the governor of the state to seize and sell the roads under the statutory liens for their benefit. Complying with this request, the governor advertised the roads for sale, and thereupon the Western Division of the Western North Carolina Railroad Company filed two bills in the circuit court of the United States for the northern district of Florida, one to enjoin the sale of the Florida Central road, and the other that of the Jacksonville, Pensacola & Mobile Company. A preliminary injunction having been granted and the sale stopped, J. Fred. Schutte and others, representing the state bondholders, filed their bill in the same court to obtain a decree for the sale of the roads to pay their bonds. In all these cases pleadings were filed and testimony taken, but before any final hearing the general assembly of North Carolina passed an act repealing all acts creating or continuing in existence the Western Division of the Western North Carolina Company, and vesting in the Western North Carolina Railroad Company absolutely all its rights, credits, rights of action and effects, with authority for the Western North Carolina Company to prosecute, defend and manage any or all suits pending in which the Western Division Company was interested. This having been suggested to the court below after the cases were called up for hearing, the suits instituted in the name of the Western Division Company were revived in the name of the Western North Carolina Company, and the parties to the suit of Schutte and others corrected so as to adapt that case to this change in circumstances. A hearing was then had in all the suits, which resulted in decrees dismissing the bills of

the Western North Carolina Railroad Company. In the Schutte suit a first lien was declared in favor of the trustees of the internal improvement fund upon the road of the Jacksonville, Pensacola & Mobile Company as far west as Quincy, to secure the payment of \$463,175.37, with interest at eight per cent. from March 20, 1869, that being the amount of the original purchase money of that road unpaid, and a second lien in favor of the complainants upon the entire road of that company, including a few miles built west of Quincy, to secure the amount of state bonds held by them, given in exchange for the bonds of the Jacksonville, Pensacola & Mobile Company, the principal of which was \$2,751,000, and the accrued interest \$1,655,001.60. A first lien was declared on the road of the Florida Central Company for \$197,000 of principal, and \$118,515.20 of interest, on account of bonds of the state given in exchange for the bonds of that company. Further provision was made in the decree for the sale of the roads separately, and for the application of the proceeds to the payment of the several sums so found to be due from each respectively, in the order of the priority of the liens.

From the decrees dismissing the bills of the Western North Carolina Company that company appealed. From the decree in the Schutte case the Western North Carolina Company, the Florida Central Company and the Jacksonville, Pensacola & Mobile Company were allowed an appeal. In perfecting their appeal the Western North Carolina Company and the Florida Central Company gave bonds which operated as a *supersedeas*. Before, however, either appeal was docketed here, a settlement was concluded between the Western North Carolina Company and the bondholders, and pursuant to an understanding to that effect, the appeal of that company was docketed and dismissed in this court on the 13th of September, 1879, pursuant to the twenty-eighth rule.

At the last term an application was made to set aside the *supersedeas* obtained on the bond of the Florida Central, because the approval of the bond was obtained by fraud and perjury. This motion was granted. *Railroad Co. v. Schutte*, 100 U. S., 644. After this, on application to this court in behalf of parties interested in the administration of the assets of the Western Division Company, and upon a representation that the settlement which had been made by the Western North Carolina Company was in fraud of their rights and without their consent, an order was made to the effect that the dismissal be set aside, and the cause reinstated, if the Western Division Company filed with the clerk of this court by the first Monday in February a bond, such as was specially designated. This bond was given and approved on the 2d day of February, 1880, and in time.

Upon these facts, gathered, with the help of counsel, from the confused mass of papers brought here as the transcript of part of the record below, and filling nearly fifteen hundred printed pages, many questions have been presented and ably argued. We will first consider the special position which the Western North Carolina Company, as the successor of the Western Division Company, occupies. So far as the Florida Central is concerned, it is not claimed that the Western Division could have had any other rights than such as belong to a stockholder holding a controlling interest in the stock of the corporation. Its moneys were wrongfully invested in that stock by an embezzler. Swepson, the embezzler, bought the stock as stock, and if the company whose money was embezzled adopts his purchase, the stock must be taken as he held it, and subject to such incumbrances as were put on it while in his hands. This is not seriously disputed.

§ 1831. *A party whose funds have been embezzled and invested in stocks, if he adopts the acts of the embezzler, must take the stocks subject to the incumbrances put upon it.*

As to the Jacksonville, Pensacola & Mobile Company, an attempt is made to reach the property of the company because of the trust deed or agreement executed by Dibble to Swepson, after the conveyances from the trustees of the internal improvement fund had been procured through Swepson's fraud. That instrument purported, however, to be in trust for Swepson to convey to the company to be created by an act incorporating the purchasers of the property as soon as the necessary legislation to that effect could be obtained. It was not executed in a form to pass title, and the security was only to continue under this plan until the contemplated corporation could be organized. When the act of incorporation was obtained, the company at once, without objection from Swepson, or any one in his interest, took possession of the property and operated the railroad as owner. Littlefield, who had succeeded to all of Swepson's rights under his several contracts, assumed the absolute control of the company and was its principal stockholder. Both Swepson and Littlefield were named as corporators of the Jacksonville, Pensacola & Mobile Company, incorporated on the same day with the purchasers, which shortly after, as no doubt was from the beginning intended, absorbed the purchasers' corporation and took possession of its property. No one ever disputed the title of the Jacksonville, Pensacola & Mobile Company until long after this litigation began, and the Western Division Company in its original bill distinctly averred that the ownership of the property was in that company. Littlefield held a controlling interest in the stock, and that undoubtedly represented the proceeds of Swepson's embezzlements invested in the Pensacola and Georgia and Tallahassee bonds, through which the North Carolina Company seeks to reach the property. This is clearly recognized in the contract of settlement entered into between Swepson, Littlefield and the commissioners of North Carolina, on the 16th of April, 1870, by which it was agreed that the North Carolina Company should be paid the money it had lost from the proceeds of the sales of the state bonds to be issued to the Jacksonville, Pensacola & Mobile Company on the faith of its ownership of this very property. Certainly under such circumstances the North Carolina Company is estopped from setting up title to the property as against the *bona fide* holders of these bonds. In this litigation that company can occupy no other position than that of an equitable owner of the stock of Littlefield in the Jacksonville, Pensacola & Mobile Company, and all incumbrances on the property are necessarily incumbrances on the stock which the property in legal effect represents. The settlement with Swepson was undoubtedly conditional, and not to be complete until the money agreed on was paid, but nevertheless the North Carolina Company became by the transaction a seller of the bonds and is estopped accordingly.

This disposes also of the claim that the lien in favor of Swepson, created by the deed or agreement of trust to him, was saved by the proviso at the end of section 6 of the act incorporating the new Tallahassee company. It is apparent from the whole tenor of the instrument that this was not intended as a continuing security, and it is equally clear from the evidence that the stock standing in Littlefield's name represents all the interest which he or Swepson held in the property, as security or otherwise, when these suits were begun. In addition to this, as the instrument was imperfectly executed and was never recorded, it passed no title as against *bona fide* purchasers. The cases, then, in all their as-

pects are to be treated as they would be if the several companies were alone, each for itself, defending the claims made by the bondholders.

We proceed, then, to inquire whether the companies or either of them can successfully defend the Schutte suit. At the outset it will be conceded that the state bonds are unconstitutional. The supreme court of the state has three times so decided in cases where the question was directly presented by the pleadings and apparently fully argued. In *State of Florida v. Anderson*, 91 U. S., 667, we said this delicate question was "one it was eminently proper the courts of Florida should determine," and while we are not now prepared to say that these decisions are conclusive on us, they certainly are not of such doubtful correctness as to make it proper that they should be disregarded. The conclusions were reached by applying the language of article 12, section 7, of the constitution of 1868, to the condition of affairs in the state when that constitution was adopted. Such a question is peculiarly within the province of the courts of the state to decide, and we ought not to depart from what they have done, except for imperative reasons.

§ 1832. *Although the bonds of a state be unconstitutional and void, the statutory mortgages of corporations that received those bonds and put them on the market are valid in favor of bona fide holders of such bonds.*

But it by no means follows that because the state is not liable on its bonds the companies are free from responsibility under their statutory mortgages. By the express provisions of the act the state bonds were to be given the company in exchange for its own bonds. The company, not the state, was to use and dispose of the state bonds. The object of the state was to aid the company with its credit. The state bonds were to be made payable to bearer, and negotiable, while the company bonds were to the state alone and not negotiable. The company bonds were to be coupon bonds payable at the same time and place as the state bonds, and, if the company paid its interest in gold, it was the duty of the state to pay in the same way. It is clear, therefore, the intention was that, as between the state and the company, the state was to be the guarantor of the company bonds, and the company the principal debtor. With the public, however, it was different. There the state was the debtor, and the company was only known through the statutes under which the bonds were put out, and the certificates indorsed on the bonds themselves, which were that the state held "the first mortgage bonds of the railroad company for a like amount as security to the holder hereof." Such bonds of the state with such indorsements the company put on the market and sold. Under these circumstances the certificate of the governor as to the security held by the state is in legal effect the certificate of the company itself, and equivalent to an engagement on the part of the company that the bond, so far as the security is concerned, is the valid obligation of the state. The case is clearly within the reason of the rule which makes every indorser of commercial paper the guarantor of the genuineness and validity of the instrument he indorses. We cannot doubt that under these circumstances the company is estopped, so far as its own liabilities are concerned, from denying the validity of the bonds. Having negotiated them on the faith of such a certificate, the company must be held to have agreed, as part of its own contract, whatever that was, that the bonds were obligatory.

§ 1833. *Rule for construction of statutory contracts.*

What, then, were the engagements into which these several companies entered when, as is alleged, they accepted the bonds of the state in exchange for

their own, and put them on the market for what they appeared on their face to be worth as commercial paper? And here it is proper to say that contracts created by, or entered into under, the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed. Where the state is concerned the words employed are sometimes to be taken most strongly against the other party, but in this, as in other cases of contracts, language is to be given, if possible, its usual and ordinary meaning. The object is to find out from the words used what the parties intended to do. Every statute, like every contract, must be read by itself, and it no more follows that one statutory contract is like another than that one ordinary contract means what another does. Of course, general rules of construction may and should be called into use when required, and sometimes, when certain words used in statutes are understood to have a certain meaning, the same words will be given the same meaning in other like cases; still, in the end, it must be determined from the language used in each particular case what has been done, or agreed to be done, in that case. We have been thus careful to state these familiar principles in this connection to guard against the use of this case as authority in others where the contract, even though it be created by or under the authority of a statute, is not the same.

In the present case a statutory lien, in the nature of a first mortgage duly registered, was given the state on the property of the company to secure the principal and interest of the company bonds, with power in the governor, if default, for a certain length of time, should be made in the payment of principal or interest, to take possession of, advertise and sell the property for lawful money of the United States, and nothing else, unless the state, for its own protection, should become the purchaser, when the price might be paid in money or such obligations of the company as the state should hold. In case of a sale the purchase money, as well as the evidences of the company's indebtedness taken as money, were to be paid into the state treasury and promptly and exclusively applied to the payment and satisfaction of the bonds issued by the state under the authority of the act now in question. If the holders of the state bonds did not present them within ninety days after the sale the treasurer was required to invest the money remaining in his hands in the securities of the United States, "to be held by the state of Florida as trustee for the bondholders" until demand of the payment of the bonds, when it was made the duty of the treasurer to turn over the securities to the bondholders. It would seem as though language could not be used indicating more clearly an intention to have the lien what the governor, when he made the exchange, certified it to be,—a security for the holder of the state bonds. It is quite true that, by section 13 of the act under which the Jacksonville, Pensacola & Mobile Company was organized, the company could, at any time before maturity, pay off its own bonds in national currency or in bonds of the state, but that does not change the character of the trust created by section 11 in case no such payment was made. Here no payment of any kind has been made and no foreclosure of the lien has been attempted by the state except in the interest of the bondholders. The state, from the beginning, has recognized its obligations as trustee, and, on the request of the bondholders, commenced the proceedings, under the authority of this statute, which have resulted in the present suits. Indeed, one of the decisions against the constitutionality of the bonds was rendered in a suit instituted by the state, apparently on its own motion, to enforce the lien on behalf of the bondholders. In our opinion there is no occasion for applying here the doc-

trines of subrogation, because, in unmistakable language, the statute has made the mortgage of the company security for the payment of the obligations of the state. This we understand to be in accordance with the opinion of the state court as expressed in the Holland and Florida Central cases, reported in the 15th and 16th of Florida Reports.

§ 1834. *Where a statute is in part constitutional and in part invalid the former will be upheld if distinguishable from the latter.*

It is contended, however, that, as the provision of the act in respect to the execution and exchange of the state bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is void also and must fall. We do not so understand the law. Undoubtedly a constitutional part of a statute may be so connected with that which is unconstitutional as to make it impossible, if the unconstitutional part is stricken out, to give effect to what, taking the whole together, appears to have been the legislative will. In such a case the whole statute is void, but in this, as in every other case of statutory construction, all depends on the intention of the legislature as shown by the general scope of the law. To our minds it is clear, in the present case, that the object of the legislature was, not to create a debt which the state was expected to pay, but to aid the company in borrowing money upon the credit of the state. As between the state and the company, the debt for the money borrowed was to be the debt of the company. If the state paid its bonds from its own funds the mortgage could be enforced to compel the company to make the state good for all such payments. If the state did not pay, then the creditors had their own recourse upon the mortgage. The state credit, so far as the state and the company were concerned, was only to aid the company in borrowing money on its own bonds. In any event, the company was to be bound for the payment of the entire debt when it matured, and its property was to be bound for the payment of the entire debt when it matured, and its property was to be given as security. Under these circumstances it seems to us that the unconstitutional part of the statute may be stricken out and the obligation of the company, including its statutory mortgage in favor of the state bondholders, left in full force. The striking out is not necessarily by erasing words, but it may be by disregarding the unconstitutional provision and reading the statute as if that provision was not there. These bonds, as state obligations, were void, but, as against the company which had actually put them out, they were good.

This disposes of this part of the case so far as the Jacksonville, Pensacola & Mobile Company is concerned. No claim is made that the statute does not on its face authorize that company to exchange its bonds for those of the state, or that the lien is not created by the exchange. Neither is it claimed that the necessary corporate action was not had to get the bonds out under the forms of law. Although on the 10th of December, 1870, a resolution was passed by the directors of the company, ordering a recall of the bonds on account of the proposed misapplication of the proceeds of the sales to be made, an actual withdrawal was never effected, and the bonds have got into the hands of *bona fide* holders. The very resolutions which directed the recall asserted the previous lawful and regular issue. As to the Florida Central Company, however, the case is different, and it is claimed not only that the statute did not authorize the exchange of the bonds and the creation of the lien, but also that the company did not in its corporate character execute its own bonds or make the exchange.

§ 1835. *Under what circumstances a decision will be held a mere dictum, and when an essential part of the judgment of the court.*

As to the first question, we deem it sufficient to say that the supreme court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the state bonds had been sold, the decision was in no just sense *dictum*. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.

§ 1836. *Innocent bona fide holders of commercial paper are entitled to the benefit of every presumption.*

This, like the constitutionality of the act, is a question of local law. It depends on the peculiar condition of local affairs. If the decision is not conclusive on us, it is of high authority under the circumstances, and we are not inclined to disregard it. The holders of the commercial paper put out by the company and bought on the faith of the state are entitled to the benefit of every presumption in their favor.

The next important inquiry is whether the necessary authority for the issue and exchange of the bonds was given by the corporation itself. Certainly the resolution of June 2, 1870, is on its face sufficient for that purpose, as is also that of April 13, 1871. It is true Littlefield now swears that these meetings of the stockholders and directors were irregular and without sufficient notice, but it is worthy of remark that, in the resolution of November 21st, rescinding that of June 2d, there is no pretense that the original resolutions were not lawfully passed and binding on the company. The rescission is put entirely on the ground that the form of the bonds was not such as to carry out the intention of the company in directing their issue. Mr. L'Engle also, in his letter to Boissevain, giving notice of the frauds that had been practiced on the company, substantially conceded that the issue of the bonds was authorized by the company and confined his protest to the improper use that was being made of them. It is clear to our minds from the whole case that but for the fraudulent disposition of the bonds the corporate action of the company in putting them out would have been considered sufficient. Littlefield's character, as it appears all through this voluminous record, is not such as to entitle him to any favorable consideration as a witness or otherwise. He and Swepson have both shown themselves capable of the most shameless frauds, and we cannot but look with suspicion upon everything they do or say. We regret it is not in our power to relieve the corporations, whose affairs they have been permitted to manage, from the consequences of their wanton breaches of trust; but in our judgment this cannot be done without injuring those who are innocent of all wrong.

§ 1837. *Bonds void as to the state may be valid by estoppel as to corporations that fraudulently obtained them. Such corporations are liable for the full amount of principal and interest.*

It is next contended that as the bonds were fraudulently put out by the officers of the companies, and are unconstitutional, the recovery must be confined

to the amount actually paid for the bonds to the agents of the companies. As we have endeavored to show, the bonds, although void as to the state, are valid as to the company that sold them. Having been put on the market by the companies as valid bonds, the companies are estopped from setting up their unconstitutionality. As against the companies, they occupy in the market the position of commercial securities, and may be dealt with and enforced as such. The companies, through their faithless agents, are in a position where they must meet those they have dealt with commercially, and respond accordingly. In commerce, commercial paper means what on its face it represents, regardless of what its maker or promoter may have got for it. The bonds of the state in the open market purported to be what they called for. The companies put them out, and in legal effect, as we think, indorsed them. A *bona fide* holder can now require the indorser to respond to his indorsement commercially; that is to say, by paying what he in effect agreed the maker must pay.

We believe we have now disposed of all the questions the record presents. It has been suggested that since the appeal the property has been sold under the decree below. That is not shown by the record. The *supersedeas* in favor of the Florida Central Company we have decided was fraudulently obtained. The justice who accepted the bond was imposed upon. That *supersedeas* was promptly vacated when the facts were called to our attention. The *supersedeas* secured by the Western North Carolina Company was, to say the least, suspended when that company voluntarily dismissed its appeal under the twenty-eighth rule. This suspension was not vacated until the bond of indemnity was filed on the 2d of February, 1880. It will be for the court below to determine, when it is called on to confirm any sale that has been made, whether a sale was stayed by a valid subsisting *supersedeas*. From relief against any order in that behalf the parties must resort to such measures as they may be advised they are entitled to. We cannot, from anything now before us, settle any such question.

Decrees affirmed.

CODMAN v. VERMONT & CANADA RAILROAD COMPANY.

(Circuit Court for New York: 16 Blatchford, 165-178. 1879.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.—This is an action of *assumpsit* against the defendant, as guarantor and indorser of fifty negotiable bonds, of \$1,000 each, to recover arrears of interest thereon, and has been tried by the court upon stipulation of the parties waiving jury, filed.

The defendant leased its road, before it was built, to the Vermont Central Railroad Company, reserving semi-annual rent equal to eight per cent. annual interest on its cost, and, to secure payment, took a stipulation for re-entry and a conveyance of the Vermont Central Railroad, to be operative on default, giving a right "to receive all tolls, fares and other lawful income receivable for the use of said railroads," and, after paying expenses, to "apply the residue of its said receipts in and towards the payment of all rent then in arrear and unpaid." The Vermont Central Railroad Company also mortgaged its road by two successive mortgages, subject to the security for the Vermont & Canada rent. Default was made of the mortgage debts, and also of the rent, and the roads were surrendered to the mortgage trustees. The Vermont & Canada Company brought a bill in equity in the court of chancery of the state to en-

force its security for the payment of its rent, and the roads were by that court placed in the hands of receivers. Much question was made in that proceeding as to the effect and validity of the lease and conveyance to secure rent, but they were finally held valid and operative by the supreme court of the state on appeal, and the amount of the annual rent was fixed, but it was not decided that the possession of the roads should go to the Vermont & Canada Company, and they were left in the hands of receivers to be operated, and to have the income applied in satisfaction of the rent, and, after that, of the mortgage debt, subject to the control of the court of chancery. *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 34 Vt., 1. After that decree an agreement was entered into between the Vermont & Canada Company and other security holders, sanctioned by a special act of the legislature of the state, by virtue of which a further decree was entered up in the cause, authorizing an increase of the stock of the Vermont & Canada Company to \$2,000,000, and providing for the payment of rent equal to eight per cent. annual interest on that amount, which was to "be paid by the trustees and receivers from time to time in possession of said roads and property, and from the income thereof," and for the payment of the residue, after paying certain expenses, to the subsequent security holders, and for keeping the cause on foot, with liberty to any party to apply to the court for further orders therein. The trustees and receivers in possession, from time to time, with consent of the Vermont & Canada Company and some of the other security holders and representatives of others, obtained orders of the court for, and negotiated, equivalent loans. In the fore part of 1871 they represented to the directors of the defendant that they were under a large floating debt, incurred in building extensions of the Vermont & Canada Railroad, in improving the road-beds and superstructure of the Vermont Central and Vermont & Canada roads, and in procuring additional equipment for them, and proposed measures for relief. They adopted a resolution providing for new stock to pay for and represent the cost of the extension, and for a new loan of \$1,000,000, to be indorsed and guarantied by that company, and for a meeting of the stockholders to consider the subject. Meetings of the directors and stockholders were held on the 16th day of May in that year, and it was voted at each that the company should indorse and guaranty the notes of the trustees and managers to the amount of \$1,000,000, payable in twenty years from date, and bearing interest at the rate of eight per cent. per annum, payable semi-annually, and the treasurer was authorized to execute the indorsement and guaranty. Application to the court was made immediately by the trustees and managers for leave to the Vermont & Canada Company to issue new stock, and for them to issue their notes for the loan, which was granted, and that company was authorized to issue \$500,000 of new stock, on account of the construction of the branches, to meet a part of the floating debt, and the trustees were authorized to issue their notes, as stated, to the amount of \$1,000,000, to be indorsed and guarantied by the company, to meet the residue. The notes were issued in sums of \$1,000 each, by which the trustees and managers, as trustees and managers only, reciting that it was in accordance with the votes of the stockholders of the Vermont Central and Vermont & Canada Railroad Companies, and by virtue of a decree of the court of chancery, as well as of a special act of the legislature of Vermont, promised to pay to the order of the Vermont & Canada Railroad Company the sum, at the time specified, with interest at the rate specified, at their office in Boston, on presentation of the interest coupons attached, and signed by the trustees and managers,

as such; and interest coupons, payable to bearer, for each instalment of interest, were attached. On each was indorsed by the treasurer, under the seal of the defendant company: "For value received, the Vermont & Canada Railroad Company hereby guaranty the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The notes so executed and indorsed were put upon the market, and the plaintiffs purchased fifty of them at par and one-eighth, without notice in regard to them beyond the general knowledge, open to all, of the location and situation of these railroads, and what appeared upon, and would be suggested by, the face of the instrument. The coupons were paid by the trustees and managers to January 1, 1876. Those falling due July 1, 1876, and January 1, 1877, were not paid. The "demand, notices and protest of said coupons as they fell due" is admitted in writing by the defendant. This suit is brought to recover the amount due upon them.

§ 1838. *Quære: Is a guaranty indorsed upon negotiable notes issued by a railroad company also negotiable?*

The defendant insists that the agreement of guaranty and the obligations of indorser were, under the circumstances, wholly outside the scope of the corporate powers of the defendant and not binding; that it was mere accommodation paper as to the defendant, and that the guaranty was, therefore, not binding; that the indorsement is not sufficient in form to bind the defendant as indorser; that its liability as indorser would not become fixed by the demand, notice and protest admitted of the coupons; that, if the indorsement was sufficient and the protest good, the guaranty, coupled with the indorsement, would show that both were for accommodation and prevent liability of the defendant. The statute law of the state then was and now is: "Every railroad corporation within this state, if it shall vote so to do, at a meeting of the stockholders, called for such purpose, shall have power to issue their notes or bonds, for the purpose of building or furnishing their roads, or paying any debts contracted for building or furnishing the same, bearing such a rate of interest, not exceeding seven per cent., and secured in such manner, as they may deem expedient." Gen. Stat. Vt., 237, sec. 97. "All notes or bonds which may be issued under and by virtue of the provisions of this chapter shall be issued for a sum not less than one hundred dollars, and shall be made payable in not less than three years, nor more than twenty years, from the time of issuing the same." *Id.*, sec. 99. The form in which railroad companies should become parties to notes or bonds issued, whether as makers, guarantors or indorsers, would not seem to be important for bringing them within the provisions of these sections, if their object should be within the scope of the power conferred, and they should not be issued contrary to the provisions. The power extends to building and furnishing their roads and to paying debts for those things. In this case, no witness has testified directly to what the purpose was for which these notes were made and sold. All that appears on that subject is what appears from the corporate acts and conduct of the defendant in connection with, and upon the representations of, the trustees and managers. They were issued and sold to pay a floating debt. This debt was represented to be for construction of new road under the charter of the Vermont & Canada Railroad, and for improving the road-beds and superstructure and providing equipment for both roads. The defendant voted to issue its new stock to pay for the construction and to indorse and guaranty the notes to pay the rest of the debt, upon these representations. The question of fact involved is to be found upon such evidence as

is competent to bind the defendant. This corporate action is deemed sufficient to show, as against the defendant, that the debt was, and it is found to have been, a debt contracted for those purposes. This purpose was building and furnishing the roads, within the meaning of the statute. The power only extends, however, to building and furnishing *their* roads, and, if these were not the defendant's roads, this building and furnishing did not come within the statute. It is said, in argument, that the defendant has never actually had any railroad at all; for it leased its road by perpetual lease, before it was built, reserving to itself rent, so that it had nothing left but a rent charge upon the roads of others. Litt., sec. 218; Co. Litt., 141a. This is true, except as to the stipulation for re-entry into the road leased, and the conveyance taken of the other to secure the rent, and true notwithstanding them, until there was a default entitling them to the roads, and until it availed itself of its right to the roads. When their proceeding in equity to enforce the security produced a receiver of the roads and put them into the possession of receivers, the receivers were mere officers of the court, without any rights whatever of their own, and they held the property under the direction of the court, by the title of and for whoever should ultimately be entitled to it. The supreme court of the state held that the defendant was entitled to it, to hold until the profits should pay the rent, but, under the then existing circumstances, left the roads in the hands of the receivers, and accorded to the defendant its rights, by requiring the profits to be paid upon the rent. The roads were, then, the roads of the defendant, and would continue to be so until the rent should be paid. The agreements and transactions which resulted in the compromise decree did not vary the title and right of the defendant to the property. By the express terms of the decree, it was provided, clause fourth: "That rent shall be paid to said Vermont & Canada Railroad Company, upon said sums of \$2,000,000, chargeable upon the whole property and income of said roads, as a first lien thereon," etc. There was no conveyance by anybody to the trustees and receivers. They were there in possession, under the orders of the court, without title of their own, and were merely left there without title of their own, and with no provision for them to acquire title. The ownership was that of the defendant, to the extent of its rent, then in the mortgagees of the first mortgage, to the extent of the mortgage debt, and then in the mortgagees of the second mortgage, to the extent of that debt, and then in the Vermont Central Railroad Company. The arrangement, so far as its terms were concerned, was perpetual. If successful enough, it might work out a right in the Central Company to the possession of the roads, subject to the lien of the defendant, by paying off the mortgage, after satisfying the accruing rent, but that would never increase the rights of the trustees and receivers; they would all the while remain in possession for others. In this situation they were claimed to be, and for some purposes were held to be, receivers of the court. Vermont & Canada R. Co. v. Vermont Central R. Co., 46 Vt., 792. When they asked for an order to sell the property as receivers, the supreme court of the state held that they were not receivers, strictly, but rather managing agents. Id., 50 Vt., 500. It is no part of the present purpose here to do more than ascertain whether, under the laws of the state, and the procedure, as expounded by the courts of the state, the roads were the roads of the defendant for furnishing and equipment. For this purpose it is not necessary that they should belong to the defendant absolutely, to every intent and for all other purposes, but is enough if they so belonged for the present purposes needing the furniture and equipment. If

agents, there must be a principal, and, in the transactions creating the agency, there was no party more prominent in the character of principal than the defendant. If receivers, they wanted the money got for these notes for the improvement of the defendant's property in their hands as receivers, in the manner authorized by the statute; if agents, they wanted it for the same purposes for the property in their hands as agents. They executed the notes in the character only in which they held the property, and not as individuals. That would only bind the right by which they held the property, which was all subject to the defendant's right, except so far as, if at all, they represented the defendant. So that, until the defendant's right to the property should be satisfied, the defendant was the sole party, in reality, to the notes, and the sole party to be benefited by the consideration of the notes. Without the furniture and equipment of the roads, the trustees could earn nothing for the defendant. Its interest was that of an owner, direct, and not remote. In this view the defendant became liable upon the notes, as guarantor, to any one to whom the guaranty would run, and who would be entitled to sue upon it.

This guaranty is not, in terms, negotiable. By it the defendant guaranties the payment of the note, principal and interest, "according to its tenor." The note being negotiable, perhaps these words draw that quality into the guaranty. If they do, the guaranty would seem to be negotiable. Story on Prom. Notes, § 484. If not, in *Partridge v. Davis*, 20 Vt., 499, *Davis, J.*, seems to have thought that such a guaranty would, in effect, be negotiable, while in *Sandford v. Norton*, 14 Vt., 228, and *Sylvester v. Downer*, 20 Vt., 355, the late Chief Justice Redfield was clearly of the opinion that, like ordinary simple contracts, such guaranties would not be negotiable. No case has been noticed in which this precise question has been settled by the decision of the highest court of the state of Vermont, where this contract was made. The plaintiffs are remote holders, and had no transaction directly with the defendant, and cannot recover upon the guaranty itself, unless it is negotiable. It is not, however, necessary to decide upon this here, unless the indorsement or protest is defective, for the amount and effect of the recovery would be the same upon the indorsement as upon the guaranty.

§ 1839. *If the proper steps have been taken to charge it, a railroad company is liable upon its indorsement of notes issued by it and another company, under a special act.*

The indorsement was filled up by an indorser when it was made; therefore, it is not capable of being filled up by an implied authority to write what would be according to commercial usage and the presumed intention of the parties, or of being altered to that, as would have been the case if the indorsement had been in blank and been left so, or had been wrongly or defectively filled up by some one besides the defendant, afterward. It is what the defendant made it, and all that was made or authorized in that behalf, and must speak for itself. The notes were payable to the defendant or order; the defendant, by the indorsements, ordered the contents of the notes to be paid to the bearer. The language used is like that which would have been used by the defendant in drawing a bill of exchange in favor of the bearer, on the makers of these notes. In that case the defendant would order them to pay the sum named in the bill to the bearer. In this case the defendant orders them to pay the sums named in the notes to the bearer. In each case, by assuming to order the money to be paid, the party undertakes that it shall be paid, if due diligence, according to the law merchant, is used. This indorsement seems to be

ample and appropriate for the purpose of laying a foundation for liability, and not to be unusual. Story on Prom. Notes, § 138, note. *Vincent v. Horlock*, 1 Camp., 442, and the language of Lord Ellenborough used therein, have been referred to by counsel for the defendant, as showing that such an indorsement would create no liability, although it would carry the title to the note. One Jacks drew the bill payable to his own order, and indorsed it in blank and delivered it to the defendants. One of the defendants, a firm, wrote over the signature of Jacks: "Pay the contents to Vincent & Co.," without signing it at all. So the defendants' names were not on the bill at all. The point was, whether writing those words over the name of Jacks made the defendants liable as indorsers. As to that, Lord Ellenborough did say: "We see these words, '*Pay the contents to such a one,*' written over a blank indorsement every day, without any thought of contracting an obligation; and no obligation is thereby contracted." That all would agree to.

The protest itself is not shown, but demand, notices and protest of the coupons, as they fell due, are admitted. The indorsements are upon the notes and not upon the coupons. The only question about this is whether the case shows that the instruments indorsed are the ones protested. If not, the liability as indorser may not be fixed, for want of that connection. The notes ran that interest should be paid on presentation of the coupons. The plaintiffs held both notes and coupons. The coupons themselves contain promises to pay, but there is no reference to the defendant in them. The notice admitted, which must have been notice to the defendant, could not have been given without production of the notes as well as of the coupons. So the admission, in connection with the circumstances, is taken to mean that the notes and coupons were presented together, and payment thereupon was refused, and that protest was made for that non-payment, whereby the liability of the defendant as indorser became well fixed.

§ 1840. *Notes issued under a Vermont statute by a corporation of that state, payable in Massachusetts, are governed by the law of the former state.*

These notes were issued in sums of not less than \$100 each, and made payable in not less than three nor more than twenty years from the date of issue, and are in accordance with the provisions of the statute in all respects, except that their rate of interest is eight per cent., while the statute recited provides for a rate not exceeding seven. In Vermont, where this contract was made, stipulating for, or taking interest at, a rate greater than the law allows does not vitiate the obligation. If such interest is not paid, it may be recovered for at the legal rate; if it is paid, the excess may be recovered back. In Massachusetts, where the notes were payable, no rate of interest was unlawful. If the law of Massachusetts is to govern, this feature of the notes cannot affect the right of recovery at all; if that of Vermont, it can only affect the rate of recovery and the amount. In ordinary cases, where there is no limitation upon the power to enter into such a contract, nor anything otherwise to affect its inherent validity, interest may be stipulated for, and is to be paid according to the law of the place of payment or performance. 2 Kent's Comm., 460, note c.; Story on Prom. Notes, § 155; *Andrews v. Pond*, 13 Pet., 65. But where the power to enter into such a contract, or the validity of it when entered into, depends upon the law of the place where made, or the contract is made apparently with special reference to the law of that place where made, that law governs. *De Wolf v. Johnson*, 10 Wheat., 367; *Andrews v. Pond*, 13 Pet., 65. In *Cheever v. Rutland & Burlington R. Co.*, not reported, the notes were executed

in Boston and payable there, but were made by a railroad corporation of Vermont, and were to bear interest at seven per cent., and, on their face, referred to the statute before recited, as authority for issuing them at that rate. The legal rate in Massachusetts was, at that time, six per cent., and the defendants contended that the law there should govern, and that only six per cent. could be recovered. The supreme court of Vermont held that the law and rate of Vermont must govern. Steele, J., in the opinion (Pamphlet, p. 16), said: "The situation of the parties and of the subject matter of the contract may conclusively show that the parties contracted, in good faith, with reference to the law of the state where the security was located, and fixed upon some commercial center as the place of payment, merely for the convenience of the holders of the loan, who, in such cases, are often widely scattered and continually changing." In *Andrews v. Pond*, 13 Pet., 65, 78, Chief Justice Taney said: "The question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute. Unquestionably it must be the law of the state where the agreement was made and the instrument taken to secure its performance."

These notes, on their face, are executed by trustees and managers, as such only, and refer to votes of stockholders of the Vermont Central Railroad Company, and of the Vermont & Canada Railroad Company, Vermont railroad corporations, to a decree of the court of chancery, and to a special act of the legislature of Vermont, as authority for their issue. The indorsement of the defendant was made expressly by virtue of a vote of the stockholders, at a meeting duly called. The whole life of the contracts, as well of that shown by the indorsement as of that shown by the note itself, not only in fact depended upon the law of Vermont, but was upon the face of each instrument shown to so depend. The law which gave the authority limited the rate of interest to be paid. The law was as if a part of the contract, and the limitation was inseparable from it, and would follow it everywhere. The contract of indorsement is separate from that in the notes, and may be so as to interest, as well as in respect to any other feature. *Slacum v. Pomery*, 6 Cranch, 221; 2 Kent's Comm., 460.

This action is upon the notes themselves, for a breach of the contract expressed there, to pay the interest on the notes, on presentation of the coupons. It is not exclusively upon the coupons, although they each contain an express contract, and would furnish ground for an action. So, the action is wholly for interest, as such, and the plaintiffs are entitled to recover for the interest at the rate allowed by law, and not more. The right to recover stands upon the same ground precisely as the right to recover interest, when due, upon ordinary contracts to pay interest annually or semi-annually, except that here the law allows seven per cent., while in ordinary contracts it allows only six.

There are two instalments of interest on fifty notes of \$1,000 each, one of which was due July 1, 1876, the other January 1, 1877. On each the defendant became liable to pay \$1,750 at those respective times. Payment was not made. There was no agreement to pay interest on those sums if payment should not be made. The statute quoted did not fix a rate in the absence of a contract, but merely permitted a valid contract to be made up to that rate. As the defendant did not pay, it became liable for interest as damages, as in cases of the breach of ordinary money obligations, from the time when payment should have been made. The same question arose in *Cheever v. Rutland &*

Burlington R. Co., before mentioned, upon this same statute, and was so decided there. Pamphlet, p. 19.

These conclusions make it unnecessary to decide the questions so fully and ably discussed by counsel, as to whether the defendant could be held, under the circumstances, if the undertaking had been without the scope of the corporate powers of the defendant. As great pains as have been practicable, and more space than usual, have been taken with this cause, as well on account of the large interests otherwise involved in these questions, as of the just rights of the parties to this suit. There must be a judgment for the plaintiffs for the two instalments of \$1,750 each, with simple interest thereon, in all, \$4,033.75.

GEBHARD *v.* CANADA SOUTHERN RAILWAY COMPANY.

(Circuit Court for New York: 17 Blatchford, 416-420. 1880.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—The plaintiff sues upon certain obligations executed and issued by the defendant, representing instalments of interest due and unpaid upon the defendant's issue of first mortgage bonds. The case, for convenience, may be considered as though the action were brought to recover several instalments of interest due on the 1st day of January, 1877, upon the first mortgage bonds of the defendant. These bonds were executed and issued in Canada, but, by their terms, were payable at the city of New York. The defendant is a Canadian corporation, and insists, in defense, that it is discharged from payment of these bonds by virtue of an act of the parliament of the dominion of Canada, passed in April, 1878, whereby the defendant was authorized to issue new bonds, payable in thirty years, in substitution of its first mortgage bonds, and bearing a lower rate of interest. This act declares that the assent of the holders of the first mortgage bonds shall be deemed to have been given to the substitution of the new bonds. The plaintiff, in fact, never assented to the substitution of the new bonds in the place of the first bonds. On first impression, the defense seems an extraordinary one. It rests upon the theory that the original bonds, having been issued in Canada, are contracts controlled, as respects the obligation and its discharge, by the law of Canada, and that the Canadian parliament, in the exercise of its unlimited powers, has discharged or modified the obligation of the contract, and that, even though this be an arbitrary or unjust act, it is conclusive upon the rights of the parties.

§ 1841. *Bonds issued in Canada, payable in New York, are governed by the laws of New York, the place of the performance of the contract.*

Several general propositions, applicable to the case, are elementary. The law of the place of the contract determines the nature, the obligation and interpretation of the contract. But when the contract is to be performed in a different place from that in which it is made, the law of the place of performance, in conformity to the presumed intention of the parties, determines the nature, obligation and interpretation of the contract. A defense or discharge, good by the law of the place of the contract, is good wherever the contract is sought to be enforced; but when the place of performance is not the place where the contract was made, the defense or discharge is valid or invalid according to the law of the place of performance. The doctrine, that a defense or discharge good by the law of the place of the contract is good everywhere, is subject to several qualifications, one of which is, that a discharge or defense must not be of such character that it would conflict with the duty of the state

where it is sought to be enforced, towards its own citizens, to recognize it. The laws of a state have no extraterritorial vigor, and are enforced by other states only upon considerations of comity, and these always yield to those higher considerations which demand of every state the protection of its own citizens against the unwarrantable acts of a foreign sovereignty. These familiar general propositions require no citation from the authorities to support them. Applying them here, the defense cannot succeed.

§ 1842. *A Canadian law impairing the obligation of contracts will not be acted upon or respected by the courts of the United States.*

The plaintiff sues upon a contract which was made in Canada, but was to be performed in the state of New York, the place of payment being the place of performance; and a discharge of the obligation, which derives its vitality solely from the authority of a foreign sovereignty, is of no more effect than would be the case if New York were the place where the contract was made. One of the most common instances, in illustration of the rule, is where the defense of usury is interposed, in an action brought here upon an obligation made in a foreign state, and bearing a higher rate of interest than is permitted by the laws of that state. When the obligation is payable here, the cases all agree that the usury laws of the foreign state have no application. Another class of cases, more analogous to the present, because they involve the effect of an *ex post facto* discharge of the obligation, is where a discharge in bankruptcy has been obtained under the laws of the state where the contract was made. Such a discharge is not a defense when the place of performance of the obligation is in a different state. The question has frequently been considered by the supreme court of the United States, and, although generally discussed in connection with constitutional questions, it has been ruled, with the concurrence of all the judges, that, irrespective of other considerations, the discharge is inoperative, when obtained in a different state from that where the debt was payable, because the contract and its obligation cannot be affected by the legislation of other states. See opinions of Grier, Daniel, and Woodbury, JJ., in *Cook v. Moffat*, 5 How., 295.

The decision of the present case may properly rest upon this ground alone; but, if the obligations in suit were Canadian contracts, the defense would be untenable. The act of the Canadian parliament is an attempt to impair and destroy the obligation of a contract. Undoubtedly, it was supposed, in view of the financial embarrassments of the defendant, that the new obligations, authorized by the act, would be acceptable to the holders of the original bonds, and would be of equal, if not of greater, value. But the plaintiff was entitled to the money due by the terms of his bonds, and any legislative act which attempts to deprive him of it, by compelling him to accept something different, violates fundamental principles of justice, and is, in effect, an arbitrary confiscation of the plaintiff's property. Although, by the theory of the British constitution, parliament is omnipotent, the jurists and statesmen of England have denied its right to transcend the boundaries which confine the discretion of parliament within the ancient landmarks. When it was proposed by act of parliament, to impair vested property rights, by remodeling the charter of the East India Company, in 1783, the attempt was denounced by Lord Thurlow and Mr. Pitt, "as a total subversion of the law and constitution of the country;" and some of the greatest jurists and judges of England have declared that an act of parliament against common right and natural equity is void. Angell & Ames on Corp., § 767. In our own country we regard such acts as so subver-

sive of natural rights as not to be within the authority delegated to the legislative department of the government. It is sometimes supposed, that, because the constitution of the United States prohibits the states from passing such laws, and is silent as to the United States, the authority to pass them resides in congress, by implication. This is an erroneous assumption. As is said by Nelson, J., in *The People v. Morris*, 13 Wend., 328: "It is now considered a universal and fundamental proposition, in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private purposes at all, nor for public without a just compensation; and that the obligation of contracts cannot be abrogated or essentially impaired. These and other vested rights of the citizen are held sacred and inviolable, even against the plenitude of power of the legislative department." The same views are expressed by the learned author of *Cooley, Const. Limitations*, p. 176, as follows: "However proper and prudent it may be expressly to prohibit those things which are not understood to be within the proper attributes of legislative power, such prohibition can never be regarded as essential, when the extent of the power apportioned to the legislative department is found, upon examination, not to be broad enough to cover the obnoxious authority. The absence of such prohibition cannot, by implication, confer power." A contract is property. To destroy it partially is to take it, and to do this by arbitrary legislative action is to do it without due process of law. *Sinking Fund Cases*, 99 U. S., 746, 747.

If any of our own states had passed such an act as the one under consideration, it would have been the duty of the courts of that state to treat it as an unlawful exercise of power; and, certainly, it cannot be expected that this court will tolerate legislation by a foreign state, which it would not sanction if passed here, and which, if allowed to operate, would seriously prejudice the rights of a citizen of this state. Comity can ask no recognition of such unjust foreign legislation; and the case falls under the qualification of the general rule, which prescribes that, when the foreign law is repugnant to the fundamental principles of the *lex fori*, it will be ignored. Judgment is ordered for the plaintiff.

BRANCH v. MACON & BRUNSWICK RAILROAD COMPANY.

(Circuit Court for Georgia: 2 Woods, 385-390. 1875.)

STATEMENT OF FACTS.—The state of Georgia indorsed the bonds of the Macon & Brunswick Railroad Company, upon condition that such indorsement should vest in the state all the property purchased with the proceeds of the bonds so indorsed, and that the state should have a first lien thereon. Default in the payment of interest was made, and the governor took possession of the road. There was a second series of bonds issued by the company, also indorsed by the state, but the legislature declared the indorsement of this issue unconstitutional, null and void, and directed a sale to be made of the property under the first issue. A holder of the bonds of the second issue filed this bill to enjoin the sale and have a receiver appointed. Further facts appear in the opinion of the court.

Opinion by **BRADLEY, J.**

The complainant has filed the present bill, in which he prays for an injunction to prevent the said sale, and the appointment of a receiver to take possession of and sell the said road and property, under the direction of this court.

§ 1843. *A creditor can require the application to the payment of his debt of a security given by way of indemnity to the surety of his debtor.*

The ground of the application is the apprehension that, in accordance with the legislative resolution of March 6, 1875, the second issue of bonds is to be repudiated, and that no part of the proceeds of said railroad will be appropriated to the sale of his bonds. The ground on which the complainant claims a right to have the railroad and other property of the company seized and applied to the payment, as well of the second issue of bonds as of the first, is the well known principle of equity, that a security given by way of indemnity to a surety may be reached and applied directly to the payment of the debt, and the surety cannot prevent such application.

§ 1844. *This court has no power to take property out of the possession of a state at the instance of a party who admits that the state has come rightfully into possession.*

In other words, that the creditors will, in equity, be subrogated to the rights of the surety in reference to the security by which the debtor has indemnified him. The great difficulty in this case arises from the fact that the surety is the state of Georgia, and that the said state is, by its agents and officers, in possession of the property given by way of indemnity. In order to effect the objects of this bill, the state must not only be displaced and the bondholders subrogated in its stead in reference to the property in question, but the courts must dispossess the state of the actual possession of that property. Of course this court has only co-ordinate jurisdiction with the state courts in this matter, and can only do what the state courts themselves could do in the exercise of general equity jurisdiction. The supreme court of this state has recently held, in the case of *Printup v. Cherokee R. Co.*, 45 Ga., 365, that the courts of this state have no power to take a railroad out of the possession of the state. As the question is one of general consideration, not depending upon any special statutory law of the state of Georgia, this court, as a court of equal and co-ordinate jurisdiction, would not feel absolutely bound by that decision, but would only give it such regard as the respect due to the learned court which made it would properly require. We are of opinion, however, that the decision has many considerations of weight in its favor. While it is true that in the case of *Osborn v. United States Bank*, 9 Wheat., 738, and *Davis v. Gray*, 16 Wall., 232, the supreme court of the United States sustained suits against state officers for the recovery or protection of property belonging to the complainants or their trustees, in which the state had no interest or right, and the pretensions of the agents, in behalf of the states, were unconstitutional and void, we think no case can be found in which any court has assumed jurisdiction to interfere with property in the possession of the state, and admitted to have come rightfully into its possession. In this case, the railroad in question is as much in possession of the state itself as is the state house, or any other property belonging to it. And then the title, by which the complainants seek to have this court take possession of the property and wrest it out of the hands of the state, is one which admits the title of the state, and is, in truth, none other than that of the state itself, to which the complainant seeks to be subrogated.

§ 1845. *This court cannot act on property in the possession of the state unless the state be a party to the suit, and the state cannot be made a party. (a)*

The court is asked to make a decree, operating directly upon the rights of the

(a) A statutory mortgage on the property of a railroad company in Georgia was made to indemnify the state on its indorsement on the bonds of the company; this did not operate to make the state a trustee for the holders

state, and transferring them to the complainant and the other bondholders. It is not merely the possession of its agents, but the actual right and title of the state itself, which are sought to be affected and transferred. We think this cannot be done without making the state a party to the suit, which cannot be done. The state has provided a security for its own indemnity, to be managed in its own way, by its own officers and agents. Can such a security be taken out of its hands, at the instance of the creditors ultimately to be benefited? Can the state be charged as trustee for those creditors, and compelled to give up the trust fund, by a court which has no jurisdiction over it? It seems to us that the difficulties of the case are insurmountable. Again, the state evidently intends to question the validity of the bonds of the second issue, and if liable only for the first issue, is interested in having the indemnity fund applied to the satisfaction of that issue. To sustain the complainant's case, the court would be compelled to decide upon the state's liability on its guaranty of the second issue of bonds, without having it as a party before it, and if satisfied of such liability, would have to decide to that effect, because the complainant and his co-bondholders have no claim against the railroad except through the equities arising from a valid guaranty of their bonds by the state. The court is called upon, therefore, to adjudicate directly upon the state's liability on the guaranty, without having any jurisdiction over it, as a party, and having decided in favor of that liability, it is then called upon to dispose of the fund which the state has taken for its indemnity. The case, therefore, involves a direct adjudication of the rights and liabilities of the state, and an ultimate execution of property in its possession, the state at the same time denying its liability and insisting upon its right to maintain its lawfully acquired possession. It seems to us that this is asking the court to go further than any court has ever yet gone, except where legislation has been adopted authorizing the state to be sued in the same manner as a private party. At all events the right of the complainant is, to our view, so doubtful that we do not feel authorized to exercise the extraordinary powers of this court sought to be put into operation. Without attempting, therefore, to point out to the complainant what other remedy he has, except to rely upon the good faith of the state of Georgia, we feel compelled to deny the motion for an injunction and the appointment of a receiver.

ERSKINE, D. J., concurred.

STEVENS v. LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(Circuit Court for Tennessee: 2 Flippin, 715-734. 1880.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—These are suits in equity pending in the circuit courts of the United States for the districts of Tennessee, brought by complainants on behalf of holders of internal improvement bonds of the state of Tennessee against various railroad companies to whom the bonds were issued, to aid in the construction of their several lines of railroads, and against all other persons interested. They were argued together in April and May last at Nashville.

The object of the suits is to have a lien in favor of the bondholders declared and established upon the railroads of the several defendant companies, and a

of the bonds which it had indorsed, when it afterwards came into the possession of the property by foreclosure of the mortgage. In such a case a bill by the bondholders against the officers of the state, to subject the property to the payment of their bonds, is in effect a suit against the state, and cannot be maintained. *Cunningham v. Macon & Brunswick R. Co.*,* 3 Woods, 418.

receiver appointed for the collection of the accrued and accruing interest, the interest having been in default since July 1, 1875. The principal is not due. The plaintiffs' contention is, briefly, that the acts passed by the legislature of the state of Tennessee in 1852, to grant aid to the railroad companies by a loan to them of the bonds of the state, imposed a lien upon the railroads, as security to the holder of the bonds and to the state—payment to the holder would operate as indemnity to the state. Inasmuch as the state and the companies are in default in the payment of the interest since July, 1875, the bondholders by these suits seek to have a lien in their favor established upon the roads.

The general assembly of the state of Tennessee passed, February 11, 1852, an act known as the "Internal Improvement Act of the state of Tennessee," extending aid to railroad companies by a loan of state bonds, the proceeds to be used in ironing and equipping the roads. Prior to the time of passing the act, there had been issued state bonds for various purposes, of which above three and a half million dollars were outstanding. The state of Tennessee was now in good credit; her six per cent. bonds brought a premium in the money markets of the world, as did also, subsequently, her bonds issued to the defendant railroad companies under the act in question, and acts amendatory thereof, which bonds are the subject of controversy in these suits. The scheme of internal improvement now adopted was to issue to each company six per cent. bonds to the amount of \$8,000 a mile in instalments—afterwards extended to \$10,000,—the first when a section of thirty miles of road was completed ready for the ties, and the subsequent instalments upon completion of each additional section of twenty miles—afterwards changed to ten miles. The bonds are transferable by delivery, run not less than thirty nor more than forty years from the respective dates of issue. The interest matures semi-annually, and, with the principal, is payable in New York. They were paid to the railroad company and sold in open market without indorsement or guaranty. The state was invested by the terms of the statute with a lien upon each section of the company's road as soon as the bonds of that section were issued, and upon final completion of the road such lien was to attach to the entire road and its equipments. The company was to be incapable of creating any lien conflicting with that in favor of the state. The amount of the lien claimed by complainants in behalf of such bondholders upon all the railroads is about fifteen million dollars. The litigation, however, affects the holders of between thirty and thirty-five million dollars of other mortgage bonds, secured upon these roads and issued under authority of the general assembly conferred in 1869-70 to enable the aided companies to repay to the state the bonds loaned to them. The holders of the last mentioned bonds claim to have a first lien upon the roads, and appear in these suits, with the defendant companies, to contest the lien claimed by complainants and their associate bondholders.

The interest of the state debt was in default from July, 1861, to 1866, during the civil war, when the price of her bonds had depreciated in value to less than fifty per cent. of their face. The storm of war left the railroads of the state without money, credit or rolling stock, and their roads and bridges going to decay. The first legislature of Tennessee, after the storm had passed, assembled in 1865, when the state and the railroad companies were alike in a condition of bankruptcy. Provision was now made by the state to fund all her overdue bonds and interest coupons outstanding into new bonds. In 1866 and 1867 the state issued additional bonds to some of these railroad companies to aid them to build bridges and repair their roads, the state reserving a lien and

imposing terms and conditions like those in the act of 1852, but somewhat modified.

In 1869-70 none of the principal of the railroad aid bonds issued under the acts of 1852 or acts amendatory thereof had matured, but now the general assembly of the state, to enable the respective companies to repay any part of the principal of their indebtedness for bonds loaned to them, passed an act permitting payment in any of the outstanding bonds of the state.

To obtain money to purchase state bonds for surrender, they were severally authorized to issue mortgage bonds upon their respective roads and equipments corresponding in denomination with the state aid bonds, and deposit them with the comptroller of the state, to be by him delivered to the company or its agents whenever and as Tennessee state bonds were by the company surrendered and canceled. These mortgage bonds were by law declared to be a first lien on the road and equipments of the company issuing them, and as evidence to the purchaser the comptroller was required to, and did, certify upon each bond that it was "secured by first mortgage."

Many of the companies availed themselves of this legislation, and under its sanction and authority an aggregate of between thirty and forty million dollars of such mortgage bonds were by the companies issued and sold, and are now outstanding. Other railroad companies did not avail themselves of the provisions of the law of 1869-70. They continued to be in default as to the payment of interest and as to payment annually into the sinking fund required by statute. Proceedings by the state were therefore commenced in the state court of chancery, and decrees of foreclosure and sale obtained. At the sale the state was purchaser. These foreclosed roads were subsequently sold by the state and new companies organized. Payment by the purchaser was made to the state in any outstanding Tennessee state bonds at their face value, and the purchaser was invested with all the right and title of the state.

The state, as before stated, had funded her overdue bonds and interest coupons into a new bond under the law of 1865, and in February, 1870, another act was passed to again fund unpaid interest that had accrued on the public debt, together with the floating debt of the state, and all that might become due up to 1874. Holders of Tennessee bonds, including holders of internal improvement bonds issued to railroad companies, generally accepted the provisions thus made for retiring overdue interest coupons, as they had done under the act of 1865. The state of Tennessee, however, again defaulted in her interest January 1, 1875, and subsequently openly repudiated her bonded debt, for the payment of which the faith and credit of the state were solemnly pledged.

The internal improvement act of February 11, 1852, will alone be referred to, as it contains all the provisions necessary to be considered. The lien is declared by the third section, which is as follows: "That so soon as the bonds of the state shall have been issued for the first section of the road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid, including the road-bed, right of way, grading, bridges and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered, and the state of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with the said lien or mortgage without a deed from the company, for the payment by said company of said bonds, with the interest thereon as the same becomes due."

The requirement, by section 5, as to the payment of interest, is that fifteen

days before it falls due the company shall deposit in the Bank of Tennessee—the state's fiscal agent—"an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for; and if said company fail to deposit said interest as aforesaid or furnish the evidence as aforesaid, it shall be the duty of the comptroller to report that fact to the governor," who is immediately to put the road into the hands of a receiver to operate it in behalf of the state until the default is made good and then to surrender the road to the company. By this section "the comptroller is authorized, and it is made his duty, upon his warrant, to draw from the treasury any sum of money necessary to meet the interest on such bonds as may not be provided for by the company, as provided for in this act, and the comptroller shall report thereof to the general assembly from time to time."

The requirement as to the payment by the company of the principal of the bonds by section 7 is, "That at the end of five years after the completion of said road said company shall set apart one per centum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the state of Tennessee, which bonds the company shall pay into the treasury of the state after assigning them to the governor, and for which the governor shall give said company a receipt, and as between the state and said company the bonds so paid in shall be a credit on the bonds issued to the company. And bonds so paid in and the interest accruing thereon, from time to time, shall be held and used by the state as a sinking fund for the payment of the bonds issued to the company, and should said company repurchase any of the bonds issued to it under the provisions of this act, they shall be credited as aforesaid and canceled. And should said company fail to comply with the provisions of this section it shall be proceeded against as provided in the fifth section of this act," viz., as in case of failure to meet instalments of interest. It will be noticed that, as these bonds were to be issued in instalments at different periods, they would therefore fall due at different times.

The sixth section provides "that if said company shall fail or refuse to pay any of said bonds when they fall due it shall be the duty of the governor to notify the attorney-general of the district in which is situated the place of business of said company of the fact, and thereupon said attorney-general shall forthwith file a bill against said company in the name of the state of Tennessee in the chancery or circuit court of the county in which is situated said place of business, setting forth the facts, and thereupon said court shall make all such orders and decrees in said cause as may be deemed necessary by the court to receive the payment of said bonds with the interest thereon and to indemnify the state of Tennessee against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a receiver, ordering the sale of said road and all the property and assets attached thereto or belonging to said company, or in such other manner as the court may deem best for the interest of the state."

By section 12 "The state of Tennessee expressly reserves the right to enact by the legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the state and to secure the state against any loss in consequence of the issuance of bonds under the provisions of this act, but in such manner as not to impair the vested rights of the stockholders of the companies."

Complainants contend that the statutory lien is to be regarded as an instru-

ment of security taken for the benefit of the bondholders; or, more fully stated, that the legislation and action of the state under it were effectual to fix upon the railroads respectively a lien not merely for the indemnity of the state of Tennessee, but also to secure the payment of its bonds to their holders; that the state became trustee of this lien for the benefit of the holder of the bonds, which lien inured to their benefit as *cestuis que trust* of the state, by force of the express contract to that effect in the law creating the security, as well as by necessary legal implication from the relations of the parties, which no subsequent dealings between the railroad companies and the state could discharge. Again it is said: "The first or primary object of the act was to compel each aided company to pay its debts directly to its true creditor, the lender on the bonds. This was effected by the usual and proper process, a lien pure and simple for the payment of the bonds upon the estate of each aided company, enforceable in equity in case of default." On the other hand defendants' answers state the opposing view thus: "That the said statutory mortgage was taken by the state in its own behalf and for its own benefit, and not as trustee for its bondholders, and that said statutory mortgage was conditioned solely for the payment by the company to the state of the company's indebtedness to the state for the bonds loaned to it, and in respect of both principal and interest such payment was conditioned to be made by the company to the state before the corresponding amount of interest or principal would become due or payable by the state to the holders of the state bonds; . . . that by the statute two entirely independent and distinct debts were created; one from the state to the bondholders upon its bonds payable to bearer, resting upon the faith and credit of the state; the other an indebtedness from the railroad company to the state for the amount of the state bonds loaned to it, and that the statutory mortgage was given to secure this latter direct obligation from the railroad company to the state, with which the bondholders had no connection or concern."

It is further said that whether the engagement of the company was to pay to the state or to holders of the bonds is not important, and that if under the terms of the act it shall be held that the companies were to make payment to the bondholders, such payment was to be merely in relief of the state from the ultimate performance of its obligation — but all the while the obligation of the state remained,— was to be in exoneration of the state, but did not modify its undertaking on the bond and created no privity between the bondholders and the company. That such an undertaking by the company would be to indemnify the state by payment of the bond in its stead, and that the obligation was to the state alone, and one in which no one else had or was intended to have any legal or equitable interest, much less any direct participation and right of intervention or control. That the relation between the railroad company and the holder of state bonds was that merely of vendor and purchaser of negotiable securities, passing by delivery and without indorsement, and therefore created no relation between them of debtor and creditor.

I cannot refrain from expressing personally and officially my acknowledgments for the complete and exhaustive arguments by learned and eminent counsel which distinguished the hearing and submission of these important cases. I approach their consideration with all the aid which the most consummate and elaborate arguments can afford. The opinion will not extend over all the debated ground.

Have the holders of internal improvement bonds, loaned by the state of

Tennessee to a railroad company, under the act in question, any enforceable right by contract or otherwise in the statutory lien that is reserved to the state of Tennessee for the payment of the principal and interest of the bonds as they matured? Section 3 provides: "That so soon as the bonds of the state shall have been issued for the first section of the road as aforesaid, they shall constitute a lien upon said section, . . . and the state of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien . . . for the payment by said company of said bonds with the interest as the same becomes due." This section of the statute relates only to the first division of thirty miles, but the lien there declared is by another part of the act applied and extended to each additional section of twenty miles as fast as completed, and finally to the entire road, as security "for the payment of all bonds issued to the company." Sec. 4.

§ 1846. *The state of Tennessee is a principal debtor upon bonds loaned by it, under the act of 1852, to railroads, and not a surety.*

The lien upon the property of the company was effected by virtue of the statute upon the issue of the bonds by the state and their acceptance by the company. Unless an intention of the legislature to secure the purchaser of the bonds can be implied from the act and the dealing of the parties, the claim of complainants to the relief asked in these suits rests upon a mere equity. There is no denial that it was the state of Tennessee which was invested with the lien, but it is said that she occupies the position of a surety holding security for the payment of the debt, of which security the creditor—the bondholder—can, upon default of the principal debtor—the railroad company,—avail himself in equity; that default by the company and by the state in the payment of the interest having occurred, the state becomes and is a trustee of this lien for the benefit of the bondholder. It was the state and the railroad company that dealt together in this matter. The state dictated the terms upon which it would grant aid, and the company accepted those terms without reference to what the purchaser of the bonds would say or claim. The bonds were loaned by the state and passed over to the company to be sold for money to aid or accommodate the company. The bonds were accepted by the company upon the understanding and agreement: 1. That the state was invested with a lien upon the company's railroad and property to secure "the payment by said company of said bonds with the interest thereon as the same becomes due;" 2. That the interest should be paid by the company to the financial agent of the state at least fifteen days before it should become due, or satisfactory evidence be produced that it had been paid or provided for; and 3, that the principal of the bonds should be paid by the company by means of a sinking fund in the state treasury, created by the purchase and deposit therein of Tennessee interest-bearing bonds, supposed to be adequate for the purpose of enabling the state to meet its bonds at maturity.

There is nothing in any of these stipulations out of which the relation of the state to the bondholder is changed from that of a principal debtor to a surety. Nor does it appear how the company becomes debtor to the bondholder in any degree whatever. There is no express promise on its part to the bondholder, nor is any contract relation implied between him and the company. Section 3 contains no language importing such promise. It declares merely that the state of Tennessee shall be invested with a lien for the payment of the bonds by the company. The state imposes the lien if its aid is accepted and as a condition of the grant. The language may imply a promise by the company ac-

cepting the aid to pay the state, but there is no obligation of the company to pay the bondholder, resulting either from positive law or from contract express or implied. The lien was clearly "reserved in favor of the state." It was the state of Tennessee that, upon the issuance of the bonds, was invested with the lien or mortgage without deed. No other lien could have priority over or come in conflict with the lien of the state. The company was to deposit the interest money and exchange with the state's fiscal agent at least fifteen days before it became due, or satisfactory evidence that the interest had been paid or provided. All the suits and proceedings under the act are given as remedies exclusively to the state. The state might have a decree and sell the road for non-payment of any bond. The bond was made by the state for the accommodation of the railroad company, and was sold in open market, without any promise by the company other than what is implied to the state by accepting the benefit of the act.

§ 1847. *Where bonds are loaned to a corporation by a state and sold without indorsement or guaranty there is no trust or contract, express or implied, between the corporation and the bondholder.*

There is no express declaration of trust on the part of the state. It is sought to raise a trust out of the language of the act, and the principle is invoked, applicable to a security given by a debtor to his surety, conditioned that it shall be void if the mortgagor pays the debt on which the mortgagee is surety, viz.: That in such case the mortgage will be held both as an indemnity to the surety and as a security for the debt; the surety being regarded in equity as trustee for the benefit of the creditor, and as having no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration without notice. The rule is not questioned. But it is not conceived that this rule would control the express terms of a mortgage or other instrument of security, nor render wholly nugatory the effect of an express reservation of a right of disposition of the mortgaged property by the mortgagee, as is provided in the statute under consideration. It is not within the province of equity to import conditions into the mortgage. The conditions of this statutory lien were, that the company should deposit the interest money and exchange with the state's fiscal agent, or furnish evidence of prior payment, and should also pay into the treasury the means of providing a sinking fund for the ultimate payment of the bonds. This dealing was to be with the state — as to the payment of the principal it must have been — as to the payment of interest it was optional with the company, — and there being no express covenant by the company, a compliance with the conditions named in the mortgage would discharge the lien.

We do not overlook a claim, made by one of complainants' counsel, that the intention of the legislature is to be ascertained by the language of the statute declaring the lien, but we think the statute must be construed together, and that the requirements put upon the mortgagor — the conditions of his mortgage, — when read in connection with the declaration, many times repeated in the statute, that the lien is the lien of the state, should have great weight in determining the legislative intention. The meaning of the legislation is to be declared from the words and subject matter of the statute. It is the scope and meaning of the whole enactment, rather than the liberalism of words and phrases, that are to govern; the signification of the entire act, and not a single clause, determines the intention of the law maker. Thus section 6, considered with other provisions of the act, is important as reserving to the state the right

through proceedings in court, to sell the road, thereby discharging it from the lien imposed by the statute.

The fact that the state might discharge the lien in such way imports that there was no intention of the law-makers to give a beneficial interest in the security to any one but the state. This view applies with peculiar force where the holder of the security is a state, not amenable to the ordinary process of courts. This view of the effect of section 6 upon the construction as to legislative intent is not weakened but fortified by section 14, which declares that "in the event any of the roads . . . shall be sold under the provisions of the act, it shall be the duty of the governor to appoint an agent for the state, who shall attend the sale, . . . and protect the interests of the state, and shall, if necessary to protect said interest, buy in the road . . . in the name of the state; and in case said agent shall purchase said road for the state, the governor shall appoint a receiver, who shall take possession of the road and property, and use the same as provided for in the fifth section of this act, and said receiver shall settle his accounts semi-annually with the comptroller until the next meeting of the general assembly." This section imports three things, at least, as to a sale: 1. A third person may be a purchaser. 2. The state may be the purchaser. 3. That the purchaser obtains a title discharged of the lien. It is manifest that if a stranger buys he takes title freed from all liens imposed by the act upon the property, and there is nothing in the language of the section or in the act to indicate that the state, becoming purchaser, does not take the property equally free from such lien.

The receiver appointed by the governor is to take possession of the road and "use the same as provided for in the fifth section," that is, in like manner, viz., "run the same and manage the entire road." This he is to do until the next meeting of the general assembly, when by clear implication the future management or disposition of the road is left to legislative action. The contract between the state and the company is that the state shall have a lien "for the payment by said company of said bonds," but it is nowhere required by the state, and therefore not assented to by the company, that the latter shall pay *to the bondholder*. It was urged that this language imports payment by the company to the only person then entitled to ask or enforce it. The language must, however, be understood to relate to other parts of the statute which prescribe specifically the manner of payment by the company, viz., payment annually into the state treasury of a sum to be employed as a sinking fund.

It is made optional, by section 5, with the company, whether it will deposit the interest as it becomes due with the fiscal agent of the state, or pay the same to the bondholder, and by section 7 the principal was to be paid by setting apart annually, after five years from the completion of the road, a certain per centum of the amount of bonds issued to the company, invested in any bonds of the state and assigned to the governor. This sinking fund provision would, within the period which the bonds had to run, place in the treasury of the state an amount sufficient to nearly or quite enable the state to pay the bonds. The Tennessee bonds were generally six per cent., and funded in those, the time required would be thirty-three years and two months.

There is nothing in the act to indicate that after the company has complied with these provisions as to interest and sinking fund, and has thus provided the state with the means of payment, that the company was also required to pay to the bondholders. Certainly this was not the condition of the security, as the only way in which a default could occur was by failure of the company to

provide for payment of the interest and principal in those specified ways. But it is said the sinking fund was not to be commenced until five years after the particular road should be completed, and that that event might not take place at all, or not till half or more of the time which the bonds had to run had expired, so that the period might be wholly inadequate in which to provide a sufficient sinking fund for paying the bonds when due, and that this indicates that the lien was not intended as a security merely for payment by the company to the state by means of a sinking fund in the manner provided. A statute must be construed from the standpoint, the circumstances and surroundings of the law-makers when it was enacted; and it would be unjust, and repugnant to reason and common experience, to assume that the legislature passed the act in the expectation that the roads would never be finished, or would not be completed within a reasonable time. Besides, section 12 reserved to the state ample powers to make such modifications in relation to the time for the sinking fund to commence, and the per cent. annually to be paid into that fund, as would fully protect the interests of the state against delay on the part of the railroad company. Whatever might be said in regard to the evidence, adduced in these cases, of contemporaneous construction through the utterances of state officials in public documents, the action of any department of the state government, or otherwise, there is, in the judgment of the court, nothing to change the views which have been expressed.

§ 1848. — *authorities reviewed.*

Chamberlain v. St. Paul & Sioux City R. Co., 92 U. S., 299, was decided upon a statute and upon facts similar to those in the present case, and is very instructive. The state of Minnesota by a constitutional amendment provided for an issue of its bonds as a loan to the Southern Minnesota Railroad Company, and required such company to convey the lands in question "in trust for the better security of the treasury of the state from loss on said bonds;" and further provided that if the borrowing company should make default in payment of either the principal or interest of the bonds issued by the state, the governor should proceed to sell the lands held in trust by the state. The company accordingly executed a trust conveyance of the lands to the state, conditioned for the payment of the principal and interest of the bonds issued to that company. The company made default in the payment of interest. The state foreclosed and became the purchaser of the lands, which she granted to another corporation, the defendant in the *Chamberlain* suit. *Chamberlain* was holder of some of the state bonds, the payment of which was secured by the trust conveyance, and sought to have a lien upon the land declared in his favor.

In the cases at bar, as in that case, the state was primarily liable to the holder of the bonds. In the cases at bar, as in that case, the state reserved to itself the right of foreclosure and disposition of the property. In deciding that case, Justice Field, after stating the position of the complainant, viz., "that the interest which the state took under the trust deed and mortgage was only the right to hold them as security against loss upon its bonds, . . . that this interest was not changed by foreclosure of the mortgage and by purchase of the property by the state," uses the following language: "The state was primarily liable to the bondholders; and it was only between her and the company that the relation of principal and surety existed. It may be doubted whether the bondholders could call upon the company in any event. The indorsement made by the president simply transferred the bonds; it was not the act of the company. Be that as it may, whatever right the plaintiff had to

compel the application of the lands received by the state to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a court of chancery against the surety. But the state being the surety here, it could not be enforced at all, and, not being a specific lien upon the property, cannot be enforced against the state's grantees."

This was said to be the law of that case, even if the bondholders could have called upon the company for payment. But laying this feature aside, the analogies are as before stated, and whatever right the plaintiffs have to claim benefit from the security rests here, as in that case, as a mere equity; there was no legal right because the law did not impose one, and the company made no promise to the bondholder. Such equity created no lien which followed the property; the liability of the state was to the bondholder. She held no relation as surety to him; as in the Chamberlain case, it was only as between her and the company that, in any possible view, the state could be regarded as surety, and this view would make it necessary to treat the company as the principal debtor to the bondholder, whereas the company was not the principal debtor, nor indeed a debtor to the bondholder in any degree.

The reasoning in the case of *Hand v. Railroad Co.*, in the supreme court of South Carolina (manuscript), referred to on the argument, cannot all be adopted as applicable to these cases, if the conclusions might be. It is not upon its facts authority. The railroad company made its own bonds, and the state guarantied their payment to the holder by indorsement. The state was secured by a lien upon the company's road, reserved by the statute which authorized the guaranty. As a surety the state assumed contract obligations to the creditor — the bondholder. If a creditor has a right to claim the benefit of security given by the debtor to his surety for the latter's indemnity, it does not follow that the right exists where the principal debtor takes the security from the accomodatee, and where the security holder holds no other relation to the creditor than that of debtor, and the giver of the security is neither a debtor nor surety to the creditor.

It becomes unnecessary to further consider the effect of the reservation of power to the state under section 12. The court has already stated that such reserved power is ample to authorize a modification of the sinking fund provisions, as has been done by increasing the amount to be paid annually into the sinking fund, and changing the time for such payment to commence.

It follows that by this judgment neither the foreclosed nor the non-foreclosed roads are subject to any lien in favor of the holders of internal improvement bonds issued by the state of Tennessee, under the acts passed by that state, and to which reference has been made.

Other topics presented in the arguments need not be considered. A decree will be entered in each case, dismissing the bill of complaint therein, with costs to defendants, and it is directed that such decrees be drawn and presented for approval.

§ 1849. *Injunction.*—The state of Louisiana passed an act providing for the issue of as many consolidated bonds as may be necessary to take up its outstanding bonds and warrants. That these should be exchanged for all valid outstanding bonds and warrants then existing, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds. That the consolidated bonds should be used for no other purpose. It also provided for the levy and collection of a certain per cent. for the sole purpose, and no other, of paying the consolidated

bonds. This act was declared by the legislature and by the constitutional amendment to be a contract on the part of the state with all the holders of bonds issued under it. It is held that the holders of these consolidated bonds may restrain, by injunction, the issue by the agents of the state of these consolidated bonds to the general creditors of the state for work contracted and done, dollar for dollar. *McComb v. Beard of Liquidation*, 2 Woods, 48.

§ 1850. **County warrants; mandamus.**—The act of the territory of Montana, of November 22, 1867, authorizing the county commissioners of certain counties to issue bonds in place of outstanding county warrants, does not confer power on the commissioners to compel any holder of county warrants to take bonds of the county instead. Nor does it empower them to forbid the county treasurer from paying these warrants when due. The holder of the county warrant may compel the payment thereof by *mandamus* if there is sufficient money in the treasury. *Thomas v. Smith*,* 1 Mont. T'y, 21.

§ 1851. **Bonus in lieu of subscription.**—A statute authorizes the police court in certain counties to subscribe to the stock of a railroad company, upon a vote of the county. A county votes subscription to stock, and levies a tax to raise the subscription. The sheriff, as collector, collects part of this tax. But, for reasons not disclosed, the county fails to make the subscription. On controversy between the county and the company, it is agreed, by way of compromise, that the county will pay to the company the tax collected as a bonus. The president of the police board accordingly directs the sheriff to pay the money to the company. The sheriff refuses. On *assumpsit* by the company for the money, it is held that the compromise, being unauthorized by the statute, is void, but that the money vested in the company when the sheriff received the order; and so far as the sheriff was concerned, as between him and the company, the latter is entitled to the money. It was also held that the failure of the sheriff to give bond to pay over moneys collected, as required by law, did not affect his duty to pay over this money, at the order of the president of the police board. *Bell v. Railroad Co.*,* 4 Wall., 598.

§ 1852. **Measure of damages.**—Where a city loans its bonds to a contractor, to whom it is indebted for paving its streets, upon an agreement to secure them by pledges and redeliver them with interest in eighteen months, the measure of damages for failure to return the bonds is the same as the measure of damages for non-delivery of chattels generally. *City of Memphis v. Brown*, 11 Am. L. Reg. (N. S.), 629.

§ 1853. **Liability of city and town.**—A town issued bonds in aid of a railroad and subsequently a part of the town was included within a city. The act making this change provided that all the bonds issued by the town should be paid by the city and town in the same proportions as if the said city and town were not dissolved. *Held*, that a suit in equity might be maintained on a judgment on such bonds against the city and the town, and the amount which each must pay will be proportioned to the amount of the taxable property in each. A bondholder in such a case is not confined to legal remedies. *Morgan v. Beloit*, 7 Wall., 617.

§ 1854. **Exchange.**—Where a city makes its bonds payable at a distant place, *e. g.*, in New York, the holder cannot recover exchange. *Mygatt v. City of Green Bay*,* 1 Biss., 292.

§ 1855. **Payment; equities.**—The state of Texas was about to institute proceedings to enjoin the transfer and payment of past-due bonds issued to it by the United States. The secretary of the treasury being unwilling to pay the bonds, and thus defeat the intended proceedings, H., who held some of the bonds, arranged with the secretary, before process was served, to pay him for the bonds upon his depositing with the treasurer, as trustee, other interest-bearing bonds as substitutes for the non-interest-bearing bonds in dispute. *Held*, that the transaction was not a payment, and the substituted bonds or proceeds thereof, *pro tanto*, were subject to the same equities as the original bonds. *Texas v. Hardenberg*,* 10 Wall., 68.

§ 1856. **United States bonds.**—Where a state, having certain United States bonds payable to bearer in its treasury, which, under a statute, passed by its legislature, could not be issued without its governor's indorsement, entered into the rebellion against the federal government, repealed said statute, and issued a number of said bonds unindorsed, *held*, (1) that the alteration of said bonds was valid if not for an unlawful purpose; (2) that the presumption is that they were lawfully issued; (3) that if a part of said bonds were lawfully and a part unlawfully issued, one who took before maturity and without notice of any illegality in the issue would have a good title, and that only a holder of the bonds or one who, having held them, has received the proceeds with notice that they were issued for an illegal purpose, can be held liable to the reconstructed state. *Huntington v. Texas*,* 16 Wall., 402.

§ 1857. **Bills of credit.**—Bonds payable to holder, issued by a county under authority of an act of the legislature, are not bills of credit within the meaning of the constitution of the United States. *McCoy v. Washington Co.*,* 3 Wall. Jr., 381.

§ 1858. **Cancellation of bonds.**—Bonds are issued by a city in payment for stock in a railroad company, under the requirement of law and the agreement of the company that their proceeds are to be expended in work on the road within the county. The company becomes

insolvent. No work is done within the county. The law under which they were issued is declared void. The bonds are delivered up by the company. *Held*, that this surrender is binding. *Foote v. Mount Pleasant*, * 1 McC., 101.

§ 1859. *Rescission of contract.*—Where a bank sells water-works to a city and takes the city's bonds in payment, the contract cannot be rescinded on the part of the bank on the ground that the bonds are void when the city has not repudiated its bonds nor denied its obligation. Nor can the holders of a part of the bonds, the bank being in liquidation, maintain a bill to prevent the city from selling or leasing the water-works, the bonds being good in the hands of *bona fide* holders, and the holders of the most of the bonds not appearing and assenting to such a bill. The ownership of these bonds would not give the holders any title to the property of the bank. *Sala v. New Orleans*, * 2 Woods, 183.

§ 1860. *City becoming a new corporation.*—In an action against a municipal corporation on its bonds, it is no defense that it has, since the issue of the bonds, been reorganized under the acts of the legislature and become a new corporation, where the act authorizing the issue of the bonds also authorized the city to levy a tax for their payment. *Milner v. City of Pensacola*, * 2 Woods, 632.

§ 1861. *Mortgage.*—Where municipal bonds have been issued to a railroad company in payment of stock subscribed, and remain in the possession of the company while it mortgages its road and all its property, it is held that the mortgagee, on foreclosing the mortgage, is not entitled to the bonds, since they were not included in the mortgage except under the general terms of "all other property, real or personal," and since they were never delivered to the trustee in the mortgage, and were delivered up by the company to the city on demand. *Foote v. Mount Pleasant*, * 1 McC., 101.

§ 1862. *Bonds issued by the United States.*—The United States, under the acts of 1862 and 1864, to aid in the construction of the Union Pacific Railroad, issued bonds to that company. The company were to pay the bonds at maturity, to allow the government to retain the compensation due the corporation for services rendered, and apply the same towards paying the bonds and interest until the whole amount should be paid, and to pay over to the government, after the completion of the road, five per cent. of the net earnings of the road, to be applied to the satisfaction of bonds and interest. *Held*, that the company was not required to pay the interest upon the bonds which accrued before the maturity of the bonds, and that the maturity of the bonds referred to the time fixed for their payment, which is the termination of the period they have to run. *United States v. Union Pacific R. Co.*, 1 Otto, 72.

§ 1863. *Guaranty.*—Certain municipal corporations, through which a railroad was located, issued their bonds, with interest coupons attached, in payment of subscriptions to its stock. The railroad guarantied the payment of the principal and interest of the bonds as stipulated. The coupons not being paid as they matured, judgments were recovered against the municipalities, and against the company as guarantor, and executions issued and returned unsatisfied. Prior to the recovery of the judgments the company executed several mortgages to secure the payment of its bonds issued at different times. The company being insolvent, the mortgages were foreclosed, and the road was sold at less than the amount of the mortgage debt, pursuant to an arrangement between the stockholders and the holders of the mortgage bonds, by which the former were to receive a percentage of the proceeds. *Held*, that the company, being authorized to receive municipal subscriptions to its stock and take bonds therefor, had authority to guaranty the same, and that the proportion of the proceeds of the sale to be paid to the stockholders constituted a trust fund for the benefit of the creditors of the company. *Railroad Co. v. Howard*, 7 Wall., 392.

§ 1864. A city ordinance provided for the issue of interest-bearing city bonds in aid of a gas company, on condition that the company should guaranty the said bonds and assume the principal thereof at maturity. *Held*, that the guaranty mentioned embraced principal and interest. *New Orleans v. Clark*, 5 Otto, 650.

§ 1865. A city contracted for certain work, and agreed to pay therefor in bonds payable in the future, with coupons attached, "principal and interest guarantied and provided for by a sinking fund set apart for that purpose." The contractor took the bonds, without objection, in payment for work, and negotiated them without making any demand that such sinking fund be provided. *Held*, that he thereby waived his right to insist upon the guaranty. *City of Memphis v. Brown*, 20 Wall., 318.

§ 1866. *Liens.*—The Missouri act of January 7, 1865, authorizing the county of St. Louis to issue and loan its bonds to the Pacific Railroad, created, on its acceptance by the company and the county, a lien or equitable charge, in favor of the county, upon the earnings of the railroad, to the extent necessary to meet the interest on the loan, and to continue until the bonds of the county were paid by the railroad, or the purchasers of the property and franchises thereof, and such lien followed the road into whosoever hands it passed. *Ketchum v. Pacific Railroad*, 4 Dill., 78; 11 Otto, 306.

§ 1867. The statute creating the lien of bondholders on railroad property governs their rights, although, without the aid of the statute, a resulting equity would have arisen in their favor. *North Carolina R. Co. v. Drew*, 3 Woods, 691.

§ 1868. The act of the 7th of January, 1865, of the state of Missouri, authorizing St. Louis county to issue bonds and loan them to the Pacific Railroad Company, and providing that the fund commissioner of the company shall, every month after the bonds are issued, pay into the county treasury out of the earnings of the road a certain sum to meet the interest on the bonds, and to continue until the bonds are paid off by the company, being accepted by the company under an express agreement to comply with its conditions, is held to create a lien in favor of the county upon the earnings of the road which is enforceable against any one into whose hands the funds may come. This lien is enforceable against a receiver of the road, or a purchaser under a decree foreclosing a subsequent mortgage. *Ketchum v. St. Louis*, 11 Otto, 806.

§ 1869. Railroad bonds.—Where there were two mortgages upon the property of a railroad company securing a first and second issue of bonds, the second mortgage having been taken with notice of the first, *held*, that the holders of the first issue of bonds were entitled to an injunction to restrain the execution of a judgment at law, obtained upon a portion of the bonds of the second issue by levy and sale of property covered by the first mortgage. *Pennock v. Coe*, 23 How., 117.

1870. It does not follow from the fact that a state is the indorser of railroad bonds that it is a necessary party to a bill to subject the property of the road to the payment of these bonds. Nor does the fact that the state is not made a party and cannot be sued prevent the holders of these bonds from subrogation to the rights of the state. *Young v. Montgomery & Eufaula Railroad Co.*, * 2 Woods, 603.

§ 1871. The entire property and franchise of a railroad company, subject to the lien of a mortgage, securing a large amount of its bonds, were sold under an order of sale, made at the suit of a holder of a few of the bonds, to which proceeding the great majority of the bondholders, whose residence was remote, were not made parties and of which they had no notice. The sale was advertised in a local paper and the property was bid in at an inadequate price. The proceeding was instituted and conducted throughout in pursuance of a combination between the party who instituted it, the president of the road, some of its directors, the trustee for a large number of the bondholders, the trustee in the mortgage and the purchaser at the sale, to prevent competition in bidding at the sale, and to obtain the property at a nominal price. At the suit of the bondholders not engaged in the confederacy, the property was declared subject to the lien of the mortgage, the sale was set aside, the property ordered sold for the benefit of the bondholders, and the purchaser, under the sale vacated, and others interested with him, were directed to account. *Jackson v. Ludeling*, 21 Wall., 816.

§ 1872. A railroad corporation issued coupon bonds, secured by mortgage, under a statute which provided that the bonds should not "mature at an earlier period than thirty years." The mortgage and each of the bonds contained a provision that on the failure to pay any coupon of any of the bonds, when presented, and continued default thereon for six months, the whole sum secured by the mortgage should become due and payable. *Held*, that the provision for the principal maturing earlier than the period prescribed in the statute was void. *Howell v. Western Railroad*, 4 Otto, 463.

§ 1873. The bonds of a state were exchanged for bonds issued by a railroad company, the statute by authority of which the exchange was made creating a statutory mortgage in favor of the state upon the railroad to secure the bonds of the company received in exchange. The state bonds were decided to be void. *Held*, that, under these circumstances, the holders of the state bonds, for which the state had received bonds of the railroad, were entitled to be subrogated to the statutory lien created in favor of the state. *North Carolina R. Co. v. Drew*, 3 Woods, 691.

§ 1874. Where holders of bonds issued by a railroad company under three mortgages filed a bill, on behalf of themselves and all other holders of bonds of the several classes under the different mortgages, for the foreclosure and sale of the road to pay in due order the outstanding bonds under the different mortgages, the objection that there was no community of interest between the several classes of bonds was held to be untenable. *Galveston Railroad v. Cowdrey*, 11 Wall., 459.

§ 1875. Where a railroad company was authorized to issue its bonds, secured by mortgage, for the purpose of taking up its bonds of a prior issue outstanding, and made its mortgage purporting to secure bonds to an amount stated, which was in excess of the amount of its then outstanding bonds, and issued bonds under said mortgage also in excess of the last referred to amount, *held*, that such bonds, to the extent they were actually out and in the hands of *bona fide* holders, where a second mortgage was executed by the company, constituted a prior lien under the first mortgage. *Claffin v. South Carolina, etc., R. Co.*, 8 Fed. R., 118.

§ 1876. A statute of Ohio provided that existing railroad companies, by filing their acceptance with the secretary of state, should have the benefit of an act empowering any railroad company to aid another company by subscribing to its stock or otherwise, upon the assent of two-thirds of the stock represented at a called meeting of stockholders. The defendant company, without having formally complied with either of the required conditions, guarantied the bonds of another company. At a subsequent stockholders' meeting, at which the stock of complainant was represented, the guaranty was approved, which approval had never been rescinded. The bonds had been placed on the market, accompanied by the resolution approving the guaranty, and sold. *Held*, that the defendant company, having assumed to exercise the powers conferred by the acts referred to, could not exonerate itself by denying its acceptance of the same, and that the complainant, a stockholder, was not entitled to an injunction upon the directors against paying interest on the bonds they had guarantied. *Zabriskie v. Cleveland, etc., R. Co.*, 23 How., 881.

§ 1877. The firm of D. S. & Co. had been for some years the general financial agents of a railroad company, and interested in its capital stock and its various classes of securities, including its mortgage and other bonds and its floating debt. The head of the firm was for some time a director, and finally became president of the company, and was invested with plenary control of its financial affairs. The company was overwhelmed with floating debt and creditors were pressing to be paid. Money enough was furnished said firm to meet interest upon bonds falling due by leaving all other debts unpaid. *Held*, that under these circumstances the firm was not precluded by its relation to the company from purchasing coupons for interest on bonds of the company as the same matured. *Duncan v. Mobile, etc., R. Co.*, 3 Woods, 587.

§ 1878. A party is estopped from denying the corporate existence of a railroad company whose bonds he holds and by virtue of which he acquires his *locus standi* in the suit; as, where the holder of second mortgage bonds, made a party to a bill to foreclose a first mortgage, seeks to impeach the latter upon the ground that the corporation has not taken the requisite steps to entitle it to assume the name in which the first and second mortgages were executed. *Wallace v. Loomis*, 7 Otto, 146.

§ 1879. Railroad bonds, secured by a first mortgage, promising on their face, as prepared for issue and sale, payment in lawful money, were guarantied by the state. A stipulation that they should be paid in coin was subsequently indorsed by the company in compliance with the demand of purchasers thereof. *Held*, that this stipulation was supplementary and subsidiary, affecting only the company and not discharging the guaranty. *Ibid*.

§ 1880. The state of Minnesota issued its bonds to a certain railroad company to aid in its construction, taking as security bonds of the company secured by a first mortgage, and a conveyance from the company of certain lands, free from incumbrances. The bonds of the state were delivered, according to agreement, from time to time as the road was graded, and were all indorsed by the company to the contractor in payment for the grading. Nothing further was accomplished by the company, and the state foreclosed its mortgage on all the property of the company, and bought it in. The state afterwards made an agreement with a new company for the consummation of the enterprise, and granted to this new company all the property of the old, free from liens and claims, and also granted to this new company the lands which it had formerly granted to the old, and of which it had taken a conveyance from the old company, as security against loss on the state bonds. The contractor holding the state bonds brought an action to charge these lands in the hands of the new company, for the payment of his bonds. The court refused his prayer, inasmuch as the lands passed from the state to the new company unincumbered, they not being affected with any specific lien in the hands of the state. *Chamberlain v. St. Paul, etc., R. Co.*, 2 Otto, 299.

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MUNICIPAL BONDS, SUBSCRIBING AND ISSUING BONDS—continued.

- disposal and delivery of bonds; delivery below par, when good. Bonds, § 1082.
 what not delivery below par. Bonds, § 857.
 power to invest proceeds in stock authorizes delivery for stock. Bonds, § 1092.
 to company, held good. Bonds, § 1093.
 unauthorized sale below par not fatal, when. Bonds, §§ 1093, 1096.
 not compelled by *mandamus* before subscription, when. Bonds, § 1121.
 provision for delivery in escrow pending performance of conditions held directory, when. Bonds, §§ 1246, 1248.
 assent of tax-payers; not necessary that they designate road by corporate name. Bonds, § 1041.
 voters presumed to be taxable. Bonds, §§ 973, 1004.
 what tax roll governs as to who are tax-payers. Bonds, § 1042.
 procured by threats to tear up road, good. Bonds, § 1080.
 attempted withdrawal of assent without effect. Bonds, §§ 1125, 1133.
 recitals in bonds or corporate records cure defective assent. Bonds, §§ 1132, 1449.
3. **CANCELING SUBSCRIPTION AND BUYING UP BONDS; RIGHTS OF OBLIGORS.**
 city may retain collaterals given for void bonds, when. Bonds, § 963.
 no contract or vested right by mere vote for subscription. Bonds, §§ 1122, 1127, 1130.
 no obligation on supervisors to issue bonds on performance of conditions. Bonds, §§ 1129, 1138.
 refusal to issue, need not be based on tenable grounds. Bonds, § 1132.
 delivery not compelled by *mandamus*, when. Bonds, § 1121.
 attempted withdrawal of assent of tax-payers to bonds, held without effect. Bonds, §§ 1125, 1133.
 municipality may recall subscription by buying in its outstanding bonds. Bonds, §§ 1126, 1134.
 corporate agent to issue bonds may take up and replace them. Bonds, § 1137.
 recitals or decision of officers not conclusive in direct proceeding. Bonds, § 1415.
 excessive judgment corrected by application to court. Bonds, § 1625.
 as to right to injunction, see *infra*, 11.
4. **PUBLIC PURPOSE.**
 includes aid to railroads. Bonds, §§ 840, 864, 1164, 1428.
 and to plank road, is. Bonds, §§ 1139, 1151-1153.
 so of toll bridge. Bonds, §§ 1140, 1154.
 so of steam grist mill, under statute. Bonds, §§ 1143, 1158.
 so of custom grist mill, run by water power. Bonds, § 1153, note.
 otherwise of steam grist mill under Nebraska law. Bonds, §§ 1144, 1159.
 development of manufacturing resources a municipal purpose. Bonds, § 1160.
 manufactories conducted by private enterprise, not. Bonds, §§ 1148, 1167, 1169, 1190.
 municipal bonds or taxes can only be authorized for. Bonds, §§ 1162, 1166, 1172, 1173.
 review of authorities as to what is. Bonds, § 1168.
 what public and what private enterprises. Bonds, § 1174.
 incidental public benefit immaterial. Bonds, § 1175.
 Boston "fire bonds" held void; so of private academy. Bonds, § 1176.
 aid for railway machine shops, is. Bonds, § 1179.
 recital of issue pursuant to authority of charter and ordinances, public purpose conclusively presumed. Bonds, §§ 1329, 1443.
5. **ISSUING TO PROPER COMPANY.** See *infra*, 6.
 bonds must be issued to company to which subscription authorized; to one of three into which former organized, void. Bonds, §§ 1181, 1186.
 after subscription, county may change same to successor of company. Bonds, §§ 1182, 1191.
 to company not designated by vote, when void. Bonds, §§ 1188, 1194, 1195.
 power to aid railroad to a city, prolongation of one existing included. Bonds, §§ 1184, 1196.
 when railroads organized after enabling act may be aided. Bonds, §§ 1185, 1198.
 road beyond corporate or state limits may be aided. Bonds, § 852.
 bonds for relocated road held good. Bonds, § 947.
 act to aid home company, foreign excluded. Bonds, § 956.
 act to aid one road extends to separate company. Bonds, § 1088.
 transfer of franchises after subscription. Bonds, §§ 892, 1203.
 bonds to branch road, held valid. Bonds, § 1199.
 assignment of franchises by parent road, immaterial. Bonds, § 1200.
 misnomer of company in petition and notice of election. Bonds, § 1201.
 change of name immaterial. Bonds, §§ 1202, 1222.
6. **CONSOLIDATION OF COMPANIES.** See *supra*, 2, 5.
 bonds not avoided by consolidation, by consent of obligor. Bonds, § 1226.
 pending issue, bonds valid. Bonds, §§ 1028, 1221, 1222.
 company succeeding to rights of former, issue valid. Bonds, §§ 1204, 1205, 1207, 1209, 1211, 1213, 1218, 1219.
 consolidation, pending issue, valid as to *bona fide* holder, when. Bonds, §§ 1206, 1216, 1217.
 with foreign company, immaterial. Bonds, § 1214.

MUNICIPAL BONDS, CONSOLIDATION OF COMPANIES—continued.

change of name immaterial. Bonds, § 1232.
 valid when purposes of road same. Bonds, §§ 1305-1307, 1233.
 before subscription, when valid. Bonds, § 1224.
 in invalid consolidation after subscription, *bona fide* holder protected. Bonds, § 1225.
 issue to consolidated company held void without new vote. Bonds, § 1228.
 when consolidation authorized by charter, issue valid. Bonds, § 1430.
 objection to, waived by acts of ratification, see *infra*, 18. Bonds, § 1693.

7. LIMITING INDEBTEDNESS. See *Constitutional Law*.

construction of Illinois constitution; assessed valuation, etc. Bonds, § 896.
 debt beyond limit, void. Bonds, §§ 1229, 1232.
 how existing debt and assessed valuation determined. Bonds, §§ 1233, 1234.
 recitals may cure want of power. Bonds, §§ 1235, 1420, note.
 otherwise of recital not containing averment of full authority to issue. Bonds, §§ 1327, 1431.
 limit of charter repealed by enabling act. Bonds, §§ 1230, 1237, 1238.
 constitutional provision requiring legislature to restrict municipal debts construed. Bonds, §§ 1231, 1240-1242, 1245.
 limitation in charter inapplicable to prior enabling act. Bonds, § 1241.
 interest coupons not considered in computing debts. Bonds, § 1243.
 constitutional limitation no effect on prior contract. Bonds, § 1244.
 restraining bonds when payment not provided for out of proper fund. Bonds, § 1574.
 recital of issue pursuant to law may set question of limit at rest. Bonds, §§ 1333a, 1453.
 law limiting tax to defray expenses inapplicable to special tax. Bonds, § 1613.
 limitations after bonds issued, inoperative. Bonds, § 1614.

8. REGISTRATION.

act requiring held directory. Bonds, § 1074.
 when registration amounts to certificate of regularity. Bonds, § 1249.
 when a condition precedent to validity of bonds. Bonds, §§ 1247, 1250, 1251.
 not when not made condition of issue. Bonds, § 1251, note.

9. RECOVERY ON INVALID BONDS. See *infra*, 12.

county issuing void bonds liable for money received. Bonds, § 1189.
 where bonds invalid, action for money paid by mistake lies, the borrowing power existing. Bonds, §§ 1255, 1261, 1264.
 no contract for interest implied. Bonds, § 1263.
 so when bonds invalid as given for unauthorized and authorized purposes. Bonds, § 1265.
 invalid bonds renewed by valid, latter good. Bonds, §§ 1259, 1269.
 recovery of purchase money of assignor. Bonds, § 1272.
 deed of trust to secure void bonds valid. Bonds, § 1273.

10. NEGOTIABILITY; BONA FIDE HOLDER; PURCHASER; ASSIGNEE.

when town estopped as to irregularities, see *Estoppel*.
 no *bona fide* holding of bonds issued wholly without authority. Bonds, § 845.
bona fide holder protected against want of valid delivery. Bonds, § 857.
 and against expiration of power to issue, against recitals. Bonds, § 875.
 must take notice of authority by which bonds issued. Bonds, § 908.
 and against informal passage of ordinance, inconsistent with recital. Bonds, § 925.
 and informal application and notice of election. Bonds, §§ 974, 1007.
 and against notice to trustee in deed of trust. Bonds, § 1033.
 need look no further than authority to issue, and official decision of compliance with conditions. Bonds, § 1038.
 entitled to every presumption. Bonds, § 1836.
 and against unauthorized delivery. Bonds, § 1094.
 false recitals do not affect. Bonds, § 1157.
 must take notice of want of power to issue. Bonds, § 1177.
 not against issue to wrong company. Bonds, § 1187.
 but against inadequate vote, if recital proper. Bonds, § 1197.
 when preferred to stockholder, as against company. Bonds, § 1228.
 recital may cure excess of constitutional limit of debt. Bonds, § 1235.
 charged with notice of law of issue. Bonds, §§ 1252, 1353, 1399, 1413.
 and with fact that law for issue of bonds not duly passed. Bonds, §§ 1354-1356.
 protected, though vote prior to complete organization of road. Bonds, § 1371.
 and though terminus not fixed, or town be not terminal. Bonds, § 1376.
 and though bonds wrongfully sold pending injunction suit. Bonds, §§ 1379, 1390.
 fraud in obtaining state bonds, purchaser in open market a *bona fide* holder. Bonds, § 1830.
 amendment of charter of company no defense. Bonds, § 1387.
 fraud in issuing bonds immaterial. Bonds, §§ 1890, 1410.
 not chargeable with notice of form or terms of subscription. Bonds, §§ 1305, 1402.
quære, whether absence of seal notice of equities. Bonds, § 1408.
 immaterial that requisite consent of taxables not given. Bonds, §§ 1307, 1407, 1408.

MUNICIPAL BONDS, NEGOTIABILITY—continued.

- bona fide* holder; one who investigates authority for bonds not chargeable with contents of records examined. Bonds, § 1407.
- immaterial that bonds sold below par. Bonds, § 1412.
- protected, if recitals proper, against informal notice of election. Bonds, §§ 1309, 1414.
- enough that company receiving bonds was *de facto* corporation. Bonds, § 1435.
- doctrine of *lis pendens* inapplicable to purchaser of bonds. Bonds, §§ 1456, 1548, 1552, 1554, 1555.
- so, of suit to prevent issuance of bonds. Bonds, §§ 1457, 1549, 1553.
- same rights in mortgage security as in bonds, as to equities. Bonds, § 1462.
- when change of route of road no effect. Bonds, §§ 1379, 1375-76.
- amendment of charter lengthening road no effect. Bonds, §§ 1300, 1382-88.
- that road failed to organize when required, or that scheme visionary, immaterial. Bonds, §§ 1301, 1389, 1394, 1501.
- irregularities and equities, like fraud, informality, official misconduct, immaterial. Bonds, §§ 1514, 1533.
- officer wrongly appointed; irregular election; renewal bonds signed by ex-officer. Bonds, §§ 1515-1520.
- issue to excessive amount. Bonds, § 1563.
- wrongful use of proceeds by negotiating agent. Bonds, § 1563.
- want of power to issue bonds fatal to *bona fide* holder. Bonds, § 1521.
- what is want of power; express legislative authority; when power in any case enough; county through which line does not run. Bonds, §§ 1522-1526.
- recital may cure want of power, by estoppel. See *Estoppel* and *infra*.
- when mortgagee is not. Bonds, § 1532.
- de facto* officers may issue bonds. Bonds, § 1560.
- indorsement of governor presumed legal. Bonds, § 1535.
- misapplication of proceeds immaterial. Bonds, § 1569.
- bad faith in holder necessary to defeat title. Bonds, §§ 1275, 1342.
- what is not evidence of bad faith; absence of stock certificates recited to be attached, immaterial. Bonds, § 1344.
- so of gross negligence, suspicion of defect, or suspicious circumstances. Bonds, § 1345.
- overdue coupons attached, or unpaid interest due; authorities reviewed. Bonds, § 1349-1351.
- when power to issue exists, purchaser may presume its rightful exercise. Bonds, § 1367.
- purchasing with knowledge of *lis pendens* to set aside, is. Bonds, § 1550.
- otherwise if no knowledge; *lis pendens* alone not notice. Bonds, §§ 1551, 1552.
- notice to husband not notice to wife. Bonds, § 1564.
- to trustee in deed not to purchaser. Bonds, § 1566.
- recitals bind holder, either in bonds or mortgage securing them; see *infra*. Bonds, § 1368.
- taking for less than prescribed rate, is, when. Bonds, § 1570.
- not to purchase of company payee. Bonds, § 1572.
- purchasers in open market, of state bonds fraudulently obtained, held *bona fide* holders. Bonds, § 1330.
- what is evidence of bad faith; lack of stipulated indorsement, and overdue coupons attached. Bonds, § 1347.
- but overdue coupons attached is alone insufficient. Bonds, § 1349 and note, 1350.
- transcripts from record showing irregularities, when excluded. Bonds, § 1491.
- correspondence between third persons immaterial. Bonds, § 1492.
- need not pay full value; may be for prior debt. Bonds, § 1493.
- taking for less than prescribed rate, when. Bonds, § 1570.
- purchaser with notice, but from *bona fide* holder, protected. Bonds, § 1383.
- successor of *bona fide* holder has his rights. Bonds, § 1438.
- negotiability not affected by agreement on face allowing holder to receive stock on surrender. Bonds, § 1343.
- otherwise when place of payment not expressed, whereby sum due uncertain. Bonds, § 1346.
- bonds and coupons negotiable; interest and exchange recoverable. Bonds, §§ 1370, 1410, 1468.
- irregularities in issuing not fatal. Bonds, § 1372.
- bonds payable to bearer negotiable; equities cut off. Bonds, § 1441.
- so in Illinois. Bonds, § 1444.
- recital that bond given for railway subscription and construction of road held unconditional. Bonds, § 1451.
- unpaid interest no effect on bonds and immature coupons. Bonds, § 1467.
- even though overdue coupons attached. Bonds, §§ 1349-1351.
- that payment made on surrender of coupons not a contingency. Bonds, §§ 1312, 1451-53.
- as to form as affecting negotiability, see *supra*, 2.
- expressions equivalent to "order" or "bearer," good. Bonds, §§ 1044-48, 1478.

MUNICIPAL BONDS, NEGOTIABILITY — continued.

- if convertible into bonds to be issued contingently, not negotiable. Bonds, § 1479.
- so if payable on condition road built. Bonds, § 1479.
- statute as to negotiability affects pending actions. Bonds, § 1482.
- individual bonds payable to bearer, negotiable. Bonds, § 1483.
- payable to company or assignees, when not negotiable. Bonds, § 1484.
- may be payable in blank; holder may insert name. Bonds, §§ 1487, 1488.
- doctrine of negotiable paper applied to United States notes. Bonds, § 1488.
- when disposal for less than authorized rate affects. Bonds, § 1570.
- payable to company and assignees, negotiable. Bonds, § 1785.
- quære*, whether company's guaranty negotiable, indorsement is. Bonds, §§ 1833-39.
- stolen securities; thief nor his assignee can fill up blank making sum due definite. Bonds, § 1846, note.
- thief can give good title to *bona fide* purchaser. Bonds, §§ 1292, 1340-42, 1494; see §§ 1294, 1346-47.
- negotiated after maturity, holder no title. Bonds, § 1490.
- who is a purchaser for value; one giving negotiable notes for purchase price is. Bonds, §§ 1279, 1363-1366.
- when manner of acquiring title not clearly shown, title not established. Bonds, §§ 1395, 1396.
- pledgee advancing material, is. Bonds, § 1475.
- so of purchaser on sale of pledge. Bonds, § 1476.
- and purchaser to pay previous debt. Bonds, § 1477.
- assignee of *bona fide* holder has his rights. Bonds, § 1477.
- recitals containing erroneous reference to enabling act, immaterial. Bonds, § 1381.
- of due performance of conditions, conclusive. Bonds, §§ 1388, 1403, 1409.
- showing election before enabling act took effect, bonds void. Bonds, § 1400.
- fact of issuance of bonds evidence of performance of conditions. Bonds, § 1416.
- purchaser need not look beyond recitals. Bonds, §§ 1417, 1420.
- recitals absolutely conclusive as to *bona fide* holder. Bonds, §§ 1324, 1426, 1434, 1437, 1440, 1458, 1495-1512.
- but must contain averment of full authority to issue. Bonds, §§ 1327, 1431.
- need contain only statement of issue pursuant to law, without details. Bonds, § 1433.
- that assent of taxables had, final. Bonds, §§ 1331, 1447.
- so, that proper petition had. Bonds, § 1449.
- so, that bonds issued pursuant to vote. Bonds, §§ 1334, 1454, 1504.
- in town records, when final. Bonds, §§ 1331, 1449, 1450; so in ordinance. Bonds, § 1504.
- settle question as to time of election. Bonds, § 1452.
- cure defect in proceedings sufficient to sustain direct proceedings to restrain bonds. Bonds, § 1454.
- cure defective subscription; charge purchasers; in their absence, burden on holder. and that debt within legal limit not presumed. Bonds, §§ 1497, 1500-1502, 1503, 1511.
- not shown that date of subscription wrong, against recital. Bonds, § 1503.
- showing issue unauthorized, bonds void. Bonds, § 1505.
- cure defect in capacity of issuing officers. Bonds, § 1506.
- and that too many bonds issued. Bonds, § 1507.
- false recitals final. Bonds, § 1512.
- cure total disregard of conditions of issue. Bonds, § 1513.
- non-performance of recited condition, fatal. Bonds, § 1530.
- unauthorized condition not recited, immaterial. Bonds, § 1534.
- of issue pursuant to ordinance, final as to election. Bonds, § 1544.
- cure defect of non-assent of voters. Bonds, § 1547.
- cure non-publication of law, when. Bonds, § 1556.
- enabling acts considered local, valid without publication. Bonds, § 1557.
- irregularities recited, cured by ratifying act. Bonds, § 1700.
- decision of constituted officers as to performance of conditions precedent, final. Bonds, §§ 1052, 1249, 1366, 1394, 1539.
- of commissioners, as to route, termini, etc., final. Bonds, § 1375.
- such decision is made by the proper officers acting after performance. Bonds, §§ 1419, 1540.
- recitals are evidence of such decision. Bonds, §§ 1318, 1420.
- in Kansas, board of county commissioners qualified. Bonds, § 1486.
- of tribunal created to decide on assent of tax payers, final. Bonds, §§ 1331, 1447.
- as to proper election, final. Bonds, §§ 1335, 1458, 1543.
- as to completion of road, an estoppel. Bonds, § 1531.
- as to petition for subscription. Bonds, § 1538.
- issue of bonds alone is a decision of performance of conditions precedent. Bonds, §§ 1540, 1541, 1545.
- implied in recitals, when. Bonds, § 1541.
- without recitals, final as to vote. Bonds, § 1542.
- evidence may be offered in addition to presumption in favor of *bona fide* holder. Bonds, § 1339.
- bona fide* holder must prove his character as such if bonds fraudulently or illegally issued. Bonds, § 1395.

MUNICIPAL BONDS, NEGOTIABILITY—continued.

bona fide holder must show consideration paid by him. Bonds, §§ 1836, 1463.

holder of detached coupons must establish his ownership. Bonds, § 1896.

so if purchase pending suit. Bonds, § 1554.

in general, strong presumption in favor of *bona fides* of holder. Bonds, §§ 1848, 1898, 1472, 1473, 1480.

judgment on coupons as to *bona fides* not conclusive in action on other coupons of same class. Bonds, §§ 1802, 1895-97.

decision of master empowered to determine *bona fides*, a presumption of law. Bonds, § 1474.

mistaken judgment as to *bona fides* not corrected. Bonds, § 1571.

see *Burden of Proof; Evidence; Presumption.*

purchaser need not inquire whether company has taken proper course to obtain bonds. Bonds, § 891.

recitals affect negotiability. Bonds, § 912.

when regularity certified by recital, holder protected. Bonds, § 1029.

provision against sale below par, how not broken. Bonds, § 1002.

purchaser not required to show authority to issue, when. Bonds, § 1005.

payable to bearer, pass by delivery in Illinois. Bonds, § 1007.

canvass of votes conclusive; so of register's certificate indorsed on bonds. Bonds, §§ 976, 1012, 1013.

payable to order, negotiable; to "holder," negotiable. Bonds, § 1045.

bonds and coupons an exception to the rule that assignee gets same title as assignor. Bonds, §§ 1274, 1340.

gross negligence of buyer or suspicious circumstances no effect on his title. Bonds, §§ 1275, 1341, 1342, 1343-1345.

nothing but bad faith material. Bonds, § 1481.

possession of negotiable bonds strong *prima facie* evidence of good title. Bonds, §§ 1348, 1472, 1473.

negotiability of bonds encouraged. Bonds, § 1352.

presumption in favor of *bona fide* holder. Bonds, § 1898.

11. INJUNCTION.

pendency of suit to restrain issue not notice to purchaser, see *Lis Pendens*. Bonds, §§ 1456, 1548, 1552-55.

tax-payer may sue to avoid bonds; for irregularity. Bonds, §§ 1573, 1575.

when adequate defense at law, bill to restrain action on bonds dismissed. Bonds, §§ 1576, 1577.

does not bind non-residents constructively served. Bonds, §§ 1218-20, 1578. See *Estoppel*.

irregularities not enough to support; must be fraud, want of power, etc. Bonds, § 1579.

when irregularities sufficient. Bonds, § 1581.

when federal courts have jurisdiction. Bonds, § 1580.

when bonds enjoined as running too long. Bonds, § 1583.

none where recitals adequate, and *bona fide* holders affected. Bonds, § 1584.

complainant must file bill in behalf of all interested. Bonds, § 1585.

when bonds violate constitution, jurisdiction taken. Bonds, § 1586.

restraining taxing officers, *mandamus* effective. Bonds, §§ 1619, 1682.

process on judgment not enjoined for matters pleadable as defenses thereto. Bonds, § 1624.

excessive judgment corrected by application to court. Bonds, § 1625.

collection of tax not enjoined because all taxable property not listed. Bonds, § 1628.

12. ENFORCING PAYMENT; PAYMENT IN GENERAL. See 17, *infra*.

void renewal bond, no effect on prior bond. Bonds, § 1267.

confined by limit of taxation fixed by law or constitution. Bonds, §§ 1589, 1609.

judgment creditor no additional rights over others. Bonds, § 1610.

except all previously litigated questions settled. Bonds, §§ 1599, 1611.

liability of transferer without warranty, see *infra*, 16.

limitations in enabling act held not to confine remedy. Bonds, § 1615.

mortgage to secure void bonds may be valid. Bonds, § 1832.

when tax not limited to special precinct for whose benefit bonds issued. Bonds, §§ 1594, 1617.

new void bonds no effect on remedy on old. Bonds, § 1621.

remedy when bonds void, see *supra*, 9.

general fund may be reached; *mandamus* to reach same. Bonds, §§ 1587, 1602, 1850.

receiver appointed in default of proper levying officers. Bonds, §§ 1598, 1622.

bill in equity to compel each tax-payer to pay in his share of debt. Bonds, §§ 1598, 1623.

second receiver, when first amount paid in not sufficient. Bonds, §§ 1599, 1622-23.

special remedy does not take away general. Bonds, § 1802.

bondholders' rights to resort to different funds at same time. Bonds, § 1626.

action will lie though state courts hold same unnecessary. Bonds, §§ 1683, 1635.

taxing power implied by grant of bonding power. Bonds, §§ 1637-39.

where right to have tax levied a contract, and vested right. Bonds, §§ 1640, 1647-51, 1659.

taking warrant by creditor, no priority. Bonds, § 1642.

remedy on bonds is at law. Bonds, § 1652.

MUNICIPAL BONDS, ENFORCING PAYMENT — continued.

- garnishment of debt due county. Bonds, § 1653.
- debt or *assumpsit* on coupons. Bonds, § 1772.
- special tax a cumulative remedy only; general fund applicable. Bonds, § 1601.
- tax proper though stock pledged to secure bonds. Bonds, §§ 1607-11, 1588, 1608.
- authority to incur special liability includes power to levy. Bonds, § 1612.
- provided in enabling act, not exclusive. Bonds, § 1616.
- assessment in special manner provided, not exclusive. Bonds, §§ 1593, 1616.
- when remedy at law not taken away by special funding act. Bonds, §§ 1596, 1620-21.
- general levy, and not special tax, in eighth circuit. Bonds, § 1641.
- guaranty of bonds by company, valid. Bonds, §§ 1816, 1838-40, 1863.
- guaranty held to include principal and interest. Bonds, § 1864.
- company may legally guaranty interest. Bonds, § 1810.
- when priority of payment from taxes not allowed. Bonds, § 1659.
- local judgments no effect on remedies, see *supra*, 11.
- when *bona fide* holder of state bonds subrogated to state lien on road. Bonds, § 1815.
- injunction to prevent diversion of fund to pay bonds. Bonds, §§ 1655, 1658-59.
- when refused, to prevent city receiving scrip for taxes. Bonds, § 1656.
- and to prevent further issue. Bonds, § 1657.
- effect of consent to diversion. Bonds, § 1658.
- equitable remedy on town bonds against town, and city afterwards absorbing town. Bonds, § 1853.
- mandamus*, lies to reach general fund, or compel tax. Bonds, §§ 1587-88, 1602.
- will not lie to tax beyond legal limit. Bonds, §§ 1599, 1609, 1654.
- proper to enforce municipal duty to tax. Bonds, §§ 1608, 1629-32.
- judgment must precede. Bonds, §§ 1618, 1634.
- judgment creditor entitled to, though taxing officers enjoined. Bonds, §§ 1595, 1619, 1643.
- immaterial that creditor a party to injunction suit; time of issue unimportant. Bonds, § 1644.
- against county officers, to provide payment of township debt. Bonds, § 1636.
- validity of bonds not inquired into; judgment final. Bonds, § 1646.
- by holders of county warrants. Bonds, § 1850.
- lien of bondholders, construed. Bonds, § 1867.
- what not a payment. Bonds, § 1855.
- 13. RATIFICATION; CURATIVE LAWS.** See *Estoppel*.
- by vote of tax-payers. Bonds, § 1004.
- by several years' payment of interest. Bonds, § 1023.
- issuing officers cannot ratify, being mere agents. Bonds, §§ 1181, 1188.
- by lapse of time and payment of interest. Bonds, § 1192.
- and by retaining stock. Bonds, § 1193.
- when state decisions not followed. Bonds, § 1691.
- by taxation for interest, and acting as stockholder. Bonds, § 1215.
- by popular vote. Bonds, § 1270.
- payment of interest. Bonds, §§ 1667, 1683-86; unless bonds totally void. Bonds, §§ 1692, 1695-96.
- receiving shares in company, and paying interest. Bonds, §§ 1667, 1687-89, 1694.
- cures objection to location of road. Bonds, § 1690.
- and of unauthorized order for election. Bonds, § 1686.
- cures objection to consolidation of companies. Bonds, § 1693.
- curative law held retrospective and prospective. Bonds, § 1033.
- effect of as ratification. Bonds, §§ 1227, 1546.
- illegal bonds may be legalized; so by implication. Bonds, §§ 1660-61, 1673, 1679-81, 1698, 1702.
- otherwise if legislature no power to authorize them. Bonds, § 1668.
- imperfect execution cured. Bonds, § 1671.
- act appointing railroad officer to pay scrip, held to be curative. Bonds, § 1673.
- act may pass on sufficiency of prior election. Bonds, §§ 1665, 1677.
- defective subscription cured. Bonds, § 1675.
- sale below par cured. Bonds, §§ 1666, 1679.
- act ratifying unauthorized bonds, on condition, latter must be performed. Bonds, § 927.
- that enabling act did not limit amount of debt, cured. Bonds, § 1699.
- irregularities recited may be cured. Bonds, § 1700.
- subsequent charter providing for payment held curative. Bonds, § 1703.
- exchange for stock, instead of sale and investment in stock, cured. Bonds, § 1704.
- act confirming company effective. Bonds, §§ 1705, 1706.
- bonds under unconstitutional act, validated by later act. Bonds, § 1733.
- 14. STATE DECISIONS.**
- construing state statute, not conflicting, followed by supreme court. Bonds, § 843.
- unless question one of general jurisprudence, and decision against authority. Bonds, § 866.
- and no federal question involved. Bonds, § 870.
- and no rights acquired under conflicting construction. Bonds, § 871.
- nor when precise point not covered. Bonds, § 1009.
- not when made after bonds issued. Bonds, § 1032.

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 - so when non-corporate precinct owes bonds. Bonds, § 1799.
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 - local judgment decreeing bonds invalid does not bind bondholder made party by constructive service. Bonds, §§ 1220, 1403.
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 - objection that jury tried but one of two issues must be made below. Bonds, § 1404.
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 - change in charter not extinguishing corporation, no defense. Bonds, § 1645.
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 - bondholders no equity requiring strict foreclosure and not decree of sale. Bonds, § 1741.
 - purchasers under decree may give bonds for purchase money. Bonds, § 1742.
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19. **RECITALS IN BONDS.** See 10, *supra*.
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Terms of Payment. No books will be sent out on credit. Subscribers who wish to save express charges can remit in advance—otherwise the books will go by express, freight at cost of subscriber, and cost of returning the money paid by us. As each volume is ready, subscribers will be notified by mail.

Comparative Cost of Original Volumes over our Work.

U. S. Supreme Court Reports, all of the original edition, \$450; if with the reprint of early volumes (now going through press), \$150; if with the Curtis reprint, \$180 to \$150. The Circuit Reports cost \$750 to \$800, and the District Reports, with Attorney-General Opinions and Court of Claims \$200. If to the above figures is added the cost of other cases included by us, it will be seen that we offer for \$200, cases which cost, otherwise, \$1,000 to \$1,500.

Comparative Cost of other Reprints. When the large cost of editing our volumes is taken into account, they are the cheapest series ever offered to the profession. Our 80,000 pages will cost over \$2.00 each for the brain labor.

Maritime Law—Patents and U. S. Bankrupt Law Cases. The cases on these subjects will be principally digested, but a sufficient number will be given in full under each head to illustrate the general principles of the subject. We adopt this plan with these three subjects, because to do otherwise would make nine or ten volumes, devoted to three subjects, seldom referred to by ninety-nine lawyers out of every hundred. Most of the cases turn on mere matters of fact and not law that can apply to other cases.

Cases on Insolvent laws, and those on U. S. Bankruptcy laws which discuss general principles, will be printed in full as freely as those on other subjects, but those that touch only on the procedure under the repealed statutes will be digested. Although the cases in the Bankruptcy Register have not been included in our whole series, yet they will be freely cited in our title of Bankruptcy.

The names of the final editors on each of these topics will be a guarantee that no valuable case will fail to appear in full.

READ THESE ECHOES FROM THE PRESS.

They show that honest, conscientious and, capable authorship, producing accurate, thorough and exhaustive work, is certain to be acknowledged and appreciated in the long run; particularly when presented with clear type, on good paper, in fine binding, and at an exceedingly low price considering the large sum (about \$40,000), paid out for brain labor.

From the "Central Law Journal," (of St. Louis, Mo.), after examining Vol. 1.

[One of the largest circulated Law Journals in the West. As a matter of purchase, no amount of money could have bought the below review from this Journal. Its oft-repeated unfavorable criticism of poor law books is so well-known that great confidence is placed in its opinions.]

That the plan of this remarkable publication, the first instalment of which is before us, was conceived by one possessing talent of no mean order, is a fact which stands out so boldly, that not even the most obstinate opponent of progressive ideas in law-book publishing can deny it. In from twenty-five to thirty volumes, are to be gathered all the decisions of every Federal court, from the district court to the Supreme tribunal, in the shape in which they are the most serviceable to the practitioner. By the method adopted, he will not only have all the reports which he ever can need, but in addition, an element of no small value, a series of text-books written by the ablest hands.

Every case in the reports was first arranged under its appropriate title. These were distributed among various assistants, among them able law writers. Such as embodied nothing more than the point decided, and those merely following a prior decision, are reduced to a digested form, the remainder of the decisions being rejected as wasting unnecessary space and being of no service. These are placed at the foot of the series of cases upon the given subject, as notes.

All cases selected to be printed in full, also those to be digested, are then referred to an expert, and he passes upon the efficiency of the sub-editor's work. He corrects the errors, replaces cases digested, if necessary, or reduces cases in full to a digested form. He certifies the results of his supervision, and we thus have the guaranty of able critics for the efficiency of the work. When a case involves two or more points, and it is to be published in full under one head, the other points are digested out and sent to their appropriate topic, by which means they appear at length under one head and digested under another. Thus a case may be seen in full or digested three or four times. If there is not sufficient in these minor points to warrant printing in full, the digested point appears in the notes at the proper place. Cases entirely reduced to a digest are known as star cases. Such cases are those which are unimportant, and generally appear to be decided without argument.

At the beginning of each subject or subdivision of a large subject, a summary of the points decided therein is given with reference, and at the conclusion, the notes appear at length. There are abundant cross-references, and thus all difficulty in investigation is avoided. The subjects are arranged after the method of a digest, of the best quality, and, consequently, any title may be examined, and almost all the law there is upon the subject obtained.

There is one feature which is especially worthy of commendation. Every paragraph of every case is numbered to the end of the particular subject in hand, and at the beginning of each paragraph are what are called catch words, which indicates the doctrine laid down therein, and often contains the whole point. When the series are to be used as reports, all that is required in a reference to the table of cases, by which means the cases desired are easily discovered. This table of cases is a perfect model, there being subdivisions, containing the names of all vessels, banks, etc. Thus, if one desires to find a case in which a bank figures as one of the parties, he may refer to the special list of banks.

Every feature of the publication indicates a strong contrast between it and the original reports in this, that every means is adopted for facilitating the investigations of the practitioner; the reporters, on the other hand, seem to have an instinctive desire to place the materials for which he is searching as far beyond his reach as possible.

The work is being compiled by W. G. Myer, Esq., who has made quite a reputation by his digests and indexes. He has demonstrated by his first volume of this series that a work involving the tact required by this, could have fallen into the hands of no one more competent. This volume is printed in large, bold type, and is bound in the best manner. No publication will receive a more hearty welcome in our *sanctum* than this one, and we await with impatience the completion of this great undertaking.

From the Central Law Journal, (March 7, 1884), after examining Vol. 2.

If the whole work is accomplished with the same satisfaction which these two volumes have given, there certainly ought to be no doubt in the minds of the publishers, as to the success of the project. It is true that the bar is conservative and it requires time to impress the legal fraternity with the merit of progressive plans. This with the crying down which it is receiving, and will continue to receive, at the hands of those publishers with whose reports this series apparently competes, renders the adoption of the idea difficult, and will compel the publishers to make efforts of more than ordinary character. Still, we think that in the end, the profession will begin to perceive the merits of the work, and will conclude that it is a necessary incident to every well cared for library.

This volume completes the subject of Appeals and Writs of Error, which is divided into twenty-nine chapters, and treats fully of Arbitration and Awards, Assignment and Attorneys. At the end of this volume is the table of cases to volumes I and II, and the index to the same volumes, which is very well done by one who seems to be no novice in legal literary work.

Desiring to convince ourselves of the judiciousness with which cases have been reduced to a digested form, we have examined a number of them, and we are of the firm opinion that the whole meat, of every case digested, is contained in the digest. To be sure, we had already the assurance of distinguished authors to that effect, but all doubts in our mind have been dispelled by this personal scrutiny of a list of cases selected at random. This series can therefore be well substituted for the original reports, and they are certainly in a much more available form. We have no reason to alter the views previously expressed by us, and we are glad that we have one more volume in our *sanctum* as a support.

ECHOES FROM THE PRESS.

From the Boston Advertiser, (March 6, 1884.)

Whose law book critic is one of the best known, and most highly respected reviewers in this country.

In Mr. Myer's "Federal Decisions" we find a new method of reporting, but one no less comprehensive than the system to which we have been accustomed. Indeed, the title is a modest one, in view of the vast labor represented and of the advantage which it promises, both for the bench and the bar. It is intended to include all the decisions of the federal courts, both those which have been published in the regular reports and those which are to be found in the various periodicals and in the different state and territorial reports.

The important cases are to be published in full; and those decisions which simply affirm or follow some leading case, or which turn merely upon some particular state of facts, without enunciating any real principle of law, are to be only digested. Where, as often occurs, a later case reviews and affirms a series of previous cases upon the same subject matter, such later case is to be given in full, and the others digested. All the decisions are to be arranged logically, rather than chronologically or topically, according to the subjects considered; all the cases being assigned to the various heads of the law, and these heads being divided and subdivided suitably, for convenience of arrangement and for reference, in the same system that is adopted in digests.

At the head of each division is given a summary of the points of law embraced in that division, followed by the cases in full, divided into convenient paragraphs, each of which is preceded by a brief statement of the point embraced in it. At the end of these cases is a digest of the points applicable to the particular subdivision, taken both from those cases which are to appear in full under some other head or subdivision and from those which are not to be given in full in any part of the work. It is accordingly anticipated that the work, when completed, will give all that has been decided by the federal courts on each topic of the law, arranged logically and in order, and mainly stated in the very words of the court, though with the matter of over 800 volumes compressed into less than thirty.

The work is one of which the proper performance demands unwearied patience and the hardest and dreariest labor; but we doubt very much if it is not the kind of work which must, sooner or later, be applied to all of our reports, if they are to be brought into any manageable compass. Of American reports alone there are now more than 8,000 volumes; and the muster-roll, already formidable to those who expect no more than the ordinary length of life, is increasing by more than 100 volumes every year, to say nothing of the constantly swelling bulk of the English and colonial reports, all founded on the common law, and all available and dangerous to the lawyer and the student. The "American Decisions" and "American Reports" have been found serviceable devices, but their arrangement and object must, in practical convenience, yield to those adopted by Mr. Myer. His method combines the merits of a digest and of a volume of reports; we have the scope and treatment of the latter, with the methodical arrangement of the former.

Many lawyers will indeed object to the abridgment of any cases, and yet more strongly to the limitation of others to a mere digested reference; but a little reflection will at once show that some abridgment and some omission are indispensable,

if the body of the reports is to be brought into any reasonable compass. After a principle has been affirmed in a dozen decisions, why should our books be encumbered with a hundred more repetitions, to be renewed whenever a persevering litigant or a shifty attorney chooses to call the principle in question? Is there nothing so certain that its affirmation is needless?

For our part, we are inclined rather to think that there has been in this volume too little condensation and too little omission; but the editors have, no doubt wisely, preferred to err rather by including too much than too little.

The real and vital test of the value of such a work as this is its accuracy, its thoroughness and its absolute copiousness. These points can be fully determined only by the test of daily use; but we have examined this first volume with no little care, and have been unable to find any blemishes under either of these heads. So far as we can see from the publishers' statement of the editorial labor, certainly every possible precaution has been taken against error or omission, each part of the work being passed through so many successive competent hands as, at any rate, to minimize the possibilities of mistakes.

The work is certainly constructed upon a plan which, though novel, is of manifest merit; it includes the series of decisions which, throughout this country, is confessedly more valuable than any other; and it includes the contents of volumes, many of which are now out of print, and a complete set of which could scarcely be obtained by any one.

It seems to us that Mr. Myer's work, when fully carried out, will be found to be an extraordinarily valuable contribution to the study of the law; and we very strongly suspect that he has found the basis upon which all our reports will in the future have to be reconstructed. He has well embodied and carried out the idea that was in the mind of Mr. Reed, when he said in his "American Law Studies" that we should expect in future series of reports "a great but accurate condensation of the opinions, and a much more concise statement of the facts, so that only the cases, the judgments, and the grounds of the latter, will be given. Such compression will benignly aid the student in mastering, and the practitioner and author in consulting and making use of, the reports; and it will be one of the ways by which a substitute for the multiplying volumes will be cheaply furnished to every law-office." But Mr. Myer has gone further in the way of improvement than Mr. Reed's anticipations extended; for he has added the great convenience of a logical and systematic arrangement by subjects to the merits enumerated by Mr. Reed; and this it is which seems to us to be the greatest advantage in his treatment. In this first volume, which covers titles under the letter A, half through "Appeals and Writs of Error," the work has been well and wisely done; only the right cases have been selected for abridgment and digesting; and the publishers have certainly a right to say that, upon each of the subjects here covered, the lawyer can learn more, in less time, of what has been decided by the United States courts than by using any other books which are yet available to the profession.

If, as we may well expect, the remaining volumes are executed with the same careful skill and thoroughness, the work will be one of the very highest value.

NOTICE!

We contemplated printing all the notices of Myer's Federal Decisions at length, as on the first two pages of "Echoes," but we find that to do so will soon make a large volume. From all sources come the same uniform and unlimited praise. Therefore, we have concluded to print only enough to fully satisfy inquirers of the merits of the series.

[From the Ohio Law Journal, March 15.]

A new departure is undertaken in the method of arrangement. The decisions are gathered under the subject upon which they treat, without regard to chronology. This innovation will receive universal indorsement as a great improvement upon the chronological arrangement plan. At the end of each series of cases is a digest of points applicable to the particular sub-division of the subject. The present volume which contains the subjects from "Accounts" to "Appeals and Writs of Error," shows great painstaking care and labor.

The work is a great undertaking, but the name of the publishers is a sufficient guaranty that it will be carried through to completion upon the plan of its inception. We predict for it great popularity.

[From the Boston Advertiser, March 15.]

The second volume of Myer's Federal Decisions includes the residue of the subjects under the letter A; the main topics treated of being Appeals and Writs of Error, Apprentices, Arbitration and Award, Assignment, and Attorneys. Under each of these heads, there is furnished to the reader all that has been decided by the United States Courts, in the same manner and with the same detail that we lately recapitulated in our notice of the first volume.

The good judgment with which the cases under these heads, which have not been fully reported, have been limited to a mere digest-reference is attested by the authority of such eminent writers as Messrs. M. M. Bigelow, James Schouler, and J. L. High.

The same high standard of diligence and exactness which we found in the first volume characterizes this continuation of the work; and we consider it a matter of congratulation that we may soon expect to have the labors of the Federal Courts made so convenient and easy of access.

[From the Maryland Law Record, March 15.]

We have received from the publishers Vol. I of this work.

The method of arrangement is a new one. The entire series of decisions, comprising all heads of law, are to be arranged alphabetically, according to the subject matter.

All important cases will be published in full, but cases which merely affirm or follow some leading case, or those which are based upon a particular state of facts, and do not announce any important principle of law, and in some instances those which turn upon a well settled principle of law, will not be published in full, but only digested, the extract to be sufficiently full for all practical purposes.

We believe that for reference and practical use the plan of arrangement is the best that has ever been adopted. It is as much superior in this respect to the original reports, as Appleton's Encyclopedia in its present form is to what it would be were the works of each of its contributors given in full and in chronological order. The plan is carried out with much ability and thoroughness.

Mr. Myer, whose ability is conceded, will be assisted in the final arrangement of important topics by such eminent law-writers, as Benj. Vaughan Abbott, John W. Daniel, J. L. High, Leonard A. Jones, Jas. Schouler and others.

The publishers offer to send specimen pages of the work on application, or for four cents in stamps to send a fifty page pamphlet giving the subject of Bailment in full. Parties interested in such a work will do well to write to them.

[From the Louisville Courier Journal, March 17, after examining Vol. I.]

No work ever attempted in this country will do so much to produce uniformity and harmony between the different States and between them and the Federal Courts. It will result in or rather produce in a measure a complete codification of American law, as far as is possible as long as our dual system of Government lasts.

All the cases referring to any particular subject, will be given in full in the treatise on that subject. At the end of a series of cases there will be a digest of points applicable to the particular sub-division of the subject, and at the end of the work there will be a final table of contents and a general index so arranged as to enable the reader to find the most obscure point.

Mr. Myer has succeeded in getting the very ablest law-writers in the country to assist him in this work by preparing the law on those subjects to which their studies have been specially directed,

and upon which they have in many instances already published works.

If this vast and wonderful enterprise should be as happily executed as it has been ably and wisely conceived, it will prove to be an Encyclopedia of American law. It is beyond a doubt the greatest and most ambitious legal work ever attempted in this country.

It required a great mind to conceive it, and it will require great ability and industry to execute it. The reputation of Mr. Myer and of his able and learned assistants is a guarantee of success which every lawyer can safely trust. The undertaking is so vast and comprehensive, yet so happily planned, that when completed it will be to all American lawyers a library in itself, and destined to affect at once in the most perceptible way the decisions of the State courts.

It is impossible in this article to give the details of the entire plan of this great work; they cover every standpoint from which a case can be considered, and from which the subject decided in it can be discussed.

ECHOES FROM THE PRESS.

[From John W. Daniel, author of the best known book extant on "Negotiable Paper."]

The "Federal Decisions" now being published under the editorial supervision of the well-known author, Mr. W. G. Myer, appears to me, from an examination of Volumes I and II, and of the prospectus, to be an admirably planned work, and I doubt not that they will prove the most useful and convenient series of Reports of Federal Cases that have yet been offered to the profession in compendious form. The clear and comprehensive method of presenting the body of Federal Law will greatly aid the labors of research, and put the adjudications of all the Federal Courts within reach of practising lawyers at a comparatively low cost. I am satisfied that the work deserves success, and cordially recommend it.

[From the St. Louis Republican.]

It is a very important work to a law practitioner, and will constitute a most valuable law library in itself. The first volume of the work has been gladly welcomed and warmly commended by eminent jurists and the law journal editors, who approve of its arrangement and commend its fullness and accuracy.

[From the Cincinnati Gazette]

The arrangement will be by topics alphabetically arranged as in a digest, with suitable cross references. As the result, the working lawyer is promised at about one-sixth the cost of the original Reports, everything in them that can be of any value to him in his practice.

It is a new undertaking, evidently involving a great outlay in editorial and other expense, and is rather venturesome in both publishers and editors. It is largely due to the great cost of the original Reports and the great difficulty, almost impossibility, of obtaining a set of them at any price. No reports are so valuable to the lawyer as these of the Supreme Court, and none carry greater weight in the State courts.

The editor, Mr. Myer, is well and favorably known by his indexes of the Supreme Court and various State Reports. They are a guarantee of the wise execution of the present work. The list of editors engaged to assist him in the final arrangement of the work contains many names of well-known legal writers of high standing.

We have especially noticed the treatment of the subjects, "Actions" and "Agency." Careful examination has satisfied us of the great merits of the work. It is worthy of commendation to our lawyers, who should, we think, feel a sort of gratitude for it.

[From the Boston Journal.]

The Gilbert Book Company of St. Louis have undertaken the publication of a very important collection and reprint of Federal Decisions, whose value and convenience members of the legal profession will be quick to appreciate.

The intention of the editors is to publish all accessible Federal Decisions, either in full or in a digested form, whether found in the regular series of reports or scattered through the various periodicals and State reports, including the opinions of the Circuit Court of the District of Columbia, the most valuable opinions of the Territorial Courts, and the opinions of general importance of the Court of Claims and the Attorney-General.

The cases are classified under the general heads of the law, and these are divided for convenience of arrangement and reference. A great deal of time and labor has clearly been spent upon the editorial work, with the result of making a compendium which lawyers will find invaluable for reference and consultation.

The first two volumes cover topics under the letter A, and are supplied with thorough indexes of cases reported and cited and principles applied.

[From the New York Daily Register, March 22.]
A Law Journal.

The first two volumes of the new and very important series of reports cannot fail to produce a very favorable impression upon the members of the legal profession throughout the United States. Mr. Myer is well known as a careful compiler, and the list of those who are to assist him in arranging the various subjects comprises the names of those who are widely known as legal authors.

The arrangement is simple. Cases are assigned to the general heads of the law, and these are divided and subdivided, with head notes or table of contents at the head of each subject.

At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject.

The publishers deserve praise for the excellent execution of the typography of the work.

From Hon. M. R. Waite, Chief Justice of U. S. Supreme Court.

On examining the first 400 pages of Volume I, he wrote.—"Thus far Mr. Myer appears to have done his work well, and that is good evidence of his fitness for the place in which he has been put. He has the right idea as to what such a book should be."

Later he writes, after using Vols. I and II, "I am more than ever satisfied with the value of the publication. The subject of Appeals and Writs of Error, I frequently consult, and always with satisfaction."

ECHOES FROM THE PRESS.

[From the *Daily American*, Nashville,
Tenn., March 24.]

The publication has the approval of the law journals and ablest law book critics in the country. In the series it is intended to include all the decisions of the Federal Courts, both those which have been published in the regular reports and those which are to be found in the various periodicals, and in the different State and Territorial reports.

The real and vital test of the value of such a work as this is its accuracy, its thoroughness and its absolute copiousness. So far as we can see certainly every possible precaution has been taken against error or omission, each part of the work being passed through so many successive and competent hands as, at any rate, to minimize the possibilities of mistakes.

The work is certainly constructed upon a plan which, though novel, is of manifest merit.

If the remaining volumes are executed with the same careful skill and thoroughness, the work will be one of the very highest value.

[From the *Washington Law Reporter*.]

From an examination made of volume one, we are convinced that if the series is continued with the same care and ability, it will prove an almost invaluable addition to the law literature of the country.

The book is much more than a digest; the decisions upon various subjects are arranged so that they can be readily examined and the important leading cases are published in full.

The vast number of volumes of reports that are being issued each year—a great many of them containing scarcely a single opinion of value to the profession at large—must, in the future, compel a compilation similar to the work undertaken by Mr. Myer in this book.

[From the *Legal Intelligencer*, Philadelphia,
March 21.]

This projected work, of which the first volume is now presented, is an undertaking of considerable magnitude. The intention is to group under alphabetical heads all the Federal Decisions.

The plan is excellent—and its satisfactory execution depends on the ability and judgment of those to whom it is committed. Upon this point it is promised that this work, subject to the general supervision of Mr. Myer, is and will be intrusted to certain gentlemen whose names are given in the prospectus. They are of distinguished legal attainments and of unquestioned prominence of the Bench and in legal literature, whose names are familiar to the profession.

This projected work promises to be an important professional aid, the value of which is manifest.

[From the *Albany (N. Y.) Times*.]

The Gilbert Book Company of St. Louis have undertaken the publication of a very important

collection and reprint of Federal Decisions, whose value and convenience members of the legal profession will be quick to appreciate.

With Mr. Myer are engaged in the editorship and the arrangement of the subjects, Messrs. Benjamin Vaughan Abbott, Robert D. Benedict, Edmund H. Bennett, Melville M. Bigelow, Benjamin R. Curtis, G. W. McCrary, James Schouler, William F. Wharton and a number of other well-known lawyers.

The cases are classified under the general heads of the law, and these are divided for convenience of arrangement and reference. A great deal of time and labor has clearly been spent upon the editorial work, with the result of making a compendium which lawyers will find invaluable for reference and consultation. The contents of the one hundred and five volumes of Supreme Court Reports, the one hundred and forty-two volumes of Circuit and District Court Reports, and sixty-five other volumes of miscellaneous reports will be included in the work.

[From the *Chicago Inter Ocean*, March 29.]

The plan of the work is to combine all the essential merits of full reports, an alphabetically arranged digest, and a synoptical treatise directly from the hands of Federal Judges, covering every department of Federal law completely and exhaustively before passing to any other. For this purpose the managing editor of the series, Wm. G. Myer, Esq., is doubtless the most competent person who could have been selected, having been admirably prepared for this work by his previous labors in preparing his well-known index to the United States Supreme Court Reports, and indexes to the State reports of Illinois, Iowa, Ohio, Missouri and Tennessee, his digest of Texas reports and local works on pleading and practice.

The editor makes it a rule first to digest every case, not by taking a scissor and cutting out from the opinion such portion of the Judge's language as seems to enunciate some valuable general principle of law, but by carefully compiling an accurate statement of the points on which the decision of the case turned, as on those only does the language of the court constitute an addition or accretion to the body of legal learning previously existing. For that alone is the decision valuable as a report. The general legal propositions uttered by the court in arriving at its conclusion on the contested point are used merely for illustration or as stepping stones in the process of argument, and are no part of the decision itself, and derive no new authority from their reiteration in this connection.

The mode in which the work has been done thus far has received the emphatic approval of our law journals.

The theory upon which the work is prosecuted is excellent. The work of abridging the law, or at least its evidences, as the materials accumulate it as inevitable and valuable a part of the evolution of society as any that can be performed.

ECHOES FROM THE PRESS.

[From the Chicago Law Journal.]

Already our State and Federal reports are so numerous that none but the rich can afford to buy them. From time to time a remedy for this evil has been suggested, but until now no plan has been advocated which lightened this burden and at the same time gave to the profession the important and necessary cases in full.

The plan of this work is new. It is the result of much careful study and seems to be the best that can be devised.

It will place in the hands of the lawyer, and in the compass of a single volume, whatever these courts have said upon the question he is examining; so that, without rising from his desk, he may inform himself fully in that regard.

There is no reason why one who desires to own a "working library," should not include this series among his purchases. No where else can so much good law and so great a weight of authority be had for the same amount of money.

An examination of the manner in which the projectors have carried out this excellent plan, shows that they fully appreciated the magnitude of the undertaking, and have entered upon it with the knowledge that nothing but the very best work will make it a financial or literary success.

To the lawyer owning or having access to the original volumes, this work is an admirable digest; and to his less fortunate brother it is a law library within itself.

[From the Springfield, (Mass.), Republican,
March 15.]

Good law books are among the most useful publications of literature. There is therefore an economic reason for welcoming every good codification of law or digest of decisions. An important work of that character, just beginning to appear, is "Myer's Federal Decisions."

In the judgment of good lawyers the work is well done.

Digests like this of Mr. Myer are great boons to young lawyers who are enabled to run down cases at small outlay of time and of familiarity with the reports.

[From the St. Louis Post-Dispatch.]

Competent legal authority pronounces this book one of the most remarkable digests ever offered to the profession.

The method adopted is a logical one, and will put the matter exactly in that shape which the practitioner needs most.

Every one who has examined the volumes, and who is qualified to form an opinion, have nothing but praise to bestow upon the work.

In every detail of paper, binding and typography it is simply excellent. The series is one which is absolutely indispensable to the working lawyer.

[From the Chicago Law Journal.]

From the plan of the work, as we take it from the advance circular and prospectus, by the publishers, and from the unqualified expressions of approbation from the press and many of the most eminent men in the profession, we cannot doubt that the series will be welcomed by the profession, as one of the most important of recent publications. Indeed the names of the learned gentlemen who are announced as assisting Mr. Myer in editing and arranging the work, is a guarantee that the series will be all that combined wisdom and experience, of many of our best law writers, can make it.

It would be difficult to select an equal number of other gentlemen in the profession, whose known qualification for the work would at once warrant the expectation of so great a work, of no ordinary merit.

[From the Virginia Law Journal.]

It is not too much to say that this is the most original and remarkable venture in book-making which has ever occurred in this country. The title page gives very little idea of the undertaking, which is nothing less than the presentation, in twenty-five to thirty volumes, of every subject which has been litigated in the federal courts since their foundation, by an arrangement the most novel and striking. The idea of the work is undoubtedly a great conception, and we do not know from what source it might more naturally have been expected than from Mr. Myer, who has shown such a remarkable talent for Indexes and Digests. And this great conception will require even greater labor, skill and patience to carry it out successfully.

A matter of much more importance than the mechanical arrangement, which must be studied to be understood, is a guarantee that the cases have been selected with proper judgment, and here appears the excellence of the editorial work.

A novel and pleasing feature of the work is the arrangement of the sections, which run continuously through the general divisions, regardless of the subdivisions, and in the body of the opinions which are printed in full are cleverly arranged so as to point out the exact doctrine or principle under consideration; thus giving that part of the text the appearance of a text-book, as in fact it is. The work may therefore be fairly said to have a three-fold usefulness: (1) As a complete federal reporter, through the admirably arranged table of cases which accompanies each volume; (2) As a complete federal digest, through the index, by means of which any subject may be examined and about all the law upon that subject found ready prepared; and (3) as a text-book, as indicated above.

We shall watch its progress to completion with great interest, and shall endeavor to give each succeeding volume a careful examination, and maybe attempt hereafter a more minute examination of the novel plan.

[From the Globe-Democrat, St. Louis, Mo.]

Every subject that has been litigated in the Federal Courts is to be presented in a complete and compact form. Many men of a national reputation are engaged upon this work. The authorities agree that the series may be well substituted for the original reports. Lawyers are likely to find these volumes invaluable.

ECHOES FROM THE PRESS.

[From the Denver Law Journal.]

An inspection of the present volume of 922 pages convinces us that to the lawyer, practicing in the Federal Courts, the work is not only valuable but indispensable. The cases are subdivided under the general heads of the law, giving the leading decisions of Federal Courts upon the subject, with copious notes of other decisions of the Federal Courts.

The ablest judges of the country approve the plan of the work, which we can sincerely commend to our readers, and advise them to purchase

[From New York Daily Register, a Legal Journal.]

A notice was given in these columns on March 22, of the first two volumes of this new series of reports. The publication has been so favorably received by the press and members of the Bench and bar throughout the United States that its success is assured. It is undoubtedly a work of great merit, and the single item of expense which will be saved by purchasing this set of decisions will work very much in its favor.

[From the Macon (Ga.) Telegraph and Messenger.]

This journal winds up a long article, thus: "The work will be one of the most valuable ever offered to the legal profession."

[From the Maryland Law Record.]

The work is one of such great magnitude, in every point of view, that failure to make it acceptable to, and accepted by, the profession, would be dismal and disastrous.

Its originators are astute enough to see this, and hence are sparing no pains or expense to make it, as it should be, pre-eminent as well for masterly and skillful execution, as for boldness of conception. Hence, we find in Vol. II the same careful selection and arrangement of matter and the same excellence in the mechanical work as in Vol. I.

[From the Maryland Law Record, Baltimore, Md.]

They wind up a good review of volume III, as follows :

Those who make a careful examination of this volume will be fully persuaded of the utility and comprehensiveness of the plan on which this important series of decisions is arranged.

[*From the Legal Intelligencer, Philadelphia*]

This, the third volume of this important series of reports, contains over 1100 extra size octavo pages. It covers the following general topics: Bailment, Banks, National Banks, Bills and Notes, and Board of Exchange, with numerous subdivisions of these leading heads. It presents a very large list of cases, as would be supposed, under the above comprehensive titles.

[From the Boston Advertiser.]

On examination of volume III, this critic, in a long and favorable article says:

The more we see of these volumes, the more we are convinced that Mr. Myer, has hit upon the true plan of remedying the multiplication of reports which is becoming so onerous a burden, and that the only real question is as to the mode in which the plan is executed. As to this, we can only say that every precaution against omission and against unnecessary abridgment seems to have

been taken, and all the pith of every merely digested case seems to have been successfully extracted. If we could be sure that the work would be as carefully and as thoroughly done as it has been by Mr. Myer and his coadjutors in these three volumes, we believe that it would be a public benefit to nearly every one of our States to have its own reports reduced to order and to manageable bulk by the same process of reduction which has been here adopted. It would be a mode of codification not wholly unlike that to which Justinian owes his fame; and, if well performed and made by public authority as authoritative as the present reports, it would, more than any other one device, simplify and reduce to order the now somewhat confused mass of the law.

[From the Pittsburgh Legal Journal.]

A vast amount of useless rubbish in the form of statements of facts, etc., is eliminated, and the lawyer finds just what he may need in a few sentences, with a reference to the original reports. It promises to be a useful work.

[From the Colorado Law Reporter.]

This last undertaking of Mr. Myer, so well known to the profession as an indefatigable and reliable publicist, is by far the most extensive, as well as most valuable of any of his works. As an earnest of what the complete work will be, the two volumes before us furnish abundant assurance that the series when completed will be absolutely invaluable.

Mr. Myer has arranged and classified the opinions in the alphabetical order of the subjects treated, thus grouping all the rulings upon a given question. The great saving of labor thus guaranteed is apparent in the statement of the fact.

An examination of the volumes before us enables us fully to indorse the very favorable opinion of the series expressed by Hon. T. J. Nixon, U. S. District Judge.

[From the Central Law Journal, March 23, 1884.]

N. B.—This article is so long that we have not space for one-fifth of it.

This is the third volume of the series whose merits we have already commended.

The editor of every subject of importance seems to be selected with particular attention to the feature of adaptability, and thus we are guaranteed that those subjects are handled by men acquainted with them. The grand subject of Bills and Notes affords the opportunity of satisfying ourselves of the discriminating ability of Adelbert Hamilton, Esq., of Chicago, a frequent contributor to the CENTRAL LAW JOURNAL, and other periodicals. We have closely scrutinized Mr. Hamilton's work in this volume, and we have no hesitation in saying that it is the neatest work that has ever caught our gaze. He seemed to have a thorough grasp of the subject, and it does him credit.

As the series grows in size our opinion of its value strengthens. We look with pleasure upon each volume on its appearance, and no one will hail the completion of the great undertaking with more real satisfaction than we do. We feel that it is going to be a boon to the profession, and if they do not take hold of it, we feel that they will be thereby depriving themselves of a *rade mecum* of incalculable value.

EXTRACTS FROM LETTERS

WRITTEN BY

EMINENT AND WELL-KNOWN JURISTS.

[All these letters and many others, printed in full, will be sent by mail on application.]

Thus far Mr. Myer appears to have done his work well, and that is good evidence of his fitness for the place in which he has been put. He has the right idea as to what such a book should be.—*M. R. Waite, Chief Justice of United States Supreme Court.*

The plan seems to be executed with ability, and I cannot but think will become popular through its proved utility.—*Stanley Mathews of the U. S. Supreme Court.*

In Mr. Myer's Index of the U. S. Supreme Court reports we have a guaranty of good work in the proposed publication. That Index is the first book I turn to when I want to find anything in our reports.—*Joseph P. Bradley, of the U. S. Supreme Court.*

Permit me to say that I concur in what the Chief Justice and Mr. Justice Bradley say of your editor. I have from the first used his "Index," both that of the Supreme Court and Tennessee Reports, and invariably use them to begin an investigation. I have a very high opinion of his qualifications for the work in which he is engaged, and think the profession can rely on him.—*E. S. Hammond, Judge of U. S. District Court, Memphis, Tenn.*

I take pleasure in saying that Mr. Myer is well fitted by learning, scholarship, industry and profound knowledge of the law, to prepare and take charge of such a work. Your work meets my unqualified approval.—*H. S. Orton, Wis. Supreme Court.*

The pages of the work now before me impress me with the belief that the editor has mastered his plan, has given his work scrupulous care, and has brought to his task keen powers of discrimination and analysis. The notes are well selected, concisely worded, and judiciously arranged. In every way the work seems a good one, and to be in capable and worthy hands.—*Byron K. Elliot, Judge Supreme Court of Indiana.*

All things considered, it seems to me that your work executed with such fidelity as to gain a reputation for reliability, will be more serviceable to the general practitioner than would be the original volumes, which you will arrange and condense.—*James B. Black, Commissioner Sup. Court of Indiana.*

The work submitted has been well done, and the reputation of Mr. Myer as an able and careful editor, gives promise that the series will be well and carefully edited and arranged.—*G. M. Sabin, Judge United States District Court, Nevada.*

There can be no doubt of the excellence of your plan. I have been much aided by Mr. Myer's Indexes, to which I frequently refer; and from what I have seen of his work, I believe him to be uncommonly capable and painstaking.—*R. A. Bakewell, Associate Judge St. Louis Court of Appeals.*

The index part of your plan is admirable, and in the hands of Mr. Myer, with whose work in this direction I am entirely familiar from constant use. I can say that the work cannot be done better.—*J. D. Westcott, of Sup. Court of Florida.*

I had an impression when I began the examination of your plan I should have several suggestions to make. But a further examination has shown that each one of them has been anticipated. If the work is carried out as promised by the specimen pages, it will certainly be a great thing accomplished for the profession. A better work even than the original publications.—*Chas. Danforth, of Supreme Court, Maine.*

The entire arrangement of the work is admirable. Where I discovered matters in which improvements might, as I supposed, be made, on fuller reflection I always found that the deficiency was imaginary—that the supposed want was provided for under the exhaustive plan for the execution of the work.—*Rich'd S. Walker, of Texas, Presiding Judge of Commission of Appeals Court.*

It embodies so many attractive features, that one cannot help wondering how it happens that no publisher has heretofore undertaken the same thing.—*Edward Lewis, Presiding Justice of the St. Louis Court of Appeals.*

The "new departure" is so good that 'tis strange it has not been adopted heretofore.—*W. H. Seever, Chief Justice Sup. Court of Iowa.*

I have given the scheme some thought, and the more I reflect upon it, the higher is my opinion of its utility.—*John B. F. Graves, Chief Justice Sup. Court of Michigan.*

Your general idea is a good one.—*T. M. Cooley, Associate Justice of Michigan Supreme Court; also author of several well known law books.*

I think it is safe to speak with unqualified commendation concerning the fidelity and thoroughness of the work done.—*James V. Campbell, of the Michigan Sup. Court.*

I regard the plan as very convenient, as in a few volumes all of the decisions of the Federal Courts will be presented in a compact and an accessible form.—*Pinkney H. Walker, Ch. Justice Sup. Court of Illinois.*

This much may be said without any hesitation: If the remaining portion shall be edited with the same learning and ability as the article on "Bailment," the work, when completed, cannot fail to be of the highest importance to the bench and the bar.—*John M. Scott, on the Illinois Sup. Court Bench.*

A. C. Snyder, of W. Va. Sup. Ct. agrees with the opinion expressed above.

After a very careful consideration of the general plan of your forthcoming work entitled "Federal Decisions," I have no hesitancy in saying it has my hearty approval.—*John H. Mulkey, of Sup. Court of Illinois.*

The plan of the work, as given, is, in my judgment, correct.—*Thomas J. Freeman, one of the Judges of the Tenn. State Sup. Court.*

If the plan be faithfully executed, the work cannot be otherwise than valuable.—*W. F. Cooper, of Sup. Ct. of Tennessee.*

EXTRACTS FROM LETTERS OF EMINENT AND WELL-KNOWN JURISTS.

I am much pleased with your plan of placing all cases relating to the same topic under one general head, and then arranging the subjects treated under these different heads in alphabetical order.—*W. E. Niblack, of Sup. Court of Indiana.*

The plan is entirely new to me, but it seems to be complete in all respects.—*J. P. Kidder, of Sup. Court of Dakota.*

Completed in the faithful manner, of which this chapter is the earnest, I think your work will be of great value, and that it will command a large sale.—*G. W. Stone, of Sup. Court of Alabama.*

I think your plan for the work is a very good one, and at the present I am not able to suggest any better one.—*D. M. Valentine, of Sup. Court of Kansas.*

I carefully examined the cases of *Casey v. Cavanaugh*, *Talty v. Freedman's Savings and Trust Company*, and also of *Hayward v. National Bank*, as well as *Myers v. D'Mesa*, and *Westphal v. Ludlow*, that I might satisfy my mind on the accuracy and reliability of the manner and style of arrangement and expression, and I am so much pleased with it that I acknowledge the instruction I received by the examination of the opinions on the plan suggested.—*Wm. Archer Cocke, Judge Circuit Court, State of Florida, Ex-Attorney-General.*

The plan is an excellent one, and I am sure the work will be of great value to the judges of the Federal and State courts as well as to the lawyers who practice in either courts.—*Aleck Boorman, Judge U. S. District Court, Shreveport, La.*

The work seems to be thoroughly done, and presents, in a convenient and satisfactory manner, all the principles decided in the opinions of the cases reported.—*John P. White, one of the Judges of the Court of Appeals, Texas.*

The plan is a happy one, and if faithfully executed, the reports will be a valuable accession to the library of the judge and active practitioner.—*R. R. Nelson, Judge United States District Court, St. Paul, Minn.*

Your plan is worthy of all commendation, and if carried out with the excellent judgment which the pages sent indicate, the completed work will result in much labor saving both to the bench and the bar.—*John T. Nixon, Judge United States District Court, Trenton, N. J.*

The plan of the publication is most satisfactory, and its execution, so far as it has proceeded and fore shadowed by the specimen pages, give excellent promise.—*D. M. Key, U. S. District Judge.*

I am satisfied that when your work comes before the legal public, it will be highly approved.—*Joseph P. Comegys, Delaware, Chief Justice Sup. Court.*

After careful examination of the proof-sheets sent to me, I freely say that I am pleased with the plan and arrangement of the work.—*H. E. Prickett, Sup. Court of Idaho.*

Your plan of furnishing in a series of volumes all important decisions arranged under appropriate heads is excellent, and judging from the advance sheets sent me, I am satisfied that it is being faithfully and ably executed.—*Geo. W. McCrary, of U. S. Court, Eighth Circuit.*

Your scheme is immense. If the execution rises to the level of the plan, you will be the benefactors of the bar.—*David J. Brewer, of Kansas Supreme Court.*

I do not hesitate to say that if you can accomplish what you have undertaken, you will have rendered the profession a great service.—*E. B. Turner, Judge U. S. District Court, Austin, Texas.*

On the whole, it seems an answer to the reiterated query, "What shall we do with our reports?"—*Amasa Cobb, of Sup. Court of Nebraska.*

I am much pleased with the plan adopted.—*Joel Parker, of Sup. Court of New Jersey.*

The ease and rapidity with which the respective subjects can be examined will render the work of inestimable value to lawyers.—*R. S. Taft, of Sup. Court of Vermont.*

If the work is carefully executed, it seems to me that it would certainly be both useful and convenient.—*John M. Berry, of Sup. Court of Minnesota.*

I have received and carefully examined specimen copy of the "Federal Decisions," and am much pleased with the arrangement of the work.—*R. A. Hill, Judge U. S. Dist. Court for Mississippi.*

Your enterprise seems to me to be a most commendable one. The plan itself is a good one, and will I think, meet with general favor.—*Addison Brown, U. S. Dist. Judge.*

Your plan if carried out as contemplated, will commend itself at once to the profession.—*D. H. Pinney, of Sup. Court of Arizona.*

I have given your "Federal Decisions" a careful examination, and the result is, in my opinion, the plan and work proposed cannot fail to receive the cordial approval of the courts—both State and Federal—and also of the professional generally.—*Alex. M. Spear, formerly of Sup. Court of Georgia.*

I have carefully examined the prospectus and advanced sheets of your proposed "Federal Decisions," and cordially approve of the plan in all its characteristics and leading features. You have surmounted the difficulties admirably.—*Benj. Vaughan Abbott, Esq., Author.*

I have taken the trouble to see the lawyers of this Bar, and had most of them to see your work on Bailment. All are very much pleased with it, none offering any objections, and most of them expressing a decidedly favorable opinion.—*O. B. Freeman, Esq., Trenton, Tenn.*

The more I have studied it, the more favorably I am impressed with the plan and execution of the work.—*E. W. Pattison, of St. Louis, Author of the Missouri Digest.*

So far from condemning the plan of condensing decisions in some cases to a digested form is concerned, if the work is done with the ability and fidelity evinced in the treatment of the subject of Bailment. I regard it as one of the excellencies of the work.—*Samuel L. Tate, Probate Judge, Grand Haven, Mich.*

I think the number of subscribers who will feel that the cutting out of the surplus matter has been a positive advantage, will be more than equal to the number who will feel that a sacrifice has been made for economy's sake; especially when the improved arrangement of subjects, methods of catching at once the particular thing wanted, etc., etc., are considered.—*H. M. Willsie, Attorney for City of Chattanooga, Tenn.*

PREFACE.

The aim in this work is to publish the decisions of the Federal Courts under a method of arrangement not hitherto attempted. The works on leading cases are quite numerous, but no attempt has been made to arrange alphabetically, according to the subject matter, an entire series of decisions, comprising all heads of the law. The plan here proposed has been developed by years of patient investigation and experiment, and has already met with the approval of judges and leading members of the bar in every state of the Union. The object is to present the federal decisions in such a shape that they may be easily consulted — to present under any given subject all the important cases in full appropriate to such subject, and a complete digest of points in cases assigned in full to other heads. By this means we are enabled to present in a complete and compact form every subject that has been litigated in the federal courts.

The intention is to publish all accessible federal decisions, either in full or in a digested form, whether found in the regular series of reports or scattered through the various periodicals and state reports, including the opinions of the Circuit Court of the District of Columbia, the most valuable opinions of the Territorial Courts, and the opinions of general importance of the Court of Claims and the Attorneys-General. The opinions of the Supreme Court are made the basis of the work, to be followed by those of the Circuit and District Courts, according to their value. All important cases will be published in full, (a) but cases which merely affirm or follow some leading case, or those which are based upon a particular state of facts and do not announce any important principle of law, and in some instance those which turn upon a well settled principle of law, will not be published in full, but only digested, the extract to be sufficiently full for all practical purposes. Where a series of cases, all covering the same ground and addressed to the same subject matter, are reviewed and affirmed in a later case, usually the last case will be given in full, and the others will be digested. (b) Whenever there is a well grounded doubt whether

(a) There are a few subjects, such as Slavery, Bankruptcy and Embargo Laws, under which, for obvious reasons, only a few cases, comparatively, will be printed in full. The old Embargo Laws and the questions connected with a state of slavery are obsolete, and, consequently, the cases on those subjects will be digested. The Bankrupt Laws are repealed, but as new laws are likely to be enacted from time to time, a sufficient number of cases will be printed in full to illustrate the general principles of the subject. There are other subjects, such as Maritime Law, Patents, Practice, Revenue, Prize of War, etc., from which a great many cases will be rejected, owing to the fact that there are a great number that are merely fact cases, or are confined to a statement of the same general principle. The remark here made is true of the subject of Appeals and Writs of Error, published in this volume, and will apply also to Courts.

(b) For an illustration of this point see *Crowell v. Randell*, p. 696, where MR. JUSTICE STORY reviews and reaffirms a long line of decisions touching the appellate jurisdiction of the supreme court under the twenty-fifth section of the judiciary act. It thus frequently happens that a line of decisions, all addressed to the same point, are rounded out and the question set

PREFACE.

a digest of a case will be sufficient, the case will be given in full. It is not intended, however, to publish in full the opinions of the Court of Claims, nor those found in the state reports and law periodicals, except those that are of more than ordinary value.

The opinions given in full under any subject are those which are devoted, either wholly or principally, to that particular subject. Many of the decisions comprise other points of law not appropriate to the general subject, but usually each decision is confined to a single, distinct subject matter by which it may be classified, the other points arising incidentally. It may be a surprise to many that a series of decisions can be thus classified; but an examination of the cases shows that if a decision is on the merits it is usually confined to one general head of the law, the points arising incidentally being such as relate to matters of practice; or if the case is decided on a point of practice or procedure, the question on the merits, as a general rule, is not considered. This fact makes it possible to classify the cases easily and accurately. (c)

The arrangement is very simple, and can be understood by a very little attention to details:—

(1) The cases are assigned to the various general heads of the law, and these are divided and subdivided, for convenience of arrangement and reference, with head-notes or table of contents at the head of each subject, the same as an ordinary digest. (d)

(2) For the sake of condensation, by avoiding the extensive duplicating of the various points, the cases are assigned to as few general heads as possible. (e)

(3) At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. (f)

at rest by a full and exhaustive decision. This latter decision is given the preference, because it purports to give all the reasons for the rule announced, and is manifestly intended to be final. A case is not always rejected, however, because another case covering the same ground is given in full. See, for example, page 693 *et seq.*, where a number of cases are given in full to show what is necessary to bring a case from a state court within the terms of section 25 of the judiciary act.

(c) See page 18, *Wiggins v. Burkham*. The question litigated in this case has reference solely to an account rendered. Other points arise incidentally, and will be found digested in the complete work under their appropriate heads. The cases are very rare in which it is difficult to determine to what head an opinion ought to be assigned.

(d) See the head-notes to Actions and Agency on pages 29 and 183.

(e) See, for example, the subjects of Actions and Agency. Under the former head will be found cases on cause of action, forms of actions, the various common law actions, the general principles of actions *in rem*, etc.; while the latter head comprises cases on the general doctrine of Agency, Powers of Attorney and Factors and Brokers. This plan is carried out in the subject of Appeals and Writs of Error, and will be followed in such subjects as Carriers, Constitution and Laws, Courts, Practice, Pleading, etc.

(f) See, for example, section 748 on page 672. The references at the end of the section show that the case is published in full under some other subdivision of the subject. On turning to the case (§§ 1175-1179), we find it published under the head *Rights Claimed under an Act of Congress*, and the points in the case appropriate to that head are digested and placed in the SUMMARY; while the point in the case on the breach of a marshal's bond will be found in the complete work under Bonds. See, also, § 24, page 407; § 43, page 408; § 51, page 409.

PREFACE

(4) Next in order are the cases in full, arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. (g) The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*. (h)

(5) At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. (i) 2d. Points taken from cases which will appear in full under some other division of the same subject. (j) 3d. Points taken from cases which are assigned to some other general head. (k) 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General. (l)

Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.* The tables of cases and indexes will also contain a similar designation of rejected cases, so that in consulting either the reader will readily see whether he is referred to a case in full or only a digest.

The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

(g) See the case on page 18, where the court states the facts; on page 32 a brief statement is prefixed to the opinion, while in some cases the statement of facts is found in the body of the opinion, as on page 661.

(h) The case of *Williamson v. Ringgold*, on page 88, will fairly illustrate the plan. There is really but one point in the case, which is stated in the SUMMARY, while the review of authorities and valuable points made by the court by way of argument are indicated in the *italic* sections.

(i) See the *star* case in section 17, page 21; also the foot-notes on pages 452 and 479.

(j) See sections 80, 81, 88, 748 and 749, and the references to the cases in full.

(k) This will be illustrated by any of the cases to which no *star* is annexed in sections 10 to 19, on page 21. These cases are assigned to other heads, and may or may not appear in full under those heads. If any of them are only digested when they are reached in their order, the fact will be indicated by a *star*, and the table of cases will also show that they are not published in full.

(l) These cases will be denoted by a *star* following the name of the case. There are also divisions of a subject under which there are no cases in full, as, e. g., on pages 27, 81, 128 and 132. There are no cases in full appropriate to those subheads.

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The head-notes, or table of contents, at the beginning of a subject, followed by the numbers of the sections of each division and subdivision, the section numbers at the top of the page, the running title, giving the general title on the left-hand page and a subdivision of the subject on the right, and the numerous cross-references at the end of the sections, etc., are intended to facilitate the examination of the subject. The final table of contents and the general index to be published at the end of the series will be arranged so as to enable the reader to find the most obscure points. A table of cases and index will also accompany each volume.

The great merit of the work, therefore, consists in this: (1) The value of the cases. (2) The important cases are all printed in full. (3) The SUMMARY at the head of the cases and the digest matter following form a complete digest of a subject, as full and as conveniently arranged for consultation as an ordinary digest.

In the preparation of the digest matter following the cases in volumes I and II, I have been assisted by CHARLES N. BROWN, Esq., of Madison, Wisconsin.

WILLIAM G. MYER.

WISCONSIN, 1884.

Volumes and Cases to be Included.

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The whole, in original volumes, make a total of	312

N. B. Although we offer the work at an apparently low price, we wish to assure the profession that it is not a cheap reprint. In order to carry out our plan, it became necessary to employ lawyers of experience on the editorial work, and in the matter of printing and binding, the work will be equal to the best styles of modern law books.

MYER'S FEDERAL DECISIONS.

The below list gives the number of volumes, and the contents of each, (except the minor topics.) substantially as they will appear. Full descriptive circulars sent on application.

Vols 1 & 2. \$13. They include the subjects of **ACCOUNTS; ACTIONS; APPEALS AND WRITS OF ERROR; ARBITRATION; ASSIGNMENT; ATTORNEYS.** The two subjects of **AGENCY AND APPEALS AND WRITS OF ERROR** are, we think, of more value than any treatise on either subject, both on account of their comprehensiveness and the method of treatment. We feel so certain that every attorney who examines these two volumes will be induced to subscribe for the whole series that we are willing to send them out on approval on receipt of \$18.00. Money to be refunded on return of the books.

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- 6. *Constitutional Law.*** To be edited by Prof. W. G. Hammond, Dean of the St. Louis Law School. 1000 to 1200 pages.
- 7. *Contracts,*** edited by E. H. & S. C. Bennett, of Boston University Law School, and Consuls edited by Mr. Myer. 800 to 1000 pages.
- 8. *Conveyances,*** edited by Leonard A. Jones, author of several well-known works on Real Estate and kindred subjects. 800 to 1000 pages.
- 9. *Corporations.*** Edited by Mr. Myer, and approved by some person of acknowledged authority on that subject. 900 to 1100 pages.
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